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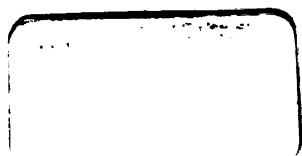
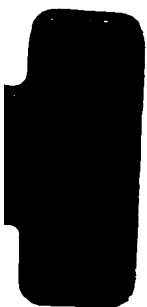
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# I R I S H J U R I S T .

VOL. XVIII. (VOL. XI. NEW SERIES.)

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND COMMON  
LAW, THE LANDED ESTATES COURT, COURT OF PROBATE, AND COURT  
OF BANKRUPTCY AND INSOLVENCY.

*With a Digest*

OF THE CASES REPORTED DURING THE YEARS 1865 AND 1866 IN THE JURIST,  
AND IN THE 16 IR. CHAN. AND 16 IR. C. L. REPORTS.

AND AN

*Appendix of the Statutes relating to Ireland.*

BY WILLIAM WOODLOCK, ESQ. BARRISTER-AT-LAW.

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DECIDED IN ALL THE

## COURTS OF EQUITY AND COMMON LAW IN IRELAND, AND IN THE HOUSE OF LORDS.

### Rolls Court.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

**EX PARTE GORDON V. BELFAST AND CO. DOWN RAILWAY COMPANY.**—Nov. 30, 1865.

*Under the Lands Clauses Consolidation Act, 1845, s. 80, Railway Companies are liable to the cost of orders obtained by successive tenants for life for payment to them of the dividends accruing on stock purchased with the price of land taken by the company, and by them paid into Court, but not to any costs incurred consequent on the order.*

**W. D. Andrews** moved that the Accountant-General should draw in favour of the petitioner (who was tenant for life of the lands taken by the company), for the cash dividends then in bank, and which should from time to time accrue due on the stock standing to the credit of the matter, and that the company should be ordered to pay to petitioner the costs of the petition, and all the costs consequent to the order of the Court thereon, which may be properly and necessarily incurred by the petitioner pursuant to the provisions of the Lands Clauses Consolidation Act. Under a previous order, the dividends had been paid to a former tenant for life, and in consequence of her death the new order now sought for became necessary.

**Lowry, Q.C.**, on behalf of the company, had no objection to the order for payment of the dividends to the new tenant for life being made, but doubted whether the new order ought to be made at the expense of the company. [*Master of the Rolls.*—I have gone so far to ease companies of the expense of such orders, as to make same for payment of dividends to clergymen and their successors; but in the case of successive tenants for life, it was necessary to make a new order, the expense of which should be borne by the company which required the

lands.] Even if the company are liable to the cost of a new order, the notice of motion asks too much, as it in addition seeks such payment of all costs to be incurred by the petitioner consequent upon it, which would include the costs of drawing out the dividends from time to time, to which the company are not liable upon the authority of *Ex parte Althorpe* (3 Young & Coll. 396); and see *Hodges on Railways*, 4th edit. p. 334. [*Andrews.*—The notice of motion merely asks costs "pursuant to the provisions of the Lands Clauses Act," which the taxing master will be guided by.] In the case of *The Westminster Bridge Acts* (33 Law Jour. N. S. 372), Lord Westbury objected to an order being so drawn up, giving the costs according to the Act, which he describes as being in truth to give the costs according to a more labyrinth of words.

**THE MASTER OF THE ROLLS.**—As my orders in these matters have been heretofore drawn up in this general form, I do not like to alter it on the present occasion further than by inserting the words "if any" into it, but if the taxing master, under it, tax any costs to the petitioner than the mere costs of the petition and order thereon, it appears to me that I will, on appeal from his taxation, be obliged to disallow them on the authority of *Ex parte Althorpe*.

### Court of Queen's Bench.

Reported by William Woodcock, Esq., Barrister-at-Law.

**THE QUEEN V. GRAY.**—Nov. 9, 11.

*Criminal information—Newspaper—Privilege.*

*Where certain parties were charged with treason felony, and, pending the preliminary investigation at the police office, certain publications appeared in a*



newspaper commenting upon the conduct of the prisoners, and calculated to prejudice the public mind against them—Held (per totam Curiam), that a conditional order for a criminal information against the proprietor of the newspaper should be granted on account of those articles.

The same newspaper published a report of the proceedings against the prisoners at the preliminary investigation at the police office, which investigation terminated in the committal of the prisoners. Part of these proceedings consisted of statements of counsel which were calculated to prejudice the public mind against the prisoners. There was no suggestion that this publication was more than a fair and bona fide report of what actually took place. Held (Hayes, J., dissentiente), that such publication was privileged, and did not form a ground for granting a conditional order for a criminal information.

THIS was a motion on behalf of John O'Leary, now a prisoner in Richmond Bridewell, on a charge of belonging to the Fenian Brotherhood, an alleged treasonable society, for a conditional order, for a criminal information against Sir John Gray, the registered proprietor of the *Freeman's Journal*, for certain publications which had appeared in that paper. The motion was grounded upon the joint affidavit of John O'Leary, Thomas Clarke Luby, and Jeremiah O'Donovan (Rossa), from which it appeared that they had been concerned in the publication of a newspaper called the *Irish People*; that on the night of the 16th September, the office of the newspaper had been broken into by the police, and they themselves and several others been arrested; that on the 1st October, after several remands, the case against them had been stated by Mr. Barry, Q.C., and evidence gone into before the police magistrate; and that finally on the 2nd October, they had been committed for trial. The affidavit also set out the publications complained of. The first was in the number of the *Freeman's Journal*, of the 18th September, two days after the arrest of the prisoners, and was as follows:—"The seizure of some thirty-five men, the capture of a printing press and types, and the suppression of a publication, are no ordinary events in a country which boasts of a free press and a free constitution. No government would have gone such lengths save upon very strong and very reliable information. It is true that the *Irish People* has been quite as outspoken and quite as mad as either John Mitchell's *United Irishman* or the *Nation* of 1848. If evidence of intended revolution, of premeditated rebellion, of a desire to get rid of the present dynasty and substitute an elective Republic were wanted, the madmen who conducted the *Irish People* have themselves furnished proofs that they said they intended what, no doubt, they never contemplated." The next publication complained of was contained in the number of the 2nd October, and consisted partly of a report of Mr. Barry's statement at the police office, and partly of comments upon it in the editorial part of the paper. The parts of the report of Mr. Barry's statement relied upon were as follows:—"But it has been deemed expedient, and I think wisely, that notwithstanding the unpre-

pared state of the case no time should be lost in laying the evidence before the public, so as to enable the public to judge from the authentic source of evidence used in a court of justice the real nature and extent of the Fenian conspiracy, undiminished by incredulity and not exaggerated by panic. The design, as manifested in their writings, public and private, as will be proved in evidence upon the trial; the design took the form, not as on former occasions of a somewhat similar character, not of a more revolutionary theory, not some theoretical scheme of regeneration by substituting one government for another, but it partook of the character of socialism in its most pernicious and most wicked phase. The lower classes were taught to believe that they might expect a redistribution of the property, real and personal, of the country. They were taught to believe that the law by which any man possessed more property than another was unjust and wicked, and the plan of operation found to have been suggested was horrible to conceive. The operations of this revolution, as it is called, were to be commenced by an indiscriminate massacre—by the assassination of all those above the lower classes, including the Roman Catholic clergy, against whom their animosity appears, from their writings, to be especially directed by reason of the opposition which these clergymen thought it right, as Christian ministers, as Irishmen, and as men of peace and honour, to give to the projects in question to the utmost of their power." The comment upon this statement was in these terms:—"The statement by which Mr. Barry opened the prosecution of the Fenian prisoners on Saturday cannot fail to produce the most intense alarm in the mind of every thinking man. If a tithe of the statement be capable of being proved, we must feel thankful at the escape society has had; and the honest sons of toil who were in danger of being made the instruments of the Fenian movement, ought to feel doubly thankful that the projects were discovered before they had committed themselves to so hopeless and so terrible an enterprise. Even now we are unwilling to believe that Mr. Barry's statement of Fenianism can be true. Yet it is hard to imagine that a man of Mr. Barry's antecedents and position, representing the crown, and acting in the name of the crown, would venture to make such a statement if he did not feel satisfied that he could sustain the leading parts of it by evidence sufficiently conclusive to satisfy the most conscientious that it was not made for effect, or for the dishonest purpose of creating a prejudice against the accused, but as a part of his duty representing that power and authority which are entrusted with the peace of society, and with the protection of life and property. The first and most daring object of the organizers of this movement is openly stated by Mr. Barry to have been to get rid of the Catholic priesthood. The Catholic priests in Ireland and in America have proved the most potential obstacles to the spread of the organization, and, therefore, the most bitter enmity exists against that sacred and self-sacrificing order. We wish that we could, without an abandonment of duty, refrain from reprinting the statement that any body of Irishmen, no matter how excited, or how mad, could contemplate the mode of

removing the priestly obstacles to their designs which is imputed to these unhappy men. If, however, it be true that the 'massacre' of all opponents and of 'the Catholic clergy,' who were the most effective opponents of their designs, was really a part of the programme, the fact cannot be hidden, and the disgrace which such a programme must bring upon our name, our race, and our country must be borne in sorrowful humiliation, to be blotted out only by an indignant protest from all that is honourable and Christian in the land." The last publication complained of was a letter of the Most Rev. Archbishop Cullen, which appeared in the number of the 20th October, and contained the following passages:—"Nay more, if the charges lately made against the originators of the movement had been known, everyone would have been filled with alarm at their introduction into the country, for they are said to have proposed nothing less than to destroy the faith of our people by circulating works like those of the impious Voltaire, to preach up socialism, to seize the property of those who have any, and to exterminate both the gentry of the country and the Catholic clergy." "Whatever is to be said of such fearful accusations, which are only founded on vague report, it is too certain that the managers of the Fenian paper, called the *Irish People*, made it a vehicle of scandal, and circulated in its columns most pernicious and poisonous maxims. Fortunately they had not the wit nor the talents of Voltaire, but according to appearances they did not yield to him in anxiety to do mischief, and in malice. And hence, it must be admitted, that for suppressing that paper, the public authorities deserve the thanks and gratitude of all those who love Ireland, its peace, and its religion." In reference to the publication of this letter, the affidavit stated that the *Freeman's Journal* was a paper of wide circulation in Ireland, and especially in the city of Dublin, and professed to be the organ of Irish Catholic opinion, and that it exercised a large influence in the country. That it was extensively read by the class from which the jurors of the city of Dublin were taken. They also stated that from the high position and character of the Most Rev. Dr. Cullen, the judgment of many of the jurors would be guided by the expression of his opinion in that letter, and that letter was calculated to exercise a large influence on the public mind. The prisoners in their affidavit further stated that at the time of the publication of this letter it was well known that they were the proprietors of the newspaper called the *Irish People*, and that they were to be tried on a charge of high treason; and that this was well known to Sir John Gray, who must have known that this publication was calculated to prejudice them on their trial. With reference to the statement respecting the extermination of the landlords and the Catholic clergy, they said that it was made without any foundation whatever, and they complained of the statement of the crown counsel, and alleged that that statement was made for the purpose of prejudicing them on their trial. They alleged that those statements were made unsupported by any evidence, and were utterly false and without foundation. They also stated that they were kept in close confinement and not permitted to speak to each other, or to their relatives or friends,

and that the only person allowed intercourse with them was their solicitor, Mr. John Lawless. Their letters, they stated, were opened by the governor of the jail. The prisoners generally complained of the prison regulations, and said that they were informed that these regulations were carried out towards them by orders of the Attorney-General. They stated that matters affecting them were commented on by newspapers in England and Ireland, and on the Continent, and that a violent prejudice was created against them. They believed that, owing to the publication of the statement of the crown counsel, and of the comments thereon, they could not have a fair and impartial trial at the next special commission, and that a grievous injustice would be done them unless the publication of similar statements against them were prevented. As to the charges against them they would at the proper time be prepared to meet them. In reference to the charges contained in the article and letter already referred to, they most solemnly and indignantly protested upon their oaths, before God, that they, or any of them, never heard or knew of any scheme, or were to take part in any scheme or contrivance for the murder of the Catholic clergy or of any other persons, or in any scheme of plunder or assassination, and that this vile and infamous charge they regarded with horror and indignation. They stated that in the evidence, in the police office, not a syllable was found to support such a charge. They stated that after their committal informers came forward to make statements to bear out that charge, which was a cruel and wicked libel on them; and they further stated that there never appeared in the *Irish People* a single line which could in any way countenance such a charge, and that they never, directly or indirectly, published an article against the authority or origin of the Christian religion, and that it was utterly untrue to say that they disseminated infidel opinions. They stated that they were informed and believed that the letter published by Archbishop Cullen was much more calculated to damage them than any of the other articles complained of.

Butt, Q. C. (with him O'Loughlen), for the application. The publication of preliminary proceedings where a criminal trial is to follow, prejudices the party who is to be on his trial. Such publication is not protected.—*The King v. Fleet* (1 B. & Ald. 379); *The King v. Fisher* (2 Campb. 570); *Duncan v. Thwaites* (2 B. & Cr. 556); *The King v. Lee* (5 Esp. 123). A publication of this kind is a contempt of Court, and criminally punishable. The cases are collected in Hodges' report of *The Queen v. O'Doherty and Martin*, at p. 220; *The King v. Clement* (4 B. & Ald. 218). The only authority in favour of the protection of such a publication is *Lewis v. Levy* (1 Ell. Bl. & Ell. 537). But that case is distinguishable on the ground that there the preliminary investigation terminated in the discharge of the prisoner. Upon the other publications we are clearly entitled to succeed.

LEFFROY, C. J.—This was an application to the court for a criminal information for the publication of certain articles in this paper (*the Freeman's Journal*) on the 18th of September and 2nd of October, and for the publication of the proceedings before

the police court, upon the occasion when an order was made for the committal of the prisoners for trial. We are all of opinion to grant the conditional order with respect to the comments that were made in the publications of the 18th September and 2nd of October, on the proceedings that had taken place. There is also another matter on which we have agreed to grant the conditional order, that is, the publication of a certain portion of a letter published by Dr. Cullen. But with respect to the mere publication of the proceedings in the police court, free altogether from any observations or comments, we are not agreed to grant the conditional order. We distinguish between the matter before us, between the comment and the mere publication by the editor of a public journal as a *bona fide* and correct report of proceedings before a magistrate—whether preliminary or not—and upon the latter we have not, as I said, agreed to grant the conditional order. Indeed I should say for myself, that in every proceeding before magistrates, whether before police magistrates or any other similar tribunal, it is most expedient for the public that they should be published, only with the proviso that they should be published correctly, and *bona fide* with the view to give information and not with a view to prejudice the trial of the party. With respect to the comments and observations said to be calculated to impress the public mind with the guilt of the parties, we are of opinion, on the ground of the tendency of those observations to prejudice the party, to grant the conditional order. As to the publication of the proceedings, we are not agreed, as I said, to grant the order. In my mind, the editor of a public journal has an indemnity for the publication of a *bona fide* and correct report of proceedings of this description. Although, no doubt, it is very important that the prisoner should have the proceedings conducted in a manner not calculated to prejudice him, it is for the interest of the public that proceedings of this description should be published fully and at the same time fairly and correctly, for otherwise it would virtually amount to an investigation with closed doors in which injury might result to the prisoner either from undue influence or some other cause. Now, it is of the utmost importance for the public to know that the magistrates do their duty impartially and without influence of any sort, and that they exercised their duty fairly and correctly according to the evidence brought before them—not only to prevent them from making unfair orders against the prisoners, but also to prevent them from undue influence which might be ascribed to them as officers appointed by the crown. It is, therefore, in every view most important that the actual proceedings and evidence on which the magistrates acted should be put before the public, that the public may know whether as between the prisoners and the public prosecutors the magistrates have fairly discharged their duty. And the only way in which the public can judge of that is by their having a correct and full detail of the evidence by the editor of the public newspaper. Therefore, it appears to me that a *bona fide* and correct publication of the evidence on which the magistrates have acted is most valuable in both points of view, both in respect to the prisoners, to see that they were fairly dealt with, and in

respect to the magistrate, to see that he could not be suspected of being influenced in any way to expose the prisoner to a greater risk in committing him for trial, and to imprisonment, than that which the evidence adduced fairly authorised. In my opinion, therefore, if the publication be a *bona fide* publication, and an exact and correct publication of the evidence, it is a most important security for the public, and the public editor should not be liable—so far as he confines himself to the faithful discharge of his duty in giving the public a correct and faithful account of the evidence. Otherwise, as I said before, there might be a preliminary decision without there being means to ascertain whether in respect to the prisoners or the public the magistrate had fully discharged his duty. I should accordingly for my own part—if it rested on my single judgment—at once refuse this application so far as it rests upon the publication of the evidence, unimpeached in respect to correctness and fairness. With respect to the comments on which the publication was accompanied, I concur with my brethren that for these comments—which, upon the case made, were no doubt, calculated, or, as it is alleged, served to influence public opinion against the prisoners, and to deprive them of the fair and impartial exercise of the judgment of the jury on the case, I concur, I say, with my brethren in giving the conditional order for a criminal information for these comments, which transgress the fair limits to which the law confines the right of the editor of a public journal to communicate to the public what passed at the proceedings.

HAYES, J.—So far as my Lord Chief Justice has announced the decision of this Court I entirely concur, and if we were altogether unanimous I should not add any thing by way of the reasons which lead me to that conclusion. But as I find that the views that I entertain are not in all respects the same as those that have been put forward by my Lord Chief Justice, and as those views have led me to the conclusion that this rule for a criminal information is not of the same extent I would desire it should go to, I think it right to add a word by way of explanation of my course of proceeding. The Lord Chief Justice has announced that as to so much of the publication as is conversant with the report of the proceedings before the police magistrate he has refused to extend the rule, and this seems, I think, if I understand his lordship, to be settled upon a principle that there is a privilege which newspaper proprietors enjoy, provided the report be fair, and correct, and *bona fide*. In my judgment there is no such privilege. I take this case to be an application, as it were, to the prerogative jurisdiction of the court. The first duty of this court, and before all others, with respect to criminal trials, is to see that a fair trial shall be ensured to every accused person, and its utmost efforts should at all times be given and its powers exerted, for the purpose of securing those most desirable results to the public. Therefore I say of the persons concerned in the administration of justice in the course of a preliminary investigation, and before the matter has come on for trial, whatever may be the course of duty prescribed by them for their own purposes, if the publication of

these proceedings tend to bring about such a state of things as that there shall not be a fair trial, that the prisoner's solemn rights shall be prejudiced or interfered with, there is nothing in the duty of a newspaper proprietor which protects him even in fairly publishing the proceedings. Necessity may require that there shall be discussion of subjects and inquiries into matters in the police office before the police magistrates, and so far it may be quite right not only that it should be discussed and published, but when it goes beyond that, and the publication of these matters leads to this crying injury, that the rights of the prisoners to a fair trial are thereby interfered with or curtailed, it then becomes not only in the power, but within the solemn duty of this Court to see that that shall be prevented. Now it may be very likely, and I say not a word upon the subject, that the statement of Mr. Barry in introducing this subject to the notice of the magistrates may be all very right and very probably justified by the occasion, and I think it may have been, but at the same time it may be very incorrect, and in my judgment very improper, that anything should be said pending the trial which would inflame men's minds or prejudices, so that in the course of the time expected to elapse between that and the trial men should not come to the discussion of the case clear, unprejudiced, and unembarrassed. I think there are both old and modern authorities for that. It rests upon the principles of law, and it rests upon the principles of fair play, which all men must feel; and it is because upon a perusal and consideration of the proceedings which have thus been published that I think their tendency is to influence men's minds, and prejudice and interfere with the due and fair administration of justice, that I will go even beyond the limits named by the Lord Chief Justice, and say that we are not only entitled, but bound, so far as we see it excites prejudice, to enlarge the rule by extending it to these cases. It may be said that these are doctrines not very consonant with modern opinions, and that it is not in conformity with the privileges of the press according to precedent. I am willing to acknowledge not only the privileges of the press, but also its duties, and that there are duties which the press owes to society, and I am willing to strengthen it and support it in all these duties—the duties of giving us daily information of public events and public opinion, but I will not say that I will give the press the power of doing injustice, or give it a sort of warrant for prejudicing men's minds in such a way as would tend to the injury of prisoners upon trial. It is for this reason, and for this reason alone, that I think the law is still, as laid down in days gone by, that everything that occurs before a magistrate during an investigation is, if published, in a certain degree at the will of a newspaper proprietor. If he publishes it, and it turns out afterwards to the prejudice of public justice, he must, in my mind, answer for it. Now, I think this principle of law is pretty well established. Since 1827, when it was decided that the judge of an inferior court, when about to enter upon an investigation of this kind of a preliminary character, and which might lead afterwards to a trial, has a right, if, in his cautious discretion, he is so disposed, to exclude the public—that is decided in 6 Barnwell and Cresswell,

and to this day I am not aware it has since been disputed. It is the duty, in my opinion, of the magistrate, first of all, when the charge is brought forward, to make himself acquainted with its general bearings. If he finds it a case which ought not to be made public, it is his duty, while he should see that he is not interfering with public justice, to give it as his opinion that it should not at present be published. Having done that he should, if necessary, resort to the expedient of excluding the press. I have made up my mind against the opinion of the Lord Chief Justice, and against the opinion of the rest of my brethren. I think, first of all, that the law is, that where the proceedings have been published, and the nature of that publication could, though it may be to influence the public mind, and to injure parties appealing to public justice, I see no reason which prevents this guard from being carried out for the great purpose entrusted to it—namely, the insuring to every accused person a fair and impartial trial, whatever his offence may be. For these reasons I am of opinion that this information should be extended.

FITZGERALD, J.—As my Lord Chief Justice has already announced, the unanimous opinion of the Court is that a conditional order should go in respect to the comments of, I think, of the 18th September and the 2nd October, and the portion also of Archbishop Cullen's circular, which is stated in the affidavit—but I wish to guard myself in reference to that as indicating no opinion whatever as to what may be, upon a motion for an absolute order, the ultimate determination of the Court. The allegation put forward in reference to those editorial comments is that they were published with a view maliciously to injure the accused parties, and pervert the true course of justice by depriving them of a fair trial, and in the affidavits that have been read to us, as I recollect, there was a statement put forward upon oath on the part of the prisoner that the publications were with the object an intent, and were calculated to affect the prisoners. The Court, therefore, without pronouncing any opinion upon this, thinks that a *prima facie* case has been made to be discussed upon a motion for an absolute order, and, therefore, so far we are unanimous in granting the conditional order. I pass now from that portion of the case to another and far more important question, and I may state my reasons now in concurring in the opinion of the Lord Chief Justice, because we are refusing the rule on this latter question, and, therefore I would have no opportunity of giving my reasons again—I allude now to that portion of the Lord Chief Justice's judgment, in which he has so forcibly expressed his reasons for refusing the rule *nisi* for a criminal information for a publication in the *Freeman's Journal* of the 2nd October last of a report of the proceedings in the police court; and by proceedings I understand him to include not alone the statement of the witness, but the whole proceedings as they actually took place, including the statement of the public prosecutor. I am happy now to be able to concur in the opinion of the Lord Chief Justice, that the rule ought to be, as to that, refused. Since I first sat in this Court I should say that no more important question has come before us than that now under discussion. I doubt whether I can add to the reasons

which the Lord Chief Justice has given. The view that my brother Hayes has taken is not, as he has stated, without authority, but in the earlier authorities which have been adverted to in the course of the arguments there were some decisions put forward which one feels called upon to protest against. In one of these Justice Heath is represented as stating that the mere publication of an *ex parte* proceeding of an inferior tribunal, evidence of proceedings before magistrates, was of itself highly criminal, and that opinion is subsequently adopted by Justice Abbott, who, without commenting upon it, says "it is well known that many persons have lamented the inconvenience and the mischievous tendency of such publications"—that is, the publication of proceedings before magistrates and their mischievous tendency. "These were, within the memory of living persons, rare and unfrequent, and having gradually increased in number, have unhappily become frequent and numerous, but they are not on that account less unlawful, nor is it less the duty of those to whom the administration of justice is entrusted to express their opinion against them." These are mere opinions, but not the judgment of the Court, upon the particular question under discussion, but still it appears to me that it is an opinion that I, for one, cannot adopt or follow. I have always understood, in common with the Lord Chief Justice, that one of the many securities for the administration—the pure administration of justice—in this country—one which distinguishes it from the administration of justice in most countries—is the great security of publicity. That applies as well to this as to other superior courts; but it applies, in my mind, in a much stronger degree to the proceedings of inferior courts, and especially to the proceedings—to the inquiries that take place in what we popularly call the police courts, courts where questions of great importance are under consideration, and in which—if not the lives—the liberties and the characters of persons are commonly at stake. It appears to me that the security obtained by publicity for the due administration of justice is this—that it brings to bear on that administration at once the pressure and the support of public opinion—its pressure to prevent intemperance on the part of the judge—to prevent corrupt or improper proceedings, and, on the contrary, its support where justice is administered in a pure, fair, and legitimate manner. It has been said, and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly; but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison to the great public advantage given by that publicity. I think I have accurately quoted from memory what Lord Campbell, and I believe Lord Denman also observed upon this matter; and now if such advantages were in the ordinary course of publicity so requisite, how much more is it in the particular case under examination. It is a case—without going into details—in which a grave charge is urged against the prisoners, in which the whole public at large are interested; and in which I would say myself that it was not alone the duty of the Government at the earliest moment to lay

before the public the nature of the case under investigation, but also the duty of the journalist—the duty of those who undertook the character and responsibilities of the public journalist—to lay before the public the matters which the public had the greatest interest in being informed of at the earliest period. I quite concur in the opinion the Chief Justice has expressed, that a person in the position of a public journalist—having, I would say, that duty and having performed it honestly, without malice, without any sinister motive, without perverting either the statement of counsel, or the evidence given, should be protected by the law in the performance of that duty. No doubt the authorities are in considerable conflict, and the law must be considered as unsettled; but it is to be observed that we are now merely—I am using the language of my brother Hayes—refusing a conditional order to put in force the high prerogative proceeding of the Court against the editor of a public journal for fairly publishing the proceedings in an inferior Court. We are not depriving the party in the slightest degree of any other remedy he may have. He may, if he has been libelled, institute an action; if this course of publication is unlawful, as he alleges by his counsel, it is open to him to indict the parties, and thus put the case upon the question of law in course of a more solemn and ultimate decision. But we are now merely deciding that upon this *ex parte* motion we decline to say that the defendant has been guilty—that the editor of this public journal has been guilty of any criminal act for the fair publication of these proceedings, and therefore we will not put in force our high prerogative proceeding against him. Such are the grounds upon which I concur in the judgment of my Lord Chief Justice. I may observe with respect to the early cases, in which strong language is represented to be used by the judges with respect to the publication of the proceedings of inferior Courts—that those proceedings may properly be called *ex parte*. Proceedings before the magistrates at that time were really *ex parte*. They usually took place in the magistrate's house—there was no right in the public to be admitted—they were, as I have said, really and truly *ex parte* proceedings, and liable to great abuse. But, in the altered state of the law, it is totally different. It is true, as has been observed, that the magistrates may, in the exercise of the discretion which has been entrusted to them, sit with closed doors and exclude the public, but I would say that is a discretion which ought rarely to be exercised. There may be possibly cases of such indecency or otherwise as would make it expedient, but the cases must be rare and few, indeed, which would justify the magistrates at a criminal investigation in sitting with closed doors; and on the other hand, while it gives the magistrate that discretion, it makes the police court—unless such an order is made—an open court to which the public have the right to be admitted. I collect that, in this particular case, this was an open court. I think Mr. Butt stated that there were no less than twenty-four reporters—that is, I suppose, the representatives of twenty-four different newspapers—admitted into that Court. For what purpose? For the purpose of reporting the proceedings. I dare say, that if we were informed on the subject, that those proceedings have

been reported, not only in the *Freeman's Journal*, but probably in every paper, not only in this city, but in the British islands. We must also take into account side by side with the altered state of the law, the altered state of public opinion—neither can we shut our eyes to the rapid, though possibly insensible—but still, I repeat, not less rapid—progress which the press has made during the interval of forty-seven years which has elapsed since the *King v. Fleet*, when an information was granted against the publisher of a newspaper for the report of proceedings in an inferior court, coupled with a commentary upon them. I therefore agree with the Chief Justice in reference to the publication of proceedings in a police court—and I emphatically include in the word “proceedings” not only the evidence, but the statement legitimately made on that occasion—that, inasmuch as it appears to us that those proceedings were published honestly and *bona fide*—it is not alleged that there was any sinister motive, or any malicious motive on the part of the defendant—we ought not to grant the conditional order. In refusing the rule in respect to the publication of the proceedings, we are not depriving the party making the application of the remedies which he may otherwise have. We merely refuse our own prerogative proceeding. With respect to the state of the law, and the cases cited to show that the law is in an unsettled state, I will just refer to a case which, although at Nisi Prius, was before a judge of considerable eminence, the present Chief Justice of England. I mean the case of *Cox v. Feeney* (4th Foster and Finlayson 13.) It was an action for libel, brought against a newspaper proprietor for publishing the report of a committee appointed to inquire into the condition of a charity. A report was made seriously reflecting on the character of the charity, imputing corruption and misconduct to them. The question was, whether the publication of the journal was answerable for having published the report, whether there was no privilege or no excuse, the matter being unquestionably a libel. In that case Chief Justice Cockburn put the matter to the jury this way:—“I shall ask the jury whether they believe this was published by the defendant to do an injury to the plaintiffs, first having determined that the matter was one in which the public was interested, or to give the public that information which the public journalist has the duty to give.” He told the jury they would have to say, first, whether the publication in question was a matter which it interested the public to know, and secondly, whether the defendant published it with the honest desire to give information to the public, and if so, they should find a verdict for the defendant. Accordingly they did find for the defendant on the issues so put, and the editor of the case adds this note:—“The case was not moved—the importance of the question of privilege or rather of excuse in matters of public discussion is very obvious.” The decision given in that case by Chief Justice Cockburn stands. I will make no further observation on the case before us save to express my concurrence in what has fallen from my brother Hayes in reference to the parties who make this application. It is the duty of every one in the community, and especially of those who like us are entrusted with the adminis-

tration of justice, to endeavour by all means to see that the trial of so grave a case shall be perfectly impartial, and I believe one good will flow from this discussion, namely, that there will be in future no comment or article published which might in the slightest degree influence the public mind with respect to the trial which is to take place. We can have only one desire—to give a fair and just administration of the law, no matter what the case is which we have to try.

O'BRIEN, J.—I shall not have much to add to what has been already stated, and I shall commence by saying what has been already said by other members of the Court, that as to those portions of the case for which the conditional order is granted, I concur in granting it. In doing so we pronounce no further opinion whatever than that the question raised upon the affidavits, and statements in them are, in our opinion, such as render it a case to be more solemnly and deliberately discussed, in shewing cause against the conditional order, and without binding ourselves in any degree to the principles of law laid down by the prosecutor's counsel. With respect to the other part of the case, in which there is a difference of opinion amongst the members of the Court—that is, whether the order should extend to that part of the case which relates to the privilege of newspapers to publish correctly a report of proceedings of preliminary inquiries such as this before a magistrate, there is certainly a conflict, if not of decision against decision, at least of opinion among judges, whose names and character, and position entitle their opinions to every consideration. The case that approaches nearest, in my opinion, to sustain the order made by the prosecutor for a conditional order as to the publication of proceedings is that of *Duncan v. Thwaites*. The judgment of the Court in that case, as will be found in other cases, goes beyond what it was necessary to decide, and they certainly do in that case lay down the proposition that the publication of proceedings such as these, preliminary to the trial, for the purpose of ascertaining whether a magistrate should commit a prisoner for trial, is not privileged, if I may use the word, though it is not accurate. However, it is sufficient to look at the last case to which we have referred, of *Lewis v. Levy* (1st Ellis and Blackburne's Reports,) to see that the opinion of the Court of Queen's Bench there, presided over by a judge of great eminence, Lord Campbell, did not go so far as the proposition already laid down. Lord Campbell in his judgment, refers to the judgment in *Duncan v. Thwaites*, that the publication of the proceedings was accompanied by what was considered to be the opinion of the reporter or publisher as to the result of the evidence, which rendered it unnecessary to sustain the proposition contended for. Lord Campbell also refers to the opinion expressed by Lord Denman, another high authority, in his examination before the House of Lords with regard to the state of the law of libel, an opinion that is not only the opinion of Lord Denman, but which is adopted by Lord Campbell, and quoted as part of his judgment. He does not profess to lay down the general proposition whether the publication of preliminary proceedings before a magistrate is protected or not. In some of the



other cases relied upon by the prosecutor,—the appeal cases,—it will be found upon reference to them that the opinions expressed by the judge, though strongly in favour of the proposition contended for by Mr. Butt were not necessarily so, or went beyond the facts of the case. In that case, before Lord Ellenborough the publication of the proceedings was accompanied by a comment. In the cases in the 1st and 4th Barnwell and Alderson, it will be found that there were circumstances which rendered it unnecessary to decide the general proposition contended for. In this case, whatever the inclination of my opinion may be, I have no hesitation in stating that it would be rather against the proposition contended for by Mr. Butt, and that for the reasons so fully stated by Lord Campbell. I would be disposed to hold that a fair and correct report of the preliminary proceedings is protected the same as a fair and correct report of the proceedings of the higher courts of justice. It occurs to me that, having regard to the conflict of opinion which exists on this subject, and out of deference to the opinions expressed by Lord Ellenborough, Lord Campbell, Justice Bayley, and others, it would be a more satisfactory course to grant a conditional order upon this question also, in order that it might be more fully discussed. In saying that the conditional order should be granted, I do not mean that I agree with the opinion laid down by my brother Hayes; but I merely do so for the purpose of having the matter discussed. Let the conditional order go so far as relates to the articles of the 18th September and the 2nd October, mentioned in the affidavit; and also so far as relates to that portion of Dr. Cullen's pastoral published on the 20th October, which is mentioned in the prosecutor's affidavit.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BEFORE MONAHAN, C.J., KEOGH, CHRISTIAN, AND O'HAGAN, J.J.

THOMAS CLARKE LUBY v. JOHN WODEHOUSE, BARON WODEHOUSE, LORD LIEUTENANT GENERAL, AND GENERAL GOVERNOR OF IRELAND.—Nov. 10, 13, 1865.

*Liability of the governor of a country to be sued for acts done by him in his official capacity—Acts of state—Application to remove the writ of summons and plaint from the file.*

*The premises of the plaintiff, proprietor of a newspaper—suspected of being concerned in treasonable practices—were entered by the police, and a quantity of private papers, printing presses, and various matters connected with the publication of the paper, were taken and detained in Dublin Castle, some of the papers so taken being wholly*

*unconnected with treasonable practices. The plaintiff brought an action of trespass against the Lord Lieutenant for the breaking, entering, and carrying away the papers, &c. Upon motion by the Attorney-General to have the summons and plaint removed from the file, and it appearing upon affidavits made by the plaintiff, that the acts complained of were done by the Lord Lieutenant for the purpose of suppressing an alleged treasonable conspiracy, the Court directed the writ of summons and plaint be taken off the file, holding that no action was maintainable against the Lord Lieutenant for an act done by him in his capacity of Lord Lieutenant.*

THE summons and plaint in this case complained that the defendant broke and entered the plaintiff's dwelling-house at No. 12 Parliament-street, against the will of the plaintiff, and disturbed him in his possession of same, broke open his doors, and took away various articles of property, which were enumerated. Service of the writ was effected on the Lord Lieutenant's private secretary, and the present application to the Court was that the writ of summons and plaint should be set aside.

*The Attorney-General* (with him the Solicitor General, Barry, Q.C., and Dames) now moved on the affidavit of Thomas Mostyn, of Merriion-square, in the city of Dublin, Crown and Treasury Solicitor, which stated that this action was brought against his Excellency the Lord Lieutenant General, and General Governor of Ireland, for acts alleged to have been done under authority, given by him, in his capacity as such Lord Lieutenant of Ireland; that this plainly appeared from an affidavit purporting to have been sworn by the said plaintiff, in a cause now depending in the Court of Exchequer, in Ireland, of *Luby v. Stronge*, filed the 31st day of October, 1865. Deponent saith he believes it to be untrue, as stated in said affidavit, that the acts complained of or any of them were done by, under, or in obedience to any written directions, warrant or document, signed by the Lord Lieutenant, or by Sir Thomas Larcom; and deponent saith he believes that no directions or authority, written or verbal, were given by the Lord Lieutenant or the said Sir Thomas Larcom, in relation to the acts complained of, or any of them. And in relation to the statements in the said affidavit of the said Thomas Luby, as to the holding of a Privy Council, in relation to the said warrant, and other matters referred to in said affidavit, deponent has been informed and believes that such statements are wholly destitute of foundation; and deponent has been informed and believes that the acts complained of were done by the constables of the Metropolitan Police Force, acting in the ordinary discharge of their duty, against the plaintiff and others, on a charge of high treason, for which they have since been committed for trial, in respect of which said acts of the constables actions have been since brought, and are now pending in the said Court of Exchequer, in which said actions deponent has been informed and believes the said constables are ready to justify their acts. Deponent further saith that the said John Baron Wodehouse, who is named as defendant, was duly appointed

Queen's Deputy, and Lord Lieutenant of Ireland, by virtue of letters patent, bearing date the 1st day of November, 1864; and that he was duly sworn in as such Deputy and Lord Lieutenant of Ireland, upon the 8th day of November, 1864; and that the acts complained of are acts of state, alleged to have been committed by the said Lord Lieutenant, in exercise of his said office of Queen's Deputy, and Lord Lieutenant of Ireland. Luby in his affidavit, in the case of *Luby v. Stronge*, stated that he believed, that the defendant in that case acted in obedience to written directions, in a warrant signed by the Lord Lieutenant or Sir Thomas Larcom; and that in addition to their signatures, the warrant was signed by Privy Councilors; that he, Luby, had no means of knowing who they were that attended the council; but he was informed, and believed, that the sittings were protracted, and that the police were in waiting for orders; that the Lord Lieutenant then gave directions to seize his house and property; and that all who were concerned in that act were liable to him. The meetings of the Privy Council are denied in Mostyn's affidavit; in fact it was admitted they never did take place; therefore, if any wrong were done to the plaintiff, by what took place in Parliament-street, he has his remedy against the persons who entered his house. Such an action is not maintainable against the head of the Executive Government. The affidavit of the plaintiff made in this case deals with a variety of matters; his treatment in prison, and the way in which his papers were seized; he refers in it to a denial by Mr. Baron Deasy, that the alleged meeting of the Privy Council ever took place, and admit that he might have been mistaken in reference to that meeting; but he states that he expects to be able to prove that the acts in question were done by the Lord Lieutenant's directions, he having interfered in the matter so as to render himself personally responsible; and that the acts complained of were not acts of state. A letter was written by the Lord Lieutenant to Lord Fermoy, in reference to the state of the county of Cork, and this the plaintiff relies on as showing a personal interference in this matter by the defendant. That letter was a letter of the 14th September, and in substance was an acknowledgment of the receipt by the Lord Lieutenant, from Lord Fermoy, of a memorial from a meeting of the magistrates of the county of Cork, in which he stated that Lord Fermoy would learn what steps were being taken by the Government in Dublin and Cork, under the Peace Preservation Act, adding a hope that these measures would re-assure the well-disposed inhabitants, and prove to the disaffected that the Government were determined to uphold the law. The plaintiff's affidavit then states that at the time when this letter was written, the Dublin papers gave the particulars of the seizure of his property, and states his belief that the defendant in his individual capacity authorized the seizure of plaintiff's house and property, and that if allowed to proceed he would prove such authorization. The letter shows that the Lord Lieutenant acted in his executive and not in his individual capacity. The head of the executive is not liable in an action for any act done by him as such; the Court must affirm that proposition, or else

overrule decided cases and principles deeply rooted in the jurisdiction of this and every civilised country in Europe. An action could not be brought against the Queen for such acts. In *Mostyn v. Fabrigas* (1 Smith Leading Cases, p. 607, and Cowp. 161.) Lord Mansfield held that the defendant who was Governor of Minorca, was not liable for his official acts. The head of the executive in this country stands on the same ground. It is essential to the discharge of their duties, in the administration of the law and the Government of the country, that those persons intrusted with Her Majesty's commissions should be able to do so without fear or apprehension, which they could not do if exposed to actions: for this reason a judge is protected. It might be objected, why did not the defendant plead his privilege? but it would involve the very mischief it was the intention of the constitution to guard against, if a Lord Lieutenant was obliged to come into Court and set out his patent and privileges. In *Napper Tandy v. Lord Westmoreland* (27 State Trials, page 1240), a similar application was made to stay the proceedings; and the question was, if the Court had materials before it, so as to conclude that the matter complained of was an act of state. The Court held that they had materials, and the motion was granted. It is not contended that the prerogative of the viceroy is the prerogative of the Crown. If this action proceeds, it will be the first of the kind which was ever allowed to go on. A judge cannot be sued for acts done by him in a judicial capacity, nor could an ambassador in a foreign country—*Buron v. Denman* (2 Exch. 167); *Ward v. Freeman* (2 Ir. C. L. R. 460); *De Haber v. The Queen of Portugal* (20 L. J., Q. B., 488); *Culder v. Halkett* (3 Moore P. C. C. 28); *Taaffe v. Lord Downes* (3 Moore P. C. C., 36). *Entick v. Carrington* (19 State T. p. 1030) has no application to the present case. In that case a Secretary of State took on himself to issue warrants, to seize papers, in aid of suspicion; it was only a case of misdemeanour, and the act was held to be illegal. If the papers seized were papers publishing treason; if the books seized contained matters of military practice, and the private books demonstrated the part those parties took in the conspiracy, the police had a right to take them? In the case of *Francis Francia*, reported in 15th State Trials, 966, where the party was tried for a treasonable correspondence in aid of the Pretender; it was argued on the prisoner's behalf that the seizure of the papers was illegal; and the judges held the act legal. The present plaintiff has also brought actions against the Superintendent of the G division, and the two constables. [*Christian, J.*—Do you disclaim the idea that the Lord Lieutenant cannot be made answerable for a personal wrong? He can for every private wrong or private debt, but not for an act done *quâ* Lord Lieutenant. In *Hill v. Bigge* (3 Moore P. C. C. 465) this distinction is upheld, and *Napper Tandy v. Lord Westmoreland* is referred to. There is a distinction between acts of state and acts of power; acts of state are those done by the defendant *quâ* Lord Lieutenant, by proclamation, warrant, or otherwise. It is plain from the affidavit that the action is brought for something done by the defendant *quâ* Lord Lieutenant; and

the question is, are the proceedings to be stayed, or must the defendant plead privilege? if the party must plead, the consequences will be to affirm the supposition, that anyone may sue the Lord Lieutenant for acts of state, and that the privilege must be set up by plea.

*Butt, Q.C.*, (with him *Dewse, Q.C.*, and *O'Loghlin*,) contra.—The grounds upon which this motion is sought to be sustained are, that the Lord Lieutenant, by virtue of his office, is exempt from the jurisdiction of the Court, and that admitting he was answerable to the Court, yet for an act of state he is not liable to be sued, and that in his case the Court have a right to try the question on affidavit on a preliminary motion, and determine, without appeal, that the action is not tenable. The act for which the present action was brought, took place on the 15th September, on which evening, when no person was in the plaintiff's house in Parliament-street, a body of men broke open the house, broke open the private presses, ripped up the floor; there was no examination of papers; a float was brought to the door, the papers placed in it, and carried off to Dublin Castle; they were examined there, and amongst them were papers utterly unconnected with any political matters, such as private letters, cash accounts, the lease of the house, and plaintiff's marriage certificate; the type was taken away, parties put into the house who are there still, and the excuse for all this is, it was an act of state. It was not an act of state but an act of power; the detectives could not, of their own authority, have seized this paper and carried it off to the Castle. Is it any part of the ordinary duty of a detective, without any warrant, to enter a house, say he suspected the owner was acting treasonably, and carry off his property, and take possession of his house? The plaint is copied almost verbatim from that in *Entick v. Carrington* (19th State Tr., p. 1030); and that case is an authority against the present application. The papers of the plaintiff were seized indiscriminately, and without any knowledge of their contents; and the plaintiff says in his affidavit, "I will prove at the trial that the defendant took part therein." By what evidence he may prove that the Court is not to try now. If of his own motion, without warrant or information, or authority from the Privy Council, the Lord Lieutenant ordered a body of men to take possession of the house of any private person, would not an action lie therefor? if what the plaintiff swore is false, it lies on the Lord Lieutenant to prove that at the trial... There is no wrong without a remedy, for a petition of right would lie even against the Queen; a petition of right does not lie for an action of trespass, like the present, and there could not be a petition of right against the Lord Lieutenant. [*Monahan, C.J.*—If no action can be brought against the Lord Lieutenant, it is as of course to stay the proceedings; but if actions may be brought for acts done, not as acts of state, the question is, ought these proceedings to be stayed? If the Lord Lieutenant has an exemption from all jurisdiction of the Court the writ should be stayed or set aside, as an abuse of process; but if this is doubtful, he should plead, or object to the jurisdiction of the Court. The question as to whether the act complained of is an act of state is a question of

law, not to be disposed of on motion. Act of state is a phrase found in the report of Lord Westmoreland's case; but an act of state might be one that involved no question of legality. The jurisdiction of the Court is not ousted whether it is an act of state or not. There is a difference between the act of a Viceroy and the act of a Queen; she is supposed never to interfere, and the act done by her is the act of her Minister. The order of the Lord Lieutenant is obeyed without being countersigned by a Minister. The Queen reigns but does not govern. Every act of the Queen must be countersigned by a Minister, and the acts of a Prime Minister or Chief Secretary can be submitted to a jury. Every one but the Queen is within the jurisdiction of the Courts. The case of Napper Tandy did not appear in any of the legal reports; it was only given *ex relations*. The position of the Lord Lieutenant was very materially altered by the Union. Before that event Ireland was an independent kingdom; the Viceroy really represented the Crown, and had distinct ministers. That is not the case now. The case against Lord Strafford, cited in the course of Mr. Emmett's argument in *Tandy v. Lord Westmoreland*, is a clear proof that such an action as the present will lie. Is Lord Wodehouse supposed to be in Court, and is the present motion the motion of the Lord Lieutenant, or of the Attorney-General, in virtue of his office? The notice of motion states that the Attorney-General will apply to have proceedings stayed. The Attorney-General has no right to appear *ex-officio*. Who is there to inform the Court that the act complained of was an act of state? This is an interlocutory application from which there is no appeal, and therefore, if the Court were equally divided, neither party could appeal. There might be an appeal in the case of a bill of exchange to the highest tribunal, but we are deprived of that in an application like the present, involving the rights of the plaintiff, who complains of a grievous wrong. The Lord Lieutenant should come into Court and put his plea of privilege on the file.

*Cur. adv. vult.*

*November 13th.*—*MONAHAN, C.J.*, delivering the unanimous judgment of the Court said—In this case in which Thomas Clarke Luby is plaintiff, and his Excellency the Lord Lieutenant is the defendant; an action is brought in the ordinary form of trespass. The plaintiff complains that the defendant, on the evening of the 15th September last, broke and entered his dwelling-house in Parliament-street, in the city of Dublin, and took away a quantity of private property, consisting of papers and other articles, and has since detained them. The plaintiff made an affidavit in an action, which he brought in the Court of Exchequer, and in which Mr. Stronge, the police magistrate, is the defendant. In that affidavit he sets forth, in detail, what the cause of action is, and the grounds upon which he hopes to render Mr. Stronge and the Lord Lieutenant responsible for the acts of which he complains. He states that he, himself, was arrested on the morning of the 16th of September, which was the day after the alleged trespass of which he complains was committed, at his house in Par-

liament-street; that he was arrested at his house in Dolphin's barn, for alleged treasonable practices, and that he has been since kept in custody. He says that he had been informed, and believed, that on the evening of the 15th of September, when he had left his office in Parliament-street, the police magistrate, with a body of police, under the command of an inspector, proceeded to his house in Parliament-street; he says that he was under the impression that what was done there had been done in the presence of Mr. Stronge. He now corrects that statement and says, that he must believe that Mr. Stronge was no party to the outrage committed on that occasion. He says that they took a great quantity of private papers, printing presses, and various matters connected with the publication of his newspaper; and he also says, that these papers were taken, and have since been detained in a room in the Castle of Dublin; that they have been inspected by several persons; that some of the papers so taken have been used against him in reference to his committal for trial, on a charge of being concerned in treasonable practices. He says that a great number of these papers were of a private character, and were wholly unconnected with treasonable practices, and that he commenced the action to get a return of these papers. In the first affidavit, made by him in the Court of Exchequer, he states the ground on which he hopes to succeed in the actions. He says he was informed, and believes, that it was a matter of public notoriety, published in all the newspapers, that on the evening of the day on which the trespass was committed a meeting of the Privy Council was held at the Castle of Dublin, at which His Excellency the Lord Lieutenant presided; that a number of the members of the Privy Council were present, and that they came to the conclusion that a warrant for the seizure of his goods should be issued; and he states that he is advised, and believes, that the Lord Lieutenant, and everybody who was a party to these proceedings, is responsible for the acts complained of. It appears that in the action which he brought against Mr. Stronge, the grounds there stated are the same as those on which he alleges he has cause of action against all the parties. It further appears that Mr. Baron Deasy, whose name was given as that of one of the members of the Privy Council, who were present on the occasion of the alleged meeting, at the hearing of the motion in the Court of Exchequer said, that the matter about the Privy Council was all a mistake and a fabrication from beginning to end; that there was no meeting of the Council as alleged, and that there was no discussion as to the propriety of taking any proceedings against Mr. Luby, and that there was no foundation for the statement whatsoever. Accordingly, in the affidavit which he made to resist the present motion, Mr. Luby states that he believes the statement of Mr. Baron Deasy, and that what he stated in his former affidavit in reference to the Privy Council was owing to mistake. He says he believes that there was no formal meeting of the Privy Council, but that he believes that something in the nature of an informal meeting of the character mentioned in his affidavit took place, and that the members of the Privy Council assembled not as a Privy Council; but still that the act in question was done in pursuance

of their directions or suggestions, and with their approbation. He says he hopes to be able to prove, that the act complained of was directed personally by the Lord Lieutenant, and when done that it was approved of by him, and he refers to a letter in which the Lord Lieutenant in answer to a letter from Lord Fermoy refers with approbation to the acts of the Government for the suppression of the conspiracy; and he says (and the inference he draws is tolerably correct) that whether or not the Lord Lieutenant was personally a party to the proceedings, he certainly expressed his approval of these proceedings, and describes them as the official acts of the Government, and therefore upon that letter the plaintiff Luby says that he is advised by eminent counsel that he is entitled to maintain this action against the Lord Lieutenant. The first question therefore which this Court has to consider is as to the matters of fact—what is the nature of the act done by the Lord Lieutenant, and which is complained of by Mr. Luby? In this case there is no difference among the members of the Court, because this act complained of looking at it from the way in which it is treated in Mr. Luby's two affidavits was an act done by the Lord Lieutenant for the purpose of suppressing or putting an end to this alleged conspiracy. Mr. Luby says that the Lord Lieutenant directed the seizure of his property in Parliament-street, and Mr. Luby seems to admit that so far as the taking of papers would be evidence against him in relation to this conspiracy, there is no complaint, but the act complained of is the taking away of his marriage certificate and papers unconnected with the alleged conspiracy, and also, as I understand, he makes the ripping up the floors of his house part of the complaint. The Court entertain no doubt whatsoever, according to Mr. Luby's own showing, and upon his own statement that the act done by the Lord Lieutenant, whether rightly or wrongly, assuming it to be done in his character of Lord Lieutenant, whether formally or not, is as much an act of the Lord Lieutenant, *quod* Lord Lieutenant, as an act of the police magistrate Mr. Stronge, would be an act of Mr. Stronge's in his character of police magistrate, and not in his character of Mr. Stronge a private individual, and therefore be it right or be it wrong, the act complained of here and for which Mr. Luby says he is advised he is entitled to obtain redress, is an act done by the Lord Lieutenant in the discharge of his duties as Lord Lieutenant. That this is the case is clearly established in the opinion of the Court by the sworn evidence of Mr. Luby himself. The next question is as to the law applicable to the case; whether his Excellency discharging the high duties of Lord Lieutenant under the Queen, if he out-steps his duty and does an act which may not in strictness be justifiable, which for the argument's sake, would not be justifiable in point of law if done by a police magistrate—whether an action would be maintainable against him in this country for such an act done by him in the discharge of his duties as Lord Lieutenant. The question that has been submitted to the Court is one that must depend in a great degree upon authority, and in some degree upon the nature of the case and the reasons applicable to it. The first case to which we have been referred is

that of *Mostyn v. Fabrigas* (Cowp. p. 161). In that case the action was brought in the Court of Common Pleas in England by the plaintiff against the defendant who had been governor of Minorca, the charge against whom was that without just cause, he as such governor imprisoned the plaintiff and afterwards sent him off to Carthageua in Spain. The question, and the only question which arose in that case was whether the action lay against the defendant. The arguments used by the learned judge who delivered judgment in the case, deserve the highest respect, from the well-known ability and great experience which he possessed. Lord Mansfield stated that he considered it perfectly clear that no action could be maintained in any country according to the law of nations—and I think he used the words, the law of nature—for such an act by a party in the country in which the act complained of was done by a man who represented his sovereign. Accordingly, he lays it down as being perfectly clear that no such action as was then being tried or disposed of in the Court of Queen's Bench could have been maintained or disposed of in the country in which the party was himself governor, the act complained of being an act done by the defendant as such governor. It is quite true that in that case Lord Mansfield goes farther and expresses the opinion that not even a civil action could be maintained against the governor or viceroy in the country in which he was governor, and while he was governor; but as to the action being maintainable for an act done by him as governor, the law appears to be perfectly clear and settled. The next case that comes before the Court is that of *Napper Tandy v. Lord Westmoreland*, reported in 27th vol. State Trials, page 1246. In that case the action was commenced in the Court of Exchequer against Lord Westmoreland. There was this difficulty in the case, that no declaration had been filed, and you are all aware that at that time the commencement of the action was by writ, which called upon the party to appear to answer the complaint which should be made against him, so that there was nothing on the face of the proceedings themselves to show the nature of the action against the Lord Lieutenant. The Attorney General of the day came in and applied to the Court to quash the proceedings, and he satisfied the Court that in point of fact the intended action upon which no declaration had been filed, was brought against Lord Westmoreland for issuing some proclamation for the arrest of Napper Tandy in pursuance of some address presented to him by both Houses of Parliament. It is not necessary to go into the grounds upon which the Court in that case came to the conclusion at which it arrived; but the conclusion was that the action was brought for an act done by Lord Westmoreland as Lord Lieutenant, and not for a personal act done by him as a private individual. The Court of Exchequer was at that time presided over by a very eminent judge, Lord Avonmore. The result of this decision was, that this act being an act done by the defendant as Lord Lieutenant, an action could not be maintained in Court, and that he was bound in duty to set aside the writ which was issued at the commencement of the action. He said that this was not a question merely as to the municipal law of

England and Ireland, but was one which belonged to the law of nations, and he referred to Puffendorf and other authorities to show that it was so. I do not think it necessary that I should go through the whole of the reasoning which satisfied him and the other members of the Court that the action about being brought by Napper Tandy should at the earliest moment be stayed and the proceedings set aside. There was another case submitted to the Court, which seems to have been reported at considerable length, viz.: *Hill v. Bigge* (3 Moore's Priv. Co. Cases, 465). That was an action brought for the recovery of the amount of a bond executed by the defendant before he was appointed Governor of Trinidad. The plaintiffs were jewellers in the city of London, and the bond was executed to them before the defendant went to Trinidad. The Court which tried that case was presided over by Lord Truro, Lord Campbell, Mr. Justice Erskine, and Dr. Lushington. The defendant being indebted on this bond, an action was commenced against him in the local Court in Trinidad. He pleaded that being Governor of the country under the commission of the Queen he was not liable for a debt due by him in England prior to his appointment. The Court of Trinidad were of a different opinion, and came to the conclusion that he was liable to be sued, and gave judgment by a decree against him for the amount of the bond. He appealed to the Privy Council in England, and the case was argued at considerable length. Counsel for the Governor argued that no action of any nature, even for a debt contracted in England, could lie against the Governor, and quoted the two cases to which I have referred, viz.: *Mostyn v. Fabrigas* and *Tandy v. Lord Westmoreland*. He relied upon some dicta of Lord Mansfield in the one case, and of Lord Avonmore in the other to show that those learned judges held that no action at all could be maintained against a Governor, whether the action was brought for an act of government or not. It is difficult to come to the conclusion that such was the opinion of Lord Avonmore, because he gives his judgment having altogether in view that the intended action was brought for an act done as an act of state. I do not therefore see how that case could be relied on as an authority in support of the appeal. Now, let us see how the case was dealt with by the counsel for the plaintiff (Mr. Erle). Counsel for the defendant having relied on Napper Tandy's case as an authority for the proposition that the Governor was not liable in any action at all, Mr. Erle, Q.C. disposed of that case by showing that the act complained of by Napper Tandy was a political act, and that for such a governor or viceroy could no more be held liable than a judge for a judicial act. But this, says Mr. Erle, is not the present case. The question here is, whether the appellant can screen himself from an action on a bond on the plea that as Governor of the colony in which the action is brought he is not liable. He does not question the propriety of the decision in *Tandy v. Westmoreland*. Lord Brougham refers to the case of *Mostyn v. Fabrigas* and asks whether there is any authority upon which to decide the question whether a Governor can be sued for a private debt. He says it is unnecessary to refer to the case of *Tandy v. Westmoreland*, because the question there

was as to the liability of the defendant for an act done by him as Governor. Lord Brougham assumed that the dicta of the Court in that case must have been inaccurately reported, and states that the decision there had no bearing or authority on the case before him, because the action was brought for an act done by the defendant as Lord Lieutenant. These State Trials are sometimes not considered the best authority, and, inasmuch as some little doubt was suggested as to the accuracy of the report, we thought it would be satisfactory to obtain from the Court of Exchequer the order made in that case of *Tandy v. Westmoreland*. There was an order pronounced on the 26th of June, 1792, on the motion of the Attorney-General, who applied to the Court to prohibit the issuing of any attachment against Lord Westmoreland. An order was made for the attendance of Mr. M. Dowling, the plaintiff's attorney, and that in the meantime no process should issue. On the 27th June, Mr. Dowling attended, and the Hon. Mr. Butler who was counsel for Tandy, having objected to Dowling answering any question, it was directed that the motion should stand till next Term. The next order in the same case was made on the 26th of November, and it was then ordered that the motion should stand till Wednesday next; and accordingly on the next Wednesday the case was called on, and the Court ordered that the subpoena issued in the case should be quashed, so that whatever inaccuracy there might be as to some of the dicta of the judges as reported in the State Trials, there could be no doubt that the decision of the Court was accurately reported, which was that the Lord Lieutenant was not responsible for an act done by him in his official capacity as Lord Lieutenant, and that an action for such official act could not be maintained. That is a case which it is the duty of this Court to take as a precedent. In that state of authority what course should this Court take? Should they comply with the motion made by the Attorney-General; or, should they refuse it, leaving it to the Lord Lieutenant to put a plea upon the file that the act was done by him in his capacity of Lord Lieutenant, and that therefore he was not answerable for it to this or any other Court? We entertain no doubt whatever as to the character of the act complained of, and we hold that it would be contrary to the principles of all law and reason, that while the Governor of a country is discharging the high duties intrusted to him by the Crown, even though a private wrong be done, that wrong could be redressed by such an action as this. We do not find a trace of a single case in which such an action was maintained or brought, except in the case of *Tandy v. Westmoreland*. We find that from that time up to the present, though this country has passed through troublous times, no such action was brought, or advised, or attempted until the present. We are of opinion that this action should be summarily disposed of. We are of opinion, that even on the plaintiff's own showing the act complained of comes within the reason of the rule requiring that this matter should be summarily disposed of, and not that a question should be submitted to a jury; and being clearly of opinion that upon the plaintiff's own showing and his own affidavit, this act comes within the reason of the rule, we have

unanimously come to the conclusion that we should comply with this application to set aside the proceedings, and to take the writ off the files of the Court.

*Application granted.*

MULHOLLAND v. M'COURT AND OTHERS.—Nov. 4, 1865.

*Irregular indorsement of writ of summons and plaint.*

*Where in an action of trespass against several defendants, judgment was allowed to go by default, and the indorsement of the service of the writ on one of the defendants, omitted to state the day of the week of such service, the Court, upon the defendants' application, set the judgment aside, the plaintiff being at liberty to take the writ off the file and serve it again.*

THIS was an application to the Court on the part of the defendants, that the judgment by default entered for the plaintiff on the 24th day of July last should be set aside on the ground of irregularity in the service of the writ of summons and plaint on one of the defendants, Edward Murphy, the indorsement being imperfect and irregular in not stating the day of the week on which such service was effected, and that the notice given by the plaintiff of speeding an inquiry on foot of the said judgment should be set aside also. The summons and plaint, which bore date the 13th day of June, 1865, complained that the defendants on the 23rd day of March, broke and entered certain lands of the plaintiff called Ballyagan in the barony of Lower Dundalk and county of Louth. The indorsement of the particulars of service was as follows:—"Served Peter M'Court in person on Wednesday the 14th day of June, 1865; Bernard Fearon in person, on Wednesday the 14th day of June, 1865; John Morgan in person, on Wednesday the 14th day of June, 1865; Patrick M'Elroy in person, on Wednesday the 14th day of June, 1865; Edward Murphy, "on the 15th day" of June, 1865; Patrick Killen, on Friday the 16th day of June, 1865; Thomas Killen, on Friday the 16th day of June, 1865, per his wife in the dwelling-house." From the affidavit of Richard MacNamara, defendants' attorney, it appeared that the writ was issued on the 13th June, and that it was filed on the 24th of same month; that instructions were given on the 23rd to take defence, that on the 25th a notice was served on the plaintiff's attorney requiring a tracing of the land trespassed on, in compliance with which the same was furnished on the 1st July, and also a notice setting forth that the trespasses complained of were committed upon a narrow strip of land skirting the sea shore. This strip was a waste piece of ground not separated from the sea shore by wall, hedge, or ditch, and could be trampled on by the public, and the action was brought by the plaintiff not for the actual damage done, but to try his right to exclude the public from the sea shore. By an order of the 6th July, the defendants got liberty



to plead double, and the time for pleading was enlarged. The defendants' attorney at or about that time searched the proper office to ascertain if the writ was filed, and on inspecting it found that the indorsement was defective in respect to Edward Murphy, and then made a pencil-mark opposite to it to call the attention of the proper officers thereto, should the plaintiff's attorney proceed to mark judgment. On the 31st of July and the 3rd of August notices were served by the plaintiff's attorney, stating that the plaintiff had got judgment, and that the enquiry would be sped in Belfast.

*Dowse, Q.C.* (with him *M'Mahon*) in support of the application.—The 31st section of the C. L. Procedure Act requires that the day of the week on which service was effected should be marked on the writ. The service on Murphy is only stated to be on the 15th day of June, 1865, the day of the week is omitted; judgment is marked against all jointly, it cannot be severed,—the action being one of trespass committed by all; a *nolle prosequi* might have been entered against Murphy; that was not done, and therefore the judgment must be set aside.

*Ferguson, Q.C.*, (with him *Hamill*) for the plaintiff submitted that there was no irregularity because the Court must infer that the 15th of June, on which day it appears on the back of the writ that Murphy was served, was Thursday—the other indorsements stating that some of the defendants were served on Wednesday the 14th, and others on Friday the 16th. But even if there was an irregularity the writ was filed on the 24th of June, and the attorney for the defendants was aware of the blot when he called for a tracing defining the "*locus in quo*."—he gives no notice till the 11th of August. Meanwhile he gets leave to plead on the 5th July. At any time a *nolle prosequi* might be entered against Murphy; the judgment is regular against the others, and therefore it ought not to be set aside; the 179th General Order applies. No person could be misled. The defendants did not apply within reasonable time. There was a waiver of the irregularity.

*PER CURIAM*.—There has been an irregularity and no sufficient waiver thereof, and the rule we make is that the judgment be set aside, the plaintiff to be at liberty to take the writ off the file and serve it again; the parties to abide their own costs.

*Application granted.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

LUBY v. STRONGE.—Nov. 7.

*Motion for liberty to exhibit interrogatories to defendant.*

*On a motion for liberty to exhibit certain interroga-*

*tories to defendant, a police magistrate, with respect to plaintiff's arrest by order of defendant, the following was held to be too general—"Was any information sworn before you on that evening? If so, by whom; where is such information, and at whose instance was such information sworn?" And it was ordered to be amended as follows—"Was any information sworn before you on that evening relative to the subject-matter of this suit, and upon which any action was taken by you or by your authority or concurrence relative to the property of the plaintiff?"*

THIS was an action brought by plaintiff, Thomas Clarke Luby, proprietor of a newspaper entitled "*The Irish People*," against defendant, John Calvert Stronge, Chief Police Magistrate of the city of Dublin, for trespass in breaking and entering plaintiff's house in Parliament-street, and taking and carrying away plaintiff's books, types, ledgers, &c., and detaining same.

Plaintiff made an affidavit alleging that he would derive material assistance in the carrying on of this action by having the interrogatories answered.

*Dowse, Q.C.*, (with him *O'Loughlen*) for plaintiff, now applied for leave to exhibit certain interrogatories to defendant, all of which were consented to by

*Barry, Q.C.*, for defendant, except the following—"Was any information sworn before you on that evening? If so, by whom? Where is such information, and at whose instance was such information sworn?" This was objected to as being too general.

*Dowse, Q.C.*, in support of the interrogatory, cited C. L. P. Act, 1856, s. 56; *Zychlinski v. Maltby* (10 C. B., N. S., 838); *Bartlett v. Lewis* (12 C. B., N. S., 249); *Baily v. Griffiths* (31 Law Jour., N. S., Exch. 477).

*Barry, Q.C.*, contra, (with him *Dames*) argued at some length against having the interrogatory exhibited, but cited no authorities.

The Court, without calling on *Dames*, asked *O'Loughlen* to reply, and then judgment was delivered by

*PIGOT, O.B.*—We are all of opinion that this interrogatory ought not to be answered. The object of interrogatories is to enable plaintiff to ascertain what is, in the knowledge of defendant, necessary to sustain plaintiff's action, and *vice versa*. Beyond that, he is not entitled to discover anything. Plaintiff must present his interrogatory in such a shape that the discovery shall be material to his case. Here is the test. Suppose the defendant answers, "Yes, 500 informations." Plaintiff must then find out which of these 500 informations is material to his case. The interrogatory must contain in the first instance all that is material. We pronounce no opinion whatsoever on the other interrogatories, inasmuch as they are acceded to by defendant's counsel.

After some further discussion, it was agreed that the interrogatory should be amended as follows—"Was any information sworn before you on that evening relative to the subject-matter of this suit, and upon which any action was taken by you, or by your authority or concurrence relative to the property of the plaintiff?"

BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.

MALONE v. KIRKPATRICK.—Nov. 11.

*Motion to set aside summons and plaint—Justices' Protection Act.*

*On a motion to set aside a summons and plaint for false imprisonment issued against a justice of the peace on the following grounds—1. Want of notice. 2. That more than six months had elapsed between the said false imprisonment and the bringing of the action. 3. That plaintiff had recovered judgment against a co-trespasser. The Court refused to interfere, there being a question to be tried, and the case not being clear.*

THE summons and plaint was for an assault and false imprisonment. The plaintiff was a farmer named William Malone, the defendant, Alexander, Kirkpatrick, a justice of the peace.

In the month of October, 1864, a Mr. Scriber summoned plaintiff before the magistrates at Blanchardstown Petty Sessions, for cutting down a portion of the boundary hedge between the plaintiff's land and Scriber's.

The case came before a bench of magistrates, of whom defendant was chairman. As it appeared to the magistrates that there had been a previous conviction against Malone for damaging the hedge in question, they felt themselves bound by the Act of Parliament, to sentence plaintiff to fourteen days imprisonment, which sentence he underwent. On May 3, 1865, a writ of certiorari was issued, and by an order of the Queen's Bench, dated May 30, 1865, the conviction was quashed on the ground of a question of title having been raised by Malone at the hearing before the magistrates. On June 1, 1865, plaintiff brought an action against Scriber for having maliciously and without reasonable or probable cause, summoned and caused him to be wrongfully and illegally convicted. In that case Malone got a verdict for £22.

On Oct. 27, 1865, plaintiff caused a writ of summons and plaint to be issued against defendant as above stated.

*Sergeant Armstrong* (with him *Napier*) now moved to set aside the summons and plaint, on the grounds—1. That the said cause of action (if any) arose out of acts done by defendant as a magistrate, and as such defendant was entitled to one month's notice of the commencement of such action, which said notice defendant did not receive. 2. That more than six months had elapsed between the said alleged cause of action and the bringing of the said action. 3. That plaintiff has already recovered judgment against a co-trespasser in the said cause of action. Counsel relied on *Lalor v. Bland* (8 Ir. C. L. R. 115).

*Doussé, Q.C.*, and *M'Kenna*, for the plaintiff, cited 12 Vict. c. 16, ss. 1, 2, 7, 8, 9; *Hazeldine v. Grove* (3 A. & E. N.S. 997); *Heath v. Brewer* (15 C. B., N. S., 803).

*M'Kenna* followed on the same side.

*Napier*, in reply, relied on *Haylock v. Sparks* (1

E. & B. 471); *Taylor v. Nesfield* (3 E. & B. 724); *Lawrenson v. Hill* (10 Ir. C. L. R. 177, 498; s. c., Cam. Scac. (13 Ir. C. L. R. 1)).

*Pigor, C.B.*—We abide by the principle laid down in *Lalor v. Bland*. In a clear case we would interfere to stay such an action as the one now before us, but not where there is a question to be tried. It is plain from a statement in defendant's affidavit that there is a question to be tried here, and we ought not merely on defendant's affidavit to decide that he is within the statute. The motion must be refused, and the plaintiff's costs be costs in the cause.

[BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.

LEVINGE v. M'DOWELL.—Nov. 17.

*Demurrer to plea—Meaning of the word "slanderous."*

*The summons and plaint was for libel, alleging that defendant published a report of a meeting, when plaintiff was fined £1 for using slanderous language to defendant. Plea—justification on the ground of truth. Demurrer—that language of plaintiff to defendant alleged to be slanderous, was not actionable. Held, that demurrer could not be sustained, for that the word "slanderous" does not necessarily mean actionable, but is to be taken in its popular sense as meaning what is calculated to be an insult to one, and is not true.*

THE summons and plaint was for libel. Plaintiff complained that defendant, under colour of being secretary to "The Metropolitan Loan Company," falsely and maliciously printed and published of the plaintiff the words following, that is to say—"Resolved by 37 members having 112 votes that George Levinge has been guilty of using slanderous language to the secretary in the company's office, and that he be fined £1 for same. Nine members having eleven votes at the meetings of said company were against the resolution." To this there was a plea justifying the alleged libel on the grounds of truth and setting forth what had been the "slanderous language" used by plaintiff to defendant, the substance of which plea was as follows—Plaintiff one day asked defendant when a certain entry had been made by defendant as secretary in a book containing entries of plaintiff's dealings with the Society, and on defendant's truly answering the question, plaintiff said, "It is a lie." Defendant thereupon offered to verify his statement by affidavit if plaintiff paid the costs of so doing, whereupon plaintiff answered, "I would not like to pay you for perjuring yourself."

Afterwards, plaintiff asked defendant to return a certain I. O. U. which plaintiff had given defendant for a debt which was then paid off, and also a receipt for such payment. Defendant refused to give plaintiff both documents, but gave him his choice, and then plaintiff said, "I will take the I. O. U. as fol-

lows like you often sue upon such instruments when they are paid." To this plea plaintiff demurred.

*M'Mahon* (with im *Morris*, Q.C.,) opened the demurrer.—His points of demurrer were—1. That defendant has not shown the libel to be true, or any circumstance showing the publication to be privileged. 2. The language imputed to plaintiff is not slanderous nor actionable. 3. The plea does not show that the Company had authority to fine plaintiff, or that he was compelled to pay such fine, or to whom, or when, or how the fine was paid. 4. The plea does not justify the libel, because the libel states that it was "resolved by 37 members having 112," &c.; and the plea states it was "resolved by 37 members, having or representing 112," &c. Also, the libel is thus—"9 members having 11," &c.; plea thus—"9 members having or representing," &c. 5. The truth of the statements contained in the resolution would not justify its publication by defendant. The names of the members who voted are not given, nor are there any grounds set forth justifying the resolution or its publication. Counsel cited *Roberts v. Camden* (9 East. 96); *Cooke on Slander*, 14; *Robins v. Huldredon* (Cro. James, 65); *Ayre v. Craven* (2 A. & E. 7); *James v. Brook* (9 A. & E., N. S., 12). When A. B. C. do any act injurious to D., and you publish their proceedings, you must show that A. B. and C. were justified in acting as they did, or else you will not be justified in reporting their proceedings; you are not justified in publishing an illegal act. [*Fitzgerald*, B.—If A. B. says you have committed murder, and I repeat this, must I in justification (although you have committed murder) prove that A. B. had a right to say what he did.] You must prove that I have been convicted before a legal and competent tribunal.

*Blake* (with him *Sidney*, Q.C.) contra, for defendant, contended that the plea did not aver or mean to aver that the "slanderous language" was actionable merely that it was in the popular sense of the word "slanderous," that is, insulting, abusive, and untrue."

*Sidney*, Q.C., followed on the same side.

*Morris*, Q.C., in reply, insisted that "slanderous" meant actionable. Words are not defamatory if there is no third party by. [*Fitzgerald*, B.—Suppose I say to a woman, "You are a strumpet," when no one else is by, and she says, "You are slandering me," is not that intelligible?] Counsel concluded by citing *Helsham v. Blackwood* (11 C. B. 111).

*PIGOT*, C. B.—We are all of opinion that the demurrer cannot be sustained. The law, as laid down by plaintiff's counsel, is in the main correct, but it is not applicable to this case. I do not think "slanderous" necessarily means "actionable," and here I think it must be taken in its popular acceptation—the imputation of something wrong, that imputation being false. We are obliged often to make use of the word when it cannot be taken as a synonym for what is actionable. Thus we say, "Is that slander actionable?" Again, "To slander one with reference to his trade is actionable." Even bearing in mind what were the component parts of the meeting referred to, we see this strongly, for the members who voted were taken from the ordinary ranks of life, and not skilled in law, or the views of a Court of Justice as to what

words are actionable, and what not, but would most likely employ the word "slanderous" in its popular sense. For these reasons, judgment must be given for defendant.

## Court of Bankruptcy & Insolvency—

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK J.]

IN RE EDWARD THORNTON.

*Lien on funds on the hands of consignees for advances made to the bankrupt on faith of shipments to such consignees—Equitable contract.*

*Where a bank makes advances upon shipments to consignees upon the faith that they are to be paid out of the proceeds of the goods thus consigned, and the bankrupt gives an order to the bank upon such third person having the funds in his hands to pay his creditor, it is a binding equitable assignment of so much of the fund as will pay the advances made. In order to constitute an equitable assignment there must be an order to pay out of a certain fund. If a certain construction is put on a contract by one party who communicates to the other his own construction of it, and the other does not think fit to reject that construction, but suffers the opposite party to act on the view he has taken, he will not be suffered afterwards to repudiate it.*

THIS case came before the Court upon charge and discharge.

*Heron*, Q.C., and *Murphy* appeared for the assignees. *Kernan*, Q.C., and *J. E. Walsh*, Q.C. appeared for the Merchant Bank. They cited *ex parte Copeland*, (3 Dea. & C. 213); *Hunt v. Mortimer* (10 Ba. & Cresw. 47); *Byrne v. Carvalho* (4 Myln. & Cr. 690); *Watson v. The Duke of Wellington* (1 Russ. & M. 632); *Ex parte South* (3 Swanston, 393); *Ex parte Horn* (4 Den. C. 449); *Ex parte Killsall and others* (De Gex's Bankruptcy Cases, 359).

The facts fully appear in the judgment of the Court.—*BERWICK*, J.—This case comes before me on the charge of the managing director of the Merchant Banking Company of London, claiming the proceeds of sundry consignments made by the bankrupt before his bankruptcy to various foreign merchants referred to in the charge in pursuance of an alleged agreement to that effect made with the bankrupt, on the faith of which the bank had made to him certain advances. The discharge of the assignees denies this agreement, or that the bank ever obtained any lien on these consignments or their produce, and seeks to recover back from the bank certain sums admitted to have been received by them on foot thereof subsequent to the bankruptcy. It appears from the evidence that the bankrupt had for many years carried on business in Cork as a general export merchant, and was in the

Habit of exporting goods to various foreign markets for sale, and as such had various dealings in the way of trade with the firm of H. & S. Johnstone of London, who had granted him a credit to a considerable extent, and that the bankrupt, in the month of July, 1863, wishing to have this credit extended to a sum of £5,000, had proposed to Messrs H. & J. Johnstone to secure the amount by "instructing his correspondents at the Cape, and elsewhere to remit to Messrs. Johnstone & Co. direct the proceeds of his consignments," and accordingly drafts of the bankrupt were accepted by the Messrs. Johnstone, which were discounted by them, and the proceeds charged to an account called the "advance account," and credited to his general account, against which the bankrupt drew as in an ordinary banking account. The credit thus obtained was continued by the Messrs. Johnstone till the month of December following, when the Messrs. Johnstone transferred their business to the Merchant Banking Company of London, of which they became part proprietors and their manager, Mr. Megaw, who was appointed manager to the bank, and still continues in that office, communicated the fact to the bankrupt, Thornton, informing him "that the Merchant Bankers Company would be prepared to transact business with him on the same terms as the Messrs. Johnstone," and the bankrupt in reply by letters of the 1st of December, 1863, expressed his readiness "to continue his old correspondence with the company," and the bank accordingly permitted him to draw on them from time to time bills to the amount of £5000, which they accepted and discounted placing the proceeds to the credit of his general account, and charging the amount to his "advance account." In March, 1864, the bank when making arrangements for taking up one of these bills, being anxious to remove all misunderstanding as to the true nature of the contract, wrote to the bankrupt, distinctly requiring him to give them "a note of the value of the outstanding consignments, for which your correspondents have to remit against the said advance and balance of account," and at the same time apprised him that "they had received of late very little money from foreign friends, and requested to know whether they may receive much soon," and on the 4th July, 1864, the bank explicitly required him to send a "memorandum of the shipments made by him, which are still outstanding, against which they had from time to time made advances." In reply to this letter the bankrupt, in a letter of the 7th of July, enclosed a memorandum of shipments naming the consignees and the amount of consignment to each, "which," he added, "he trusted they would find satisfactory." This list the bank has annexed to a schedule to their charge, and admitting that since the bankruptcy, which took place on the 24th July, 1864, they have received for these consignees sums amounting to £665, which they claim a right to retain against their advance account, they insist that by the true meaning of their contract with the bankrupt they are entitled to receive all further sums payable on foot of these consignments, as also the proceeds of all other shipments made by the bankrupt which were outstanding at the time of the bankruptcy, including certain sums on foot thereof received by the official

assignee; and the question which I have now to decide is. what was the real nature of the contract between the bankrupt and the bank, and what specific claim, if any, such contract gave to the bank against the assignees, and against the proceeds of the foreign consignments made by the bankrupt. And first, as to the true nature of the agreement itself, it is alleged by the assignees that the bankrupt never contracted with the bank, or intended to give them any lien or charge on his foreign consignment as a specific security for the amount of his "advance account," but that in offering to instruct his consignees to send their remittances through the bank, he merely intended to give the bank, while they continued their advances, the use of the remittances in order to satisfy them that they were safe in granting the extended credit, and they insist that as the bills of lading were not endorsed, or transferred, or any express formal contract in writing made to transfer the proceeds of these foreign shipments to the bank, accompanied by notice to the consignees of such assignment, the bank had no specific charge or lien thereon. Now it is quite true that there is no formal contract between the parties evidencing their agreement, and that it is necessary to refer to the correspondence in evidence to deduce the true terms thereof, and if I were confined to the statements of the bankrupt either in his letters or his sworn evidence it would be difficult to deduce therefrom that there was any specific contract at all, though certainly the very first letter of the 6th July, 1863, seems to suggest that which is insisted on by the bank. But, whether from design or accident, he has written in such vague terms both to Messrs. Johnstone and the bank that it is not easy to deduce therefrom any distinct terms of contract. But I have a right to look to the whole correspondence between them to discover what was really understood, and when I look to the letters of the bank, I find them expressly putting forward in distinct terms the construction they now seek to establish, and although mere writing by one party is not sufficient alone to establish a contract, yet I am authorised to lay down and act upon this principle, that "if a certain construction is put on a contract by one party, who communicates to the other his own construction of it, and the other does not think fit to repudiate such construction, but suffer the opposite party to act upon the view he has taken, I think then that letters of this description are quite sufficient to bind the party who takes the benefit therefrom, and to preclude him afterwards from repudiating that view thus put forward." This is laid down by Erskine, C. J., in *Ex parte Copeland* (3 Dea. & Chit. 213,) and it is consistent with the soundest principles of justice. Now whatever doubts may have existed from the reading of the rest of the correspondence, it is impossible to read the letters of 14th, 19th, and 28th March from the manager of the bank to the bankrupt, in all of which he requires "a note of the outstanding consignments abroad, for which your correspondents have to remit as against above advances on your account," and particularly that of 4th July requiring "memorandum of shipments made by you which are still outstanding against which we have from time to time granted you advances," to which the bankrupt replies, not by re-

pudding the claim, but saying, "We duly received yours of the 4th inst., and now beg to hand enclosed the memorandum of shipments, which we trust you will find satisfactory," without believing that such a contract was made. How could it be "satisfactory" if he meant to deny that it was against those shipments they had granted the advances. I think, then, this is an admission that they had stated the true nature of the agreement, and if so, the assignees of the bankrupt cannot now dispute it. But then it is said that the assignees are not bound by it because no notice was given to the consignees prior to the bankruptcy either by the bankrupt or the bank, and certainly on the evidence before me, I am bound to say that with the single exception of Gibbs, Rowland, & Co., no such notice was given by the bankrupt, and none by the bank, till after the bankruptcy, but save so far as any question arising from the doctrine of "reputed ownership," this notice is not necessary as between the bankrupt or his assignees and the creditor. In the case of *Hunt v. Mortimer* (10 B. & C. 46), Parke, J. states the true view of the law in a perfectly analogous case—"The money was not lent by the defendants on the general credit of the bankrupts, but on the faith of the monies which were to be received from the East India Company, and the arrangement between the bankrupt and the defendant had the effect of an equitable assignment of that particular fund, to which the plaintiffs (who as assignees are entitled only to such effects as the bankrupt had both legally and equitably), have no claim. It is true," he says "there was no notice of the arrangement to the East India Company, but notice is not necessary in such cases to give effect to an equitable assignment between the parties, though it is so, for the purpose of preventing the title of the assignees attaching, on the ground of the bankrupt being the apparent owner of that fund at the time of the act of bankruptcy." In *Byrne v. Carvalho* (4 Mylne & Craig,) Lord Cottenham says, "In equity an order given by a debtor to his creditor, upon a third person having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund; and in *Watson v. The Duke of Wellington*, Sir John Leach thus defines an equitable assignment—"In order to constitute an equitable assignment, there must be an engagement to pay out of a certain fund." Upon this principle it is that assignments of future freight, and of non-existing, but expected funds have been enforced in equity, but he adds, "This case is far within the limits of the principle, for here there is an existing fund in an agent's hands, and there is a distinct contract to discharge the liability out of that fund." The same principle is found in *Ex parte Horn* (4 Dea. & Chitty, 449); *Ex parte Kilsall and others* (De Gex's Bankruptcy Cases, 359), and other cases, and this being so, I have only to consider how far the doctrine of reputed ownership may interfere with the claims of the bank. Now that debts due to the bankrupt come within the meaning of the clause is beyond doubt, and that no notice was given to the debtor either by the bankrupt or the bank before the adjudication in bankruptcy, appears established, but the question still is, whether these debts were allowed to remain in the apparent

ownership of the bankrupt *with the consent of the true owner*. Now, supposing that I am to consider the bank as the true owner of these debts, yet I have abundant grounds for saying that they were never allowed to remain in the apparent ownership of the bankrupt with the consent of the bank. In this case the bank are excused for not having given notice, because if my view of the contract be correct, the bankrupt had expressly undertaken to do so, and on the faith of that being done which ought to have been done, and which the party contracted to do, the bank abstained from taking the active steps which they otherwise would to give the necessary notice. The bankrupt, by his letter of 6th July, 1863, which was imported into the terms of his contract with the bank, undertook to "instruct his correspondents abroad to send their remittances direct to the bank," and he leaves them to infer from his letter of 7th July, 1864, that he had given this instruction to the consignees named in the list sent therewith, and in a reasonable time after the bank had ascertained that the bankrupt had not kept his word, they forwarded to each of the consignees notice, and I do not think there is any evidence of laches on their part to raise the presumption of consent. A Court of Equity will presume that to be done which ought to have been done, and on that principle I think the assignees cannot now insist upon the want of such notice from the bank. On the whole I am of opinion that the bank has made out their claim against the consignments mentioned in the list contained in the bankrupt's letter of 7th July, 1864, but not against any other, and therefore are entitled to retain the monies already received by them from those consignees, and to any further sums which may be made available from those parties, and I make my order accordingly. A question has incidentally been raised by a creditor of the name of Sims, who is, I believe, also the official assignee, as to a portion of one of these consignments. The question has not been properly brought before me for decision, still I think the party has a right to have it considered, and I shall suspend the acting on this order for one fortnight, to allow him to make any case against the bank he may be advised. The bank to have their costs against the assignees, who are to have them over against the fund with their own.

[BEFORE LYNCH, J.]

RE RICHARD DONOVAN.

*Disputed adjudication—Act of bankruptcy by absentsent—Procuring goods to be taken in execution.*

*Where a trader who wishes to consult his attorney about signing a declaration of insolvency, makes an appointment to meet a creditor's attorney, after he sees his own, and he goes bona fide for the purpose of seeing him, but finds he is not at home, he then returns at nine o'clock at night to his own house, and leaves a note for the creditor's attorney if he should call, and then went out with his wife to sleep*

*at a friend's place, he thereby commits an act of bankruptcy.*

*Where a trader, two or three days before a large bill becomes due which he owes, informs the trustees of his marriage settlement, that he is in a state of insolvency, and then upon being served with a summons and plaint at their suit, signs a consent for judgment, it will be an act of bankruptcy.*

In this case the adjudication was disputed under the following circumstances, on the ground that there was no act of bankruptcy. The bankrupt was a druggist at Blackrock, near Dublin, and was indebted to M'Master & Co., merchants, on foot of an overdue bill of exchange for one hundred pounds, and M'Master's attorney having observed an advertisement in the newspapers of a sale of Donovan's property at the suit of the trustees of his wife's marriage settlement, went to him to request that he would sign a declaration of insolvency. He arrived at Donovan's shop about half-past six o'clock on the evening of the 24th of November, and saw him, but he refused to sign anything until he saw his attorney, who lived in Kingstown. He told the creditor's attorney that he would proceed to Kingstown, and that whatever his attorney advised him to do, he would do it, and to call over between eight and nine o'clock, and he would let him know what he would do. Donovan accordingly shut his shop at half-past seven, and went to Kingstown to look for his attorney, and found that he was not expected home until eleven o'clock that night. He returned then to his house at Blackrock, where he arrived about nine o'clock, and enquired if Mr. M'Master's attorney had been there since he went out, and being informed that he had not, he wrote a note and gave it to his servant to hand to the attorney if he should call, and in that note he stated that her attorney was not at home, but that he would see him in the morning. It appeared that there was a bailiff in the house, and Mrs. Donovan had arranged to go sleep at her sister's in Williamstown that night, and her husband went on before her, leaving his brother, who had called to see him, to accompany her. Shortly after he had gone out, M'Master's attorney called, and the servant gave him the note that was left him. He went away, and came back at eleven o'clock that night, when he saw the bankrupt's apprentice, who informed him that his master had not since come in, and that he did not know where he was. It did appear that the bankrupt and his wife did sleep in Williamstown that night, and that he was back the next morning at eight o'clock, and at his business as usual. It was relied on that failing to meet the attorney as agreed upon, was an absents with an intent to defeat and delay creditors, and consequently an act of bankruptcy. A second act of bankruptcy was relied on, namely, procuring his goods to be taken in execution, inasmuch as he signed a consent for judgment upon a summons and plaint being served on him at the suit of his wife's trustees, who thereupon issued an execution. These were relied upon as acts of bankruptcy.

Kernan, Q.C., and Levy showed cause.—They contended that on the ground of absents, there was not even the semblance of an act of bankruptcy. A

man leaving his house at nine or ten o'clock at night to go sleep with his wife at a friend's place, unless there was some evidence of a want of the *animus revertendi*, could not be an act of bankruptcy, but the man was back in the morning to his business as usual. As to signing a consent for judgment at the suit of his wife's trustees, he was under a moral obligation not to withhold it, and it had been decided such was not an act of bankruptcy.—*Rooney v. White* (3rd Irish Law Reports, 153); *Gore v. Lloyd* (12 Meeson & Welsby, 463). The bankrupt had sworn positively that it was his wife put the trustees in motion, and that it was at her solicitation, and that of her solicitor, he signed the consent. It was in their opinion quite clear that the adjudication could not stand.

Wilson, for the petitioning creditor, contended that both acts of bankruptcy were complete. He cited Levy on Bankruptcy, p. 34, and cases there collected.

JUDGE LYNCH said two acts of bankruptcy had been relied on, and it should be admitted that there were some doubts in the case, and very probably if it were to be decided by jury, they would, as in the case of White and Rooney, find that there had not been an act of bankruptcy; but he sat there both as judge and jury, and he knew much more about such cases than jurors could possibly know. First, as to the absents, it was contended that inasmuch as the bankrupt left a note to be delivered to the creditor, he was justified in breaking the appointment to meet him; and it was fairly relied on that the hour of the night or late hour in the evening, and not during business hours, was a circumstance to shew that the bankrupt going out that evening did not do so with intent to defeat or delay creditors, and that the intention was the foundation of the act of bankruptcy. It was not to be supposed that his creditors would derive any benefit from his remaining within to meet them or to meet any one of them; still if he went away to avoid any recrimination that might be expected to take place, or any explanation that might be required, it was clearly an act of bankruptcy. It was he himself made the appointment; he committed a breach of duty which he was bound to perform. He said, I am going to Kingstown to consult my attorney, and when I return I will let you know the result. Well, he went and returned, and instead of waiting to see the creditor's attorney, as he should have done, he went on before his wife to the place where he was to sleep that night, and he (Judge Lynch) could have very little doubt that he went away to avoid anything unpleasant that might be expected to occur; and he thought that upon the first ground there was an act of bankruptcy by failing to keep the appointment which he himself had made. As to the second ground relied on he admitted that signing a consent for judgment at the solicitation of his wife and her trustees would not of itself be an act of bankruptcy if there was nothing more in the case; but what were the facts?—the wife wrote to her trustees on the 7th of November, which it appears was not received until the 8th, and on that very day the bankrupt called on Mr. White, one of the trustees, to tell him that he was unable to meet a large bill which would be due in two or three days, in fact to announce that he was in a state of

after insolvency. A summons and plaint was then issued under the Bills of Exchange Act upon a bill of exchange more than twelve months due, and then in two or three days after he signed a consent for judgment, and an execution was put on which would sweep away whatever property the bankrupt had. No doubt the trustees offered to withdraw their execution, and to be parties to an arrangement with a view to keep the unfortunate man still in trade, and he thought it was a case where some arrangement ought to be made, but on the other hand he thought that the two acts of bankruptcy relied on had been committed, and that the adjudication should be upheld.

Attorney for the petitioning creditor—Mr. Oldham.  
Attorney for the bankrupt—Mr. Saunders.

### Re SCOTT.—January, 1866.

*Granting certificate—Obtaining forbearance by misrepresentation—Placing property beyond the reach of creditors—Costs of opposition.*

*Where traders obtain forbearance from creditors by false representations, as to their circumstances, and by family arrangements contrive to have their trade carried on by members of their family, and to place property beyond the reach of their general creditors, even though they make a full and true disclosure of their trade dealings and transactions, the Court will adjourn the granting of the certificate for twelve months, and give costs to the creditors opposing, to be paid out of the estate.*

Purcell, Q.C., for creditors.

Heron, Q.C., for the bankrupts.

LYNCH, J.—In this case an objection has been lodged by several creditors of the bankrupts to the granting of an immediate certificate to them, the grounds of which are, amongst others, the obtaining of forbearance by misrepresentation, the giving of undue preference, and the making away with property to diminish the sum to be divided among their creditors. These bankrupts had experience in this Court, having been bankrupts before in 1859. Their liabilities are now very considerable and their assets are very small. I have passed the final examination, believing that they have made fair and honest disclosures of their dealings; but the case still remains for me to consider the nature of the dealings disclosed. On the evidence I cannot help being of opinion that arrangements and plans were formed in view of bankruptcy, to work out for themselves and some favoured creditors benefits at the expense of their general creditors. The gentleman traded in Cork under the style and firm of "James Scott and Company." They had large agencies and transacted their business in their offices and stores at Queenstown, and they had pilot boats in the harbour in connection with their trade. If their own statement was true (made in April last) their commission business was worth the large sum of £2,400 in one year. That firm of "James Scott and Company" to all appearance still

exists in Cork, engaged in the same trade, transacting many of the same agencies, and the same pilot boats are attached to it. The trade is carried on in the same place, in the same offices and stores, and the only difference is that Mr. Philip Scott's son is now the owner, and the bankrupts' creditors have no interest in it. The Messrs. Scott on the 19th May last, came to the Court seeking protection as arranging traders. Their special affidavit discloses the fact of a dissolution of partnership two days before, but in no way does it allude to the business as relinquished, and it refers in terms to their premises in Queenstown, and no reference whatever is made to any agreement with young Mr. Scott. Another matter I take the date of, which is material. These bankrupts being pressed by creditors, in April, prepared a statement on the 4th April, which they sent to their creditors wherein they say in order to show their solvency, that their commission business in the past year was worth £2,400; no reference then was made to the trade relinquished to the son of one of them, and the place of business disposed of to him. This representation made in April last I cannot help regarding as one, though perhaps not in fact making any misstatement, still as one plainly suggesting that a state of things different from the reality then existed. This matter in my mind sustains the objection of obtaining forbearance by misrepresentation. The dealing with young Mr. Scott it is impossible to regard in any other light than an attempt by a sinking trader, to establish his son in his trade out of the reach of his creditors, and to give to him the substance of the trade, and to make over to him the concerns in which that trade was carried on so as to prevent the bankruptcy of the firm from interfering with the trade. The very dates of the dealings and the concealments practised are plainly circumstances suggesting an intention not *bona fide* in the transaction. The agreement was made with the son on the 20th of February, an agreement which substituted him in the self-same trade and in the self-same place of business, under the same title of "James Scott and Co." as the bankrupts. The agreement seems then to have been acted on; certainly it was not published at the time, and these gentlemen continued, to all appearances, trading as before it was executed. In April this statement made to the creditors most certainly was framed so as to infer an existing trade in them incompatible with the agreement made with the son, and the affidavit filed in this Court for the arrangement, by its statements as well as by its suppressions, was a plain attempt to carry out the arrangement without the honest disclosure of the reality of the case. But that agreement afterwards, in bankruptcy, became necessarily disclosed, and it is put forward as binding the rights of the creditors. I am not here to decide as to the validity of that agreement (the more validity it has the worse for the creditors). I am here only dealing with it as part of the conduct of the bankrupts' acts, which cannot be permitted to pass unnoticed here, deliberate attempts to frame plans and arrangements to defeat the operations of bankruptcy, and to secure the bankrupts in the future at the expense of their existing creditors; dealings of this sort, above all others, to be punished by this Court. Then—



the pilot boats, by securities given to Mr. Curran and Dr. Scott, the brother of the bankrupt, in effect, are this moment in the same connection with the trade as ever they were, a security to the brother for his advantage, and managed in connection with the trade for the benefit of the son. Then the sister of the bankrupt was on the 28th March secured by a mortgage being made to her for a debt long before that time incurred. All these matters are, in my opinion, too clearly worked out, to secure the family in the events that have happened, and to keep the trade in family possession, to pass here, as explained to my satisfaction. I therefore am obliged to say that I do not consider the dealings of the bankrupts such as to merit an immediate certificate, and I think the objections I have stated are sustained. I will therefore suspend the certificate for 12 months from the 19th day of December, 1865, and I give the costs of their opposition and objections to the parties opposing, out of the estate.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

DENNEHY'S ESTATE.—Nov. 25, 1865.

*Cy pres doctrine—Election—Marriage settlement—Will.*

*By indenture bearing date 12th May, 1791, made previous to, and in contemplation of the then intended marriage of T. D., the fee of the lands of G. was conveyed to trustees, in trust for said T. D., for life, with remainder to the children, in fee, of the said marriage, in such said shares as T. D. should limit or appoint, and in default of appointment share and share alike. There were 5 children of the marriage. T. D. by will, dated 1827, having recited his power of appointment, amongst his children, did thereby devise said lands of G. to trustees in trust, for his second son for life, with remainder to his grandson, in tail male; and in default of such issue, to his third son for life, with remainder to his son, in tail male, and so on to the fourth and fifth sons, he having otherwise provided for his eldest son, &c. T. D., then devised several other estates to and amongst his said sons; and he also bequeathed a sum of £10,000 amongst them; but he directed each of his said sons to execute to the trustees of his marriage settlement of 1791, a release of every claim and demand he or they might have under the provisions of his said marriage settlement; "and if they refused so to do, to such of them as shall neglect or refuse so to do," he revoked the bequests made in favour of such son. All the said younger sons elected to take life estates in G. under the will, and to forego their right to the fee under the said settlement; one of the sons after making his election, after the death of T. D., had a judgment recovered*

*against him. The converse of this judgment presents a petition for the sale of the estate of said son, in the said lands of G. which estates Judge Hargreave held were by the application of the cy pres doctrine, estates tail. Held—(reversing the order of Judge Hargreave) that the cy pres doctrine did not apply, and that the estates which the younger sons had in the lands of G., were merely estates for life, and not estates tail, they having elected so to take under the terms of said will.*

THIS case came before the Court on appeal from a decretal order made by Judge Hargreave bearing date the 16th day of May, 1865. The appeal was taken by Daniel Dennehy and his eldest son, Thomas Henry Dennehy. The following is the said order now being appealed from:—"Whereas.....counsel for the petitioner moved on the 25th April to make absolute the conditional order for sale in this matter dated the 26th day of November, 1864, notwithstanding the cause shown by Daniel Dennehy and Thomas Henry Dennehy, whereupon.....It is ordered that the cause shown be disallowed, the petitioner to add his costs to his demand." The entire question in this case was whether Thomas Dennehy was tenant for life or tenant in tail male of the lands of East and West Graigue at the time that certain judgments were recovered against him; and what estate the Dennehy's had in those lands, it was now for the Court to determine. The petition stated that by indenture of settlement bearing date the 12th May, 1791, and made between John Dennehy (the paternal grandfather of petitioner, who, before, and at the time of the execution of that deed, was seised in fee-simple of the lands of the East and West Graigues, containing about 1,634 acres, in the County of Cork) of the first part, Thomas Dennehy, his second son, herein-after called the elder, of the second part, Daniel Cronin of the third part, Frances Duggan, spinster, of the fourth part, and George Lombard and William Barry, of the fifth part, being the settlement executed on the marriage between said Thomas, hereinafter called the elder, and Frances Duggan, it was recited in said indenture that said John Dennehy, the grandfather, was seised in fee-simple of the lands of the Graigues, and that for the considerations therein stated, the said John Dennehy released and assigned unto said George Lombard and William Barry (trustees), their heirs and assigns, the said lands of East and West Graigues in trust for the use of said John Dennehy, his heirs, &c. until the solemnization of said intended marriage, and thenceforth in trust for the said Thomas Dennehy the elder, and his assigns, for the term of his natural life, with remainder to said trustees and the survivor of them, to preserve contingent remainders, with remainder upon trusts limited to secure a jointure of £150 for the life of said Frances Duggan if she should survive her then intended husband, and after the decease of said Thomas Dennehy the elder, subject as aforesaid "to the use and behoof of all and every the child and children of the said intended marriage as shall be living at the time of his death, and the heirs and assigns of such child and children, in such shares and proportions as the said Thomas Dennehy shall by deed or will direct, limit, or appoint, and from the want of



such direction, limitation, or appointment, in such shares and proportions" as the then intended wife should appoint, and in default of such appointment, "then to be equally divided to and amongst such children, if more than one, their heirs and assigns, in equal shares and proportions, share and share alike, to hold as tenants in common, and not as joint tenants." Of this marriage there were five sons, viz., John, hereinafter called the younger, Thomas, Daniel, Richard, and Francis. On the marriage of the eldest son, said John, the younger, his father said Thomas, the elder, made a provision for him out of other lands, not the subject of the foregoing limitations, and in consideration of this provision, said John, the younger, released his father from any obligation to provide for him out of the said settled lands, either by an exercise of the power, or by allowing him to take his share in default of appointment. In this state of facts, Thomas Dennehy the elder, made his will and codicil, dated the 28th April, 1827, and now the narrow question was, what was the effect of this will and codicil taken in conjunction with the said settlement of 1791. That will opens by the testator reciting his powers under said settlement, thus—"Whereas my estates called East and West Graigue, situate in the County of Cork, are under the provisions of the settlement entered into upon my marriage, charged with the payment of the annual sum of £150 for the life of my wife, Frances Dennehy, otherwise Duggan, and subject to said jointure, I am by said settlement empowered to appoint said lands among the issue of my marriage who shall be living at the time of my death, in such shares and proportions as I shall think fit. And whereas, upon the marriage of my eldest son, John, I have made a provision for him in lieu of any claim he may have to my said estates of East and West Graigue, and by the settlement entered into by him on these occasions, he has released such claim as he may have had on said lands under said first recited settlement. And whereas I am minded and desirous to devise and appoint my said estates in the manner herein-after particularly mentioned; and in order to enable me so to do, I intend by this my will to provide adequately out of the properties of which I may die possessed, and which are at my own disposal for such of my children as shall, under the limitations herein expressed, be precluded from the shares or proportions of said lands to which he or they may be entitled under my marriage settlement or otherwise." The testator then refers shortly to his title to other estates and funds, and he devised and bequeathed East and West Graigue, and those other estates and funds to trustees upon trust as to said lands, as to East and West Graigue, first, to pay an additional annuity of £50 a year to his wife, and subject thereto in trust for his second "son, Thomas, and his assigns, and after his decease in trust for the first and every other son of the said Thomas, according to their seniorities successively in tail male, and in default of such issue in trust for my said son, Daniel Dennehy and his assigns for life, without impeachment, &c., and after his decease in trust for the first and every other son of my said son Daniel, and to the issue male of such sons according to seniorities successively in tail male," with

similar remainders to Richard, Francis, and John successively, and their first and other sons, with remainder over to the daughters of his sons, "and in case there should be none living at the death of the survivor of my said sons then with remainder as to said lands to my own right heirs for ever." Testator then proceeded to devise another estate called the Belview Estate, which was one of the properties at his own disposal, subject to certain annuities, to Thomas, Richard, Francis, and John successively, and their first and other sons, and ultimately to their daughters and his own right heirs in the same manner in all respects as East and West Graigue, except that his son Daniel is not included in the limitations of this property. He then devised an estate in Kerry to his son Daniel absolutely, and an estate called Killarry to his other sons successively, and their male issue, in strict settlement, taking them in the order, Richard, Daniel, Francis, and John, with an ultimate devise to Thomas absolutely, and he then devised other estates which were at his disposal to Francis absolutely. Testator then gave power to his sons, as they should successively come into possession of East and West Graigue to charge jointures and portions, and similar power was given in reference to Belview, and the other estates devised. He then disposed of his personal property, which he estimated at £10,000, giving Daniel, Richard, and Francis £2,000 each, and the residue to Thomas. Having thus made these dispositions of the settled lands, and of his own real and personal property, he inserted in his said will a clause requiring from each of his sons, within three months after testator's decease, or his own majority, a release of all claims under the settlement or otherwise, as follows:—"It is my will, and I hereby direct and require each of my said sons who shall be of full age within three months after my decease to execute to my trustees a full and sufficient release of all and every claim and demand which he or they may have under the provisions of my marriage settlement or otherwise (save under this my will) to said lands of East and West Graigue, and to agree to take under this my will. And I hereby direct and require that such of my sons as shall be a minor at the time of my death shall, within three months after he or they arrive at age, execute a similar deed; and in case any of them shall neglect, omit, or refuse so to do, to such of them (if any) as shall so neglect, omit, or refuse to sign and execute such deed, I do hereby revoke and absolutely annul the bequest or bequests hereby made and appointed in favour of such of my son or sons respectively as fully as if his or their names were erased from this my will. And I direct and require that the share or shares of such person or persons so neglecting, refusing, or omitting to assent to the provisions of this my will, go to and give in compensation, and lieu of the share of such son or sons of and in the said lands of East and West Graigue to the persons who shall be deprived thereof, and be in augmentation and aid of the provision hereby made in the first instance for my son Thomas, and afterwards of these persons who successively, under the provisions of this my will, would become entitled to said lands of East and West Graigue." Lastly, testator having appointed Thomas Dennehy his residuary le-

gate, executed said will. By a codicil of the same date, 28th of April, 1827, the testator remembering that he contracted for the purchase of the lands of Prapp, devised them to Thomas Dennehy as a substitution for the purchase-money, which would have to be paid out of the residue bequeathed to him. Testator soon after, on the 9th of June, 1827, died and left his four younger sons all surviving, two of whom were then minors. The petition of appeal then stated that the testator, by conferring benefits on his said four sons, Thomas, Daniel, Richard, and Francis, intended to put them to their election to take under or against the said will, and that he did so as well by express direction, as by necessary implication from the frame of his will, and the devises of the lands of East and West Graigues, charged with such additional jointure for his wife, to his son Thomas for life, with remainder to his first and other sons in tail male as purchasers, with remainder to Daniel Dennehy (the appellant) for life, with remainder to his first and other sons successively in tail male. The said Thomas Dennehy, the younger, was of full age at testator's death, and he elected to accept the benefits devised to him by the will and codicil, and to abandon his rights under the said settlement, and accordingly he entered as tenant for life upon said lands of East and West Graigues, of the annual value of £500, and of Belview, annual value of £400. So also Daniel (appellant) elected to take the lands of Ballycasheen and Lacharne—likewise Richard, on attaining his majority, elected to accept the lands devised to him of the yearly value of £250. Francis also elected to take the lands devised to him under the will. The petition then stated that said Thomas, the younger, Daniel, Richard and Francis, with full knowledge that they were respectively put to their election between the settlement and the will, as to the said lands of East and West Graigue, thus elected to confirm the will, and to abandon the claim which they, or any of them had upon the said lands under the said settlement; that Thomas the younger acted under the conviction that he was under the said will only tenant for life of the said lands. Said Thomas, the younger, never had a son, and T. H. Dennehy, who is one of the appellants, is son of Daniel (appellant). The petition of appeal insisted that upon the true construction of the said settlement and will, the said Thomas the younger was but tenant for life of the lands of East and West Graigue, with remainder to his first and other sons in tail male as purchasers, with remainder to Daniel (appellant) for life, with remainder to his first and other sons in tail male as purchasers, and that Thomas Henry Dennehy had the first vested estate tail in the said lands. That on the 17th March, 1863, John Walsh, the respondent here and petitioner below, who was the administrator with the will annexed of one Henry Smyth, deceased, filed the petition in the Landed Estates Court, wherein it was asserted that Thomas Dennehy the younger was tenant in tail of the lands of East and West Graigue, and prayed that the estate in fee of the said Thomas Dennehy the younger might be sold for the payment of the incumbrance thereon. Lastly, the petition of appeal stated that on the 16th May, 1865, Judge Hargreave made absolute the conditional order for the sale of said lands, in the shape of an order disallowing the cause shown against the sale.

*Brewster, Q.C., Chatterton, Q.C., Warren, Q.O., James Greene, and Charles Henry Woodroffe*, appeared for the appellant, Daniel Dennehy.—The order of Judge Hargreave must be reversed. The effect of the testator's will was to limit the lands of East and West Graigue to his son Thomas Dennehy for life, with remainder to his first and other sons in tail male, with remainder to Daniel for life, with remainder to his sons in tail male. We submit that upon the true construction of that will, all the children of Thomas, the testator, were put to an election whether they would take a life estate under the will of those lands of the Graigues, or take the fee, which they had declined to do. By declining to take under the settlement the parties had taken large benefits, and they had now elected. In order to construe the estate as an estate tail, you must, as Judge Hargreave has done, have recourse to the *cy pres* doctrine, and thus do violence to the language of the will, and the manifest intention of the testator. It is an unheard of proposition to apply the *cy pres* doctrine to a deed, which it is attempted to do here; the deed gave the fee-simple absolutely to the children of the marriage, with a mere power of appointing what proportion of the fee each child was to take; Thomas had no power whatever to will those lands among his grandchildren; but he did partially appoint in giving life estates to his children; and he left each of his sons the option of taking the fee in the Graigues, and great benefits by the will; all the children preferred taking the benefits, and have elected accordingly; this is a simple case of election; they have taken a life estate, and it is absurd to say that they can after that election, which enabled them to take the large benefits, come forward and say—give us the large interest, viz:—a fee-simple or a fee tail in those lands, the very taking of which was to exclude them from those benefits, and thus trifle with the intention of the testator. Lastly there is a bequest of £10,000 benefit, and *Routledge v. Dorril* (2 Ves. jun. 382) is an authority to shew that the *cy pres* doctrine is not applicable to bequests of personal property. This *cy pres* doctrine, of all others, is one discountenanced, except in very few cases, by the Court, yet it is sought here to be carried to a greater length than has been done yet; and *Pitt v. Jackson* (2 Br. C. C. 51) is admitted to have carried the *cy pres* doctrine to the utmost verge of the law; and Lord Eldon has expressed his opinion in *Brudenell v. Elwes* (7 Ves. jun. 390), "that in the *cy pres* doctrine it is not proper to go one step further."

*The Attorney-general (Lawson), J. B. Murphy, and Dwyer*, were heard in support of the decision of the Court below.—Judge Hargreave's view of the case was the correct one. That learned judge held that a tenancy in tail was created by the operation of the will of Thomas Dennehy, and Thomas Dennehy made that will, as he professes, in pursuance of a power. Now, the power was contained in the settlement made on the marriage of said Thomas in 1791, and by that settlement the lands of East and West Graigue were conveyed to trustees *habendum* to the use of said Thomas Dennehy for life, with remainder to the children and their heirs, with power, however, to Thomas to appoint what the children were to take—namely, the fee. Now, Thomas did appoint, but

he exceeded his power in this, that he appointed the fee not to and among his children, but to and among his grandsons. And, it is for this Court to declare that they took as near as they possibly could to the wishes of the testator, who desired that the son should have a life estate, and his grandsons an estate tail, and this must be accomplished by the doctrine of approximation, or, as it is called, the *cy pres* doctrine. Whatever estate then the children take under the will, they took the moment that Thomas ceased to live, for the will speaks from the moment of death, and not from the moment of election. This will, however, is executed or purports to be executed under a power; but a will executed under a power is within the limits of the power, and is to have the same favourable construction as a proper will—*Stackpole v. Stackpole* (4 Drury & Warren 350); and there the *cy pres* doctrine was applied, and Lord St. Leonards there said that by the application of that doctrine the limitation in question became a valid appointment.—*Sugden on Powers*, 501.

THE LORD CHANCELLOR.—I am bound to say that I entirely dissent from the view of this case presented to the Court by the counsel for the respondents [petitioners below]. Now what was the general intention of the testator, which we can gather from every word in the will? The testator had considerable real and personal property; he was seised of several estates, and he had a disposing power over them; but he had only a power of appointment over the Graigues, and those several estates he differently disposed of.—As to Belview after several payments to be made thereout, he devised it in trust for his son Thomas for life, and then in trust for the first and other sons of Thomas, according to their seniorities in tail male, and in default of such issue, remainder to his son Richard, remainder to Richard's first and every other son in tail male, and so on, with like limitations, to his son Francis, remainder to his first and every other son in tail male, remainder to his son John for life, remainder to his first and every other son in tail male. I merely mention this to shew what I conceive to be the testator's intention as to the Graigues. Now as to the Graigues, the limitations of that property were exactly similar to those of Belview, with this exception, that Daniel's name was omitted altogether from the limitation of Belview. The Graigues were limited first to Thomas for life, then to the sons of Thomas according to their seniorities in tail male, remainder to Richard for life, remainder to his first and other sons, according to seniority, with like limitation to Francis and John and their sons, exactly as in Belview. Well, as to his eldest son John, although under the settlement of 1791 the Graigues were settled on the testator for life, remainder to all his sons in fee as tenants in common, among whom, of course, was John, his eldest son, yet that John, on his marriage, for certain considerations, released the claim which he had under that settlement of 1791. The testator having thus recited that he had provided for his eldest son goes on to provide for his other children as he did, and he expressly declares his intention to provide for such of them out of the properties which were at his own disposal as shall, under the limi-

tations of that will, be *precluded* from taking under the settlement, that is from taking a fee in the Graigues. Now he was clearly not acting up to the power in merely appointing life estates to his sons, while his power was to appoint the fee. Well, so far as the Graigues, he limits them, or he intended to limit them, to those unauthorized by the power in the settlement, namely, his grandsons; and he then proceeds to require that each of his sons who should be of full age within three months after his decease should execute a release of all his claims and demands which he might have under the provisions of the marriage settlement, and if his sons omitted so to release, they were to take nothing under the will. Well, this appears to me clearly to enforce an election on his children. Counsel in support of Judge Hargreave's decision have relied on the doctrine of *cy pres*, a doctrine, no doubt, very subtle and very ingenious; but that is a doctrine that can be carried no farther than it has been. We see it is very limited, indeed, in its application; it is not applicable to deeds, neither is it applicable to bequests of personal estate, and it was rejected in the case of *Seaward v. Willcock* (5 East. 198). It is then a doctrine that should not be acted upon without a considerable degree of consideration. It is clear, if without the aid of this *cy pres* doctrine we look to the testator, we find him endeavouring to put his children in the same position over the Graigue lands that he did over the part of the other lands where he was not fettered with powers, which were his own absolutely. That being clearly his intention, are we to defeat that intention? he puts his sons to elect, and they did elect, and I deny then that this will is to be construed by saying that you must read this to be an estate tail. I assert that there is not a single case in the books where *cy pres* has been acted upon in cases of election. I never knew of such a case. The conclusion I have arrived at then, and in that conclusion the Lord Justice of Appeal concurs, ingenious and subtle as all this reasoning has been, is, that it is a simple, clear, and plain case of election. The testator has assumed dominion over the whole land, and therefore the election concludes the matter; and I shall hold that Thomas merely took a life estate, with remainder to his first and other sons in tail male, and we must accordingly reverse the order of Judge Hargreave.

THE LORD JUSTICE OF APPEAL concurred.

### Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

COOPER v. WARRE AND OTHERS.—Jan. 19, 22.

*Will—Erasure of words in draft—Construction—Equitable estates—Statute of Limitations, s. 24.*

*Testator being seised of considerable estates in several counties in Ireland, by his will made in 1830, gave and devised to trustees "all and singular, my capital and other messuages, lands, tenements, rents, and*

hereditaments.....situate in the counties of Mayo, Cork, Louth, Westmeath, Sligo," (this last county testator drew a pen across, and initialed, yet leaving the word quite legible) "Kerry and elsewhere in Ireland; nevertheless, subject to the several charges thereon," upon trust for his widow, for her life, and to convey to his second son in fee on her decease "In witness whereof, I have set my hand and seal, this 2nd of August, 1820, the word Sligo being struck out before the execution, and initialed by me." It was contended by the petitioner, that the trustees were under the phrase "elsewhere in Ireland," seised of the legal estates of the testator in every county in Ireland, including Sligo; and that an adverse possession by a third party, of these lands, of over twenty years, running, during the lifetime of the said widow, the equitable tenant for life, who died in 1864, was not a bar to the equitable tenant in fee, in remainder, expectant on the death of said equitable tenant for life, the legal estate being in the trustees. Held—that the testator had excepted out of his devise, his estate in the county of Sligo, and that the expression elsewhere in Ireland, must mean elsewhere in Ireland, except in Sligo, and that therefore there was no devise of the Sligo estate to trustees.

*The Lord Chancellor (while not deciding the point) felt strongly convinced that the adverse possession of those estates by a third party, for over 20 years, would bar all rights of the trustees, and of the equitable tenants in fee in remainder.*

THE petitioner in this case was Edward Henry Cooper, the eldest son of Richard Wordsworth Cooper, deceased, who was the second son of Edward Synge Cooper, also deceased. The respondents were the five daughters and co-heiresses of Edward Joshua Cooper, who was the eldest son of said Edward Synge Cooper; one of the said five daughters was married to Arthur B. Warre, and he was also a respondent; one Arthur B. Leach was another respondent. Edward Synge Cooper (the said grandfather of both petitioner and respondents) died in the year 1830; seised of considerable freehold estates, some held in fee and others in *quasi fee*, &c., also possessed of chattels real in several counties in Ireland; previous to his death he made his will, and he thereby devised to trustees all his said lands, tenements, hereditaments, real and chattel leases, &c., as follows:—"I will devise and direct that all my just debts, funeral and testamentary expenses, and also the pecuniary legacies, herein-after by me bequeathed, shall be paid as soon as conveniently may be after my decease, out of my personal estate, not specifically hereby bequeathed; and in case my personal estate, not specifically bequeathed, shall not be sufficient to pay the same, then I charge my real estates, in aid of my said personal estate, with the payment of said debts, legacies, funeral and testamentary expenses." Testator next proceeded to make several considerable bequests, out of his personality, and having done so he then, turned to the realty, and thus went on—"I hereby give and devise unto Charles King O'Hara, and John Arthur Wynne, and the survivor of them, and the heirs of such survivor, all and singular, my capital

and other messuages, lands, tenements, rents, and hereditaments, real and chattel, lease, estate, whatsoever and wheresoever, which I am entitled to in possession, reversion or remainder, situate in the counties of Mayo, Cork, and city of Dublin, Louth, county of the town of Drogheda, Westmeath, Sligo, and Kerry, and elsewhere in Ireland. The word "Sligo" was struck out by the testator's drawing a line in ink across same, but leaving the word still legible; and having done so, he wrote his initials—E. S. C., both over and under the said word; and he afterwards, just before the attestation clause, noticed that said word "Sligo" was so struck out by him before the execution thereof. The will went on, "Subject, nevertheless, to the several contingent charges thereon, or affecting the same respectively, or to affect the same, under or by virtue of either or both of the settlements executed by me upon the respective marriages of my said sons, Edward Joshua Cooper, and Richard Wordsworth Cooper, with their several wives, to hold the same unto the said Charles King O'Hara and John Arthur Wynne, and the survivor of them, and the heirs and assigns of such survivor, whether by fee, fee-farm, or by leases for lives, with covenant for perpetual renewal, or term for years; but upon the several trusts, interests, and purposes following, that is to say, upon trust during the life of my said wife, to pay the rents, issues, and profits of my said real freehold, and chattel lease unto my said wife, and her assigns, for her and their own use and benefit; and as for and concerning all my said real freehold, and chattel lease estates, from and after the decease of my said wife, subject and without prejudice, to the existing and contingent charges thereon, as aforesaid, upon trust, that then the said C. K. O'Hara and John A. Wynne, and the survivors of them, and the heirs and assigns of such survivor, shall and do stand seised and entitled and possessed of the said real freehold and chattel lease estates, in trust, for my second son, the said Richard Wordsworth Cooper, his heirs and assigns, for all such terms and tenure, whereby I now possess and enjoy the same." The testator then gave power to the trustees to make leases for any term, or number of years, not exceeding one life, in being, or 21 years in possession, whichever should last longest; and also that trustees receipt shall be sufficient release, &c. Power to trustees to make renewals of leases, &c. He then appointed his said wife, Anna Cooper, his residuary legatee; whom also with her brother, Henry Verelst, and his said sons Edward Joshua Cooper and Richard Wordsworth Cooper, he named executrix and executors of his said will, and the said will concluded with the following words—"In witness whereof I have, to this my will, contained in five pages of paper, set my hand and affixed my seal, this 3rd day of August, 1830; the word "Sligo," in the 33rd line of the third page of this my will being struck out before execution and initialed by me."—E. S. COOPER. The petition then stated that all the estates, in petition mentioned, passed under said will to said trustees (Charles King O'Hara and John Arthur Wynne) in trust for his widow, the said Anne Cooper for life, and after her decease, in trust, to convey same to the said Richard W. Cooper, and his heirs; and that said Edward Joshua Cooper took no interest therein, as eldest

son and heir-at-law of the said Edward Synge Cooper, or otherwise. After the death of testator, his eldest son, Edward Joshua Cooper, entered into the receipt of the rents of the estates, in the county of Sligo. The petition then stated that Richard Wordsworth Cooper duly made his last will, in writing, bearing date the 3rd of September, 1849; and that he thereby bequeathed all the estates, whereof he might be possessed at his decease, to trustees upon various trusts, therein-mentioned; and after declaring his intention, with respect to his various estates, in several counties, not naming or including the county of Sligo; the said testator devised all the *residus* of his real estates, whosoever situated, and not thereinbefore devised to the petitioner, his heirs and assigns; said Richard Wordsworth Cooper died in March, 1850, leaving petitioner, him surviving; and thereupon petitioner alleged that the freehold estates in the county of Sligo became vested in equity in petitioner, the legal estates being in the trustees of the will of testator Edward S. Cooper. Petition then stated that in the year 1848, Edward Joshua Cooper brought an ejectment, for non-payment of rent, in the Court of Exchequer, against certain defendants on the said Sligo estates, and that a writ of *habere* was duly executed, whereby Edward Joshua Cooper was put into possession of a considerable portion of said estates, and that he continued in such possession until the time of his said death. Leach, one of the respondents in this suit, had a conveyance of a portion of the Sligo estate made to him by indenture of 13th of December, 1862. On the 23rd of August, 1863, Edward Joshua Cooper died intestate, and without male issue, whereon his four said daughters, one of whom was the wife of the respondent Warre, entered into possession of said estates as co-heiresses at law. On the 17th of November, 1864, Anne Cooper, the wife of Edward Synge Cooper died, whereupon petitioner insisted he was entitled in equity to the possession of the said leasehold interest under the trusts of the will of Edward Synge Cooper. The respondents in their answering affidavit submitted their case to the Court namely, that upon the death of Edward Joshua Cooper the legal or equitable estate vested in the petitioner's father, Edward Joshua Cooper.

*Brewster, Q.C.*, with *Warren, Q.C.*, and *William Fatherstone H.* appeared in support of the petition.—Two points present themselves here for the consideration of the Court. The first on the construction of the will. Second on the Statute of Limitations. Now the first point is one of the greatest importance, and to that first the consideration of the Court is invited. The interest, the subject of controversy here, is a lease for lives made to Edward Synge Cooper, which lease has been regularly renewed. Now the first question turns upon this, whether you must interpolate after the words "elsewhere in Ireland" the additional word "except Sligo." But has the Court the power so to do? has it the power of adding to a will words that are not contained therein? Testator in effect, and not only in effect but actually, says he charges every part of land he has all over Ireland with his debts, &c. The case of *Magrath v. Montgomery* (3 Ir. Jur., N.S., 102), which may be relied upon on the

other side is not at all a case in point, as against us; there, two townlands were devised *nomina-tim* one to the eldest son, and the testator in devising the other townland to his other son, omitted to mention the name of the only other townland he had to devise: that is not a parallel case to the present, where the name of one county is omitted in a list of names of the said counties where testator had property, as in this particular will. There is no question whatever about this that if the word "Sligo" did not appear at all in the will the Sligo estates would follow the limitations in the will as the other estates; the expression "elsewhere in Ireland" being large enough to carry them. We contend that striking out this word "Sligo" amounts to an actual omission thereof: in truth as if it had never appeared at all on the face of this instrument. That being so, then the property in the counties specified and not specified pass. And here, lest there should be any mistake, he overrides all by the most comprehensive expression he could use, "elsewhere in Ireland;" they then ask you first to hold that the word "Sligo" was to be omitted before "elsewhere," and in the next breath that you interpolate "except Sligo" after "elsewhere." *Shea v. Boschetti* (18 Beav. 325) was where the testator cancelled certain words by drawing his pen through them, and it was there held that the words did not remain after cancellation, and that the limitation in the subsequent portion of the will remained unaltered. [*The Lord Chancellor*.—Is not this a case of revocation?] No, there is nothing to revoke, we must look at this will as if the word Sligo was not in it at all; and the term elsewhere carries with it all the estates not named in the will. The expression "elsewhere" prevents a man dying intestate as to his lands in that county; and it is at all events a residuary devise. The next question is on the Statute of Limitations. Now before we come to deal with what the law is, we must see what it was before the 3 & 4 Wm. IV. chap. 27, the Statute of Limitations. Before that time there was no statute law in cases of equitable estates.—*Wattlington v. Williamson* (Barnadiston, 270) is a case on how far the Statute of Limitations is a good plea to a bill in a Court of Equity. The Statute of Limitations is no defence whatever when there are trustees who have in them the legal estate. Our rights here only accrued in 1864, at the death of Edward Synge Cooper and our rights cannot be prejudiced by anything that has occurred during the life time of the equitable tenant for life. If the trustees permit an adverse possession by a third party, such adverse possession cannot affect the rights of the remainderman, that is, affect our rights when they arise, and if the trustees do make a conveyance, they to whom such conveyance is made will be held to be trustees.—*Life Association of Scotland v. Speddal* (3 De Gex. Fish. & Jones 58), where it is laid down that a *cestui que* trust will not be held to have sanctioned a breach of trust merely on the ground that while his interest is reversionary he knew of the breach of trust and did not interfere. [*The Lord Chancellor*.—If a trustee permit a party to remain in possession, in adverse possession for forty or sixty years if the *cestui que* trust tenant for life so long lives, is not that the same as if the trust-

tees made a conveyance to the party in adverse possession?] No trust arose for us, the tenant is remainder until after the cessation of the previous life estate. [*The Lord Chancellor*.—Suppose the tenant for life lived as long as old Parr, to 200 years, am I called on to decide that a conveyance will not be presumed to have been made by the owner of the legal estate?] At law the legal estate of the tenant in tail cannot be prejudiced by any act of the tenant for life, and equity follows law, so the equitable tenant in tail can not have his rights destroyed by the equitable tenant for life.—*Duke of Leeds v. Earl of Amers* (2 Phillips 125); *Browne v. The Bishop of Cork* (1 Dr. and Walsh, 700), and it is laid down in *Rafferty v. King* (1 Keene, 601) that time will not run against a remainderman during the continuance of the life estate. Mr. Leach, it is perfectly true, purchased for value those lands, and he says he did not make any searches. Now his purchasing as he did can not in the slightest prejudice our right. In *Rafferty v. King*, just last cited, page 617, Lord Langdale thus expresses himself—"If a mortgagee enters not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of the vendor, and to the validity of the conveyance he takes; and if the conveyance be such as in law or in equity only gives for his benefit the estate of a tenant for life, he takes that estate subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainderman."

*Frederick Walsh, Q.C.*, with *Chatterton, Q.C.*, and *Dames* were heard for the respondent *Warre*.—With respect to the erasure of the word *Sligo*. If a testator draws a pen over part of a will only, a revocation is effected *pro tanto*, and the unobliterated portions remains in force.—*Sutton v. Sutton* (Cowp. 812) *Larkin v. Larkin* (3 Bos. & P. 16). The very striking out of the word "*Sligo*" shows that the intention of the testator was to except his estates in that county from the course he destined for his estates in the other counties. It was held in *Strickland v. Maxwell* (3 Crompt. & Mees. 539), that the words struck out might be looked at to show what the intention of the testator was. The next point to be considered is the Statute of Limitations, 3 & 4 Will. 4; c. 27, and its reference to the case now in hand. The second and third sections of that statute are conversant with legal rights, while the 24th section deals with the limitation of time as to suits in equity. An equitable claim to lands could never have been preferred after the lapse of twenty years. Here there was an outstanding trust estate—the fee was in the trustees; if they were guilty of *laches* in not protecting the interests of the *cestui que trust*; it was open to the *cestui que trust* to change his trustees; that was not done, and are we now to be told, after over thirty years, that the Statute of Limitations is no bar to this effectment?

*May, Q.C.*, appeared for Mr. Leach.—Mr. Leach is a purchaser for value. In *Daire v. Beardsham* (1 Ch. Cases, 39), it is laid down that "Where, though the legal estate of a copyhold was outstanding in a trustee, the owner of the equitable estate having acquiesced for twenty years in the adverse possession of

the person to whom the estate was by mistake supposed to belong, was held to be barred in equity, by analogy to the statute, though it was clear he would have been entitled to it had the suit been instituted before the 20 years had elapsed." And so in *The Marquis of Cholmondeley v. Lord Clinton* (2 Jacob and Walk. 175), Lord Eldon says that "the *laches* and non claim of the rightful owner of an equitable estate for a period of twenty years (supposing the case of one who must within that period have made his claim in a Court of Law had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the Statute of Limitations, if during all that period the possession has been held under a claim unequivocally adverse, where the same is uniformly treated as belonging to the claimant in possession." Now it cannot be contended that the estate here devised to the trustees has been barred and extinguished altogether, and our proposition is, that if the estate of the trustees is barred, so also is that of *cestui que trusts*.—*Melling v. Leek* (16 C. B. 652). The language of Lord St. Leonards is very strong on this point; he says in his book on Vendors and Purchasers, 13th edit. p. 397, that "a *cestui que trust*, although for a limited interest not in possession, but in law acting as bailiff or agent of the trustees, who allowed him to act as owner, cannot be deemed to be a tenant at will of his trustees so as to save time; and the possession of a third person, although obtained from the *cestui que trust*, may, by possession for twenty years without payment of rent or acknowledgment, give to him a title against both the trustees and the *cestui que trust*."

THE LORD CHANCELLOR.—The question in this case is one of construction of the will of Mr. E. Synge Cooper, and it is contended by the petitioner that the devise of all his lands in the several counties he enumerates, (one of which counties he afterwards erases,) and "elsewhere in Ireland" is sufficient to carry to his devisees all his estates even in that county, the name of which county he had already erased. The first question then is, what is the construction of this will? Well, the opinion I have arrived at on the construction of this word "elsewhere," taken in connection with the previous erasure, will put a stop to any decision of this other question, however nice, on the Statute of Limitations. Now the testator first strikes out "*Sligo*," and he actually writes his initials both over and under the word so erased; and at the end of his will, at the last clause, he notices that he had so struck out the word "*Sligo*," and he tells the very page and line where the erasure is, and he also notices that such erasure was initialled by him. I, then, am clearly of opinion that the testator did not mean his estates in *Sligo* to pass under the expression "elsewhere in Ireland." In *Gann v. Gregory* (3 De Gex M'N. & Gord. 780), Lord Cranworth said that the meaning of lines drawn through a word, "was that what the testator had intended as to giving legacies over which the lines had been drawn, had ceased to be his intention, and he therefore placed the lines there to show this, that he meant to strike out the legacies." Clearly the testator's intention then was to except *Sligo*. It

does certainly appear to me that this is the common sense view of the case. I am told by the counsel for the petitioner that I must add words to the will—that I must add after the term “elsewhere in Ireland” the two words “except Sligo.” Suppose I do—why, words are added frequently in this Court—not alone words, but sentences. We also strike out words, and we also substitute others, and we are not to be terrified by saying we are to add words here to this will. It appears to me, then, that the words “elsewhere in Ireland” does not carry any lands in the County of Sligo. I then think that the testator did except Sligo—that is the common sense view, at all events, to take of the case, and the trustees therefore never had any estate in the Sligo estates, and that being so, I have no question to decide on the 24th section of the Statute of Limitations; it would be otherwise, of course, had I been of opinion that the Sligo estates were vested in the trustees. I must, however, say that I have formed a strong opinion on this portion of the case. There is not, in my mind a doubt but that if the trustees had the legal estate in them, the Statute of Limitations would apply, and that if the trustees here suffered an adverse possession for twenty years, I am clearly of opinion that the Statute of Limitations would be a bar to the trustees, and also to the *cestui que trust*. Assuming that the trustees had the legal estate in them, they then had the fee at law, and clearly an adverse possession of twenty years would be a bar to their claim, and not alone to their claims but to the *cestui que trusts*. I feel bound to dismiss the petition with costs.

### Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

GRIFFIN, APPELLANT; MALCOLMSON, RESPONDENT.—  
Nov. 10, 1865.

*Fishery*—“Land adjoining”—Partners—License.

*A being seised of lands under a lease for lives, obtained from his landlord in 1843 a license to erect a weir upon said lands. He being in occupation, erected the weir, which was fished by him and B. as partners down to the period of the inquiry by the Commissioners in 1864. In 1852 A. surrendered the lands to his landlord, who in 1857 executed an agreement for a lease of them to B. for 21 years, and a life concurrent, under which agreement B. was in possession of them in 1862. The Commissioners having ordered the weir to be abated, and A. and B. having respectively appealed, the decision of the Commissioners was upheld upon the appeal of B.*

APPEAL from a decision of the Fishery Commissioners, ordering the abatement of the weir mentioned in the case. Upon the hearing below, it was insisted on behalf of

the appellant, Patrick Griffin, that he had a right to maintain and use said weir, or fixed net, under the 19th section of the 5th and 6th Victoria, chap. 106, by reason of same being erected on or attached to a part of the shore, adjoining lands held and occupied by him as tenant for lives determinable, at the time of first erecting such weir or net, and of same having been so erected with the previous consent, in writing, of Robert Royse, who was then the lessor, seised of the rent and reversion in said lands. It appeared that said weir was a Scotch weir, situated adjacent to the lands of Carrowbanebeg, herein-after mentioned; and that by indenture bearing date the 5th of November, 1795, Robert Royse, the owner in fee of the lands herein-after mentioned, demised to James Griffin, the grandfather of the appellant, Patrick, that part of the lands of Carrowbanebeg, then in the possession of the said James Griffin, with the rights, members, and appurtenances, at the yearly rent of £45 Os. 7½d., for 3 lives, one of whom, Garrett Barry, lived until the year 1854. In the year 1843 the interest in said lands, under said lease, had become vested in the appellant, Patrick; but the lands were then in the occupation of one of his tenants at a yearly rent. In the beginning of the year 1843 the appellant, Patrick, applied to the said Robert Royse, for liberty to erect a weir on the shore, adjacent to said lands, to satisfy the requirements of the 19th section of said statute; and the said Robert Royse, with that intention, gave to the appellant a letter in these words:—

Dear Sir—“I am satisfied with your proposal for the Fishery on the Shannon, at the yearly rent of £10, to commence on the 21st day of January, 1843.”

This the Commissioners considered to be a sufficient consent to the appellant, Patrick, to erect a weir adjacent to said lands, to satisfy the requirements of the said 19th section. It appeared that shortly after getting such consent, the appellant, Patrick, got up said lands from the tenant, and went into the occupation thereof, and immediately erected the weir, the subject of this appeal; and from its erection to the present time, the weir was continuously fished. The said appellant, Patrick, continued in the occupation of the lands, until the year 1850 or 1851, when he set them, for one year, to John Griffin, a very distant connection. In 1854 the last life expired, as already stated; but previously, in 1852, the appellant, Patrick Griffin, surrendered the lands to Robert Royse. In 1857 Mr. Royse gave 17 acres of the lands to John Griffin, under an agreement bearing date the 17th day of January, to give him a lease of same, at the yearly rent of £25, commencing from 26th March, 1859, for a term of 21 years and the life of said John Griffin, concurrent, at whatever time the said Robert Royse should have power to make good said term, and said John was ever since in occupation of said lands, being the lands adjacent to the said weir or fishery. The appellant, Patrick, had not since had possession of or any interest in any part of said lands, but he continued to hold the fishery under the said letter, and had paid the rent therein mentioned. It appeared also that from the year 1842 the said John had fished the fishery for the appellant, Patrick, and he continued to do so



after he had got possession of the land up to the time of the inquiry, the arrangement between them during Patrick's and John's tenancy, respectively, of the lands being that the said John should, out of the produce of the weir, pay for poles, nets, and everything required; and after so doing, that he and appellant should divide the remainder between them. Upon this evidence it was contended, on behalf of the appellant, that the appellant and John Griffin should be considered to be partners in said weir and fishery, and that John's occupation of the said lands with the said consent to erect the weir given to the said Patrick, was sufficient under the 19th section, to entitle the said Patrick to maintain and use said weir. But the Commissioners decided that it was not so, inasmuch as though it could be held that Patrick and John were partners in the weir, they were not partners in the land, and therefore the appellant, Patrick, held no land adjacent to the shore on which the net was erected, and had failed to establish a title to maintain and use said weir under said 19th section. It was then insisted on behalf of the said John Griffin, that he had a right, under said 19th section, to maintain and use said weir; and the Commissioners proceeded to inquire into the said claim under a summons similar to that set out in the preceding case; and they accepted the evidence in this case, so far as it applied, in addition to the evidence then given. It was proved that accounts used to be settled between the appellants, John Griffin and Patrick Griffin about twice a year, and the profits divided; that the weir was fished by them in conjunction in the year 1862, and an account was settled, and each of them took half the profits; that a Mr. Browne kept the accounts of the fishery, of the materials, and expenses, and gave it to John Griffin; but he stated that he did not keep any accounts between Patrick and John, but that he kept what he called a partnership account, but gave no explanation of the meaning that he attached to that term; that there was no written agreement between Patrick and John; and that in 1862 John paid the license and managed the fishery; and that Patrick Griffin lived a distance away from the weir, and paid Mr. Royse the rent, and John paid or allowed Patrick his share; that John paid for poles, nets, and all expenses, and charged them against the gross receipts or profits of the salmon, and divided the remainder. There was also produced and given in evidence, an indenture bearing date the 27th day of August, 1722, whereby Nicholas Bourke conveyed to Henry Royse, in fee, the townlands and tenements of Carrigbune, with all buildings, meadows, pastures, feedings, bogs, commons, royalties, fishings, mills, mill seats, waters, watercourses, and all other rights, privileges, advantages, and appurtenances to the said town and lands belonging. The interest of the said Henry Royse became vested in said Robert Royse. Evidence was also given which satisfied the Commissioners that said weir was not injurious to navigation or to the public right of fishing. Upon the above evidence the majority of the Commissioners held that the appellant, John, had failed to establish a title under the 19th section, to maintain and use said weir upon the grounds, first, that Patk. Griffin, and not the appellant, was the person, who

in the year 1862, and previous and subsequent thereto, fixed and erected the weir, within the true meaning of the 5th and 6th Vict. cap. 106; and that John was not his partner in the weir; secondly—that the appellant had not any consent, in writing, from the chief landlord or lessor, to erect same. But the legal Commissioner contended that under the circumstances above stated, the consent given to the said Patrick enured for the benefit of the said John; and that the said John being in occupation of the land, had therefore established a title under the said 19th section, to maintain and use said weir. The said weir was ordered to be abated and removed.

*Chatterton, Q.C., Tandy and O'Loghlen* for the appellants.

*Longfield, Q.C., Shaw, Q.C., and Barry, Q.C.,* for the respondents.

*LEFROY, C.J.*—The Court is of opinion that the weir in this case should be sustained, and, therefore, that the order of the majority of the Fishery Commissioners should be reversed. I confess that I was for some time disposed to take a different view of the case, but, upon conferring with my brethren, they have shaken the opinion I was so disposed to form so much that I would not feel myself justified in differing from them. The decision of the Commissioners must be reversed.

*O'BRIEN, J.*—I shall adopt what I have already thrown out in the course of the arguments, and very shortly state why I think that this weir should be sustained and the order below reversed. I think that Mr. Longfield, in his very able argument, most properly admitted that, in 1857, when the new lease was made to John Griffin, this weir was legal; and what is the present state of facts? The lease so made is still subsisting; John Griffin is still in possession of the land adjoining, and has fished the weir ever since. Although he did not take out the original license to fish, it appears most distinctly that by some arrangement or partnership, as it was called, he is the person who has always fished the weir. The man who has thus used this weir from 1857 is the person we find in occupation of the adjoining land under a lease; and without further going into the general case, I feel that the very short and simple view of it enables us to sustain the legal right of this party. We are fully authorized, I think, in maintaining the weir ordered by the majority of the Commissioners to be abated upon John Griffin's appeal, and we will make an order accordingly.

*HAYES, J.*—I was much taken with the able argument of Mr. Longfield, and for some time inclined to go with him; but I am very willing now to yield my opinion upon considering the way in which the case has been so clearly and so simply put by my brother O'Brien. I entirely concur in the view put forward by him, that the appeal in this case must be allowed, and the decision of the Commissioners, or rather of the majority of them, so far as John Griffin is concerned, must be reversed.

*FITZGERALD, J.*—I am most happy to be able to agree with the other members of the Court, and to take the view adopted by the learned third Commissioner, who differed from his brother Commissioners. I think that this weir was legally erected and used in



1862, and should therefore be maintained. I confess that I would have been struck by Mr. Longfield's very able argument if it had not been so ably answered. This weir must be upheld.

LEFROY, O.J.—The able argument of Mr. Longfield pressed my mind so strongly and powerfully, that, I confess, until I conferred with my learned brethren, I was rather disposed to concur with the order of the Commissioners, but where the opinion of the Fishery Commissioners was a divided one, and the majority of the Court had no hesitation in concurring with the opinion of the dissenting Commissioner (Mr. W. O'Connor Morris), I felt that I could not refuse to uphold this view.

An order was then formally made, allowing the appeal of John Griffin, and reversing the order of the Fishery Commissioners so far as it was concerned.

LORD MONTEAGLE, APPELLANT; MALCOLMSON, RESPONDENT.—Nov. 13, 17, 1865.

*Several fishery—St. 5 & 6 Vict. c. 106, s. 19—Meaning of word "land"—Nuisance to public right of fishing.*

*Facts found by the Commissioners of Fisheries held not to amount to sufficient evidence of the existence of a several fishery.*

*A weir, which is a common nuisance to the public right of fishing, is illegal; but there cannot be an interference with the public right of fishing, in a place where the public cannot exercise the privilege of fishing.*

*It is not necessary that land should be arable or pasture land to meet the requirements of s. 19 of 5 & 6 Vict. c. 106.*

THIS was an appeal from the decision of the Fishery Commissioners abating certain weirs of the appellant which the appellant insisted on his right to maintain under section 18 of st. 5 & 6 Vict. c. 106 by reason of their being erected within the limits of a several fishery to which the appellant claimed to be entitled, and also under s. 19 of the same statute, as being the occupier of "land adjoining the shore" as tenant in fee simple. The case stated by the Commissioners set out the facts as follows:—The weirs in this case are four in number, and are Scotch weirs placed in the estuary of the River Shannon, near the lands of Mount Trenchard and Foynes Island. They are called through the case the North Island Weir, which is placed at the Northern point of Foynes Island; the South Island weir, which is at the Southern point of said island; the Durnish weir, which is situated near Durnish point on the shore between the said point and Foynes Island; and Mount Trenchard Weir, which is situated on the shore under Mount Trenchard House. None of these weirs, except the Durnish weir, are marked upon the ordnance survey, but a map was used on behalf of appellant at the inquiry, to which the Commissioners referred, on which the sites of the weirs were shown, and they were marked No. 1,

2, 3, and 5 respectively. The appellant made common title under the 18th section to said weirs, and produced, and gave in evidence,—first, a copy of letters patent of 20th June, 10 James, (1612,) whereby King James I. granted to Francis Trenchard, his heirs and assigns, "the castle, towns, lands of (*inter alia*) Cappagh with the apportionments in the County of Limerick," and "also the castle and island of Foynes, and the island of Durnish, situated in the county of Limerick," and all and singular (*inter alia*) "islands, waters, water courses, fishings, grindings, warrens, waifs, strays, deodands, royalties whatsoever, situate, lying, and being or arising in or within the castle, islands, places or hamlets aforesaid; or within any parcel of them to the aforesaid castles, townlands, lands, tenements, and other the premises thereby given belonging, as fully and freely as the said premises came or ought to have come to the hands of the said King, or to the hands of any of his progenitors or predecessors, kings or queens of England, by reason of any attainder, forfeiture, or by reason of any gift, grant, surrender, or release; or by reason of the suppression, relinquishing or dissolution of any abbey, monastery, or other religious house, to hold said castles, wastes, waters, islands, fishings," &c., to the said Francis Trenchard, his heirs and assigns, paying the yearly rent of £50 3s. 6d. It was admitted upon the said inquiry that the appellant is entitled in fee to the lands and islands granted by said letters patent; and it appeared that the lands called Cappagh therein are now called and known as Mount Trenchard, of which the appellant is in the occupation, and that they are situated opposite, and adjacent to the Mount Trenchard weir (No. 5), but he was not in the occupation of the arable land opposite or adjacent to the other weirs. The appellant also produced and gave in evidence a lease bearing date the 22nd day of September, 1812, whereby after reciting a proposal of one Vere Hunt, then deceased, bearing date the 25th of March, 1773, by which the said Vere Hunt proposed and promised to pay to the Right Honorable Henry Lord Viscount Conyngham, and his heirs for the farm and lands of Foynes Island in the River Shannon, as surveyed by Michael Rahilly, the yearly rent of £146 10s., with 4d. in the pound, receiver's fees, upon a scale to be made, for three lives, with covenant for perpetual renewal as therein; and that said proposal after being sealed and executed by said Vere Hunt was accepted as therein, and that by virtue thereof the said Vere Hunt had continued in possession, not only of the said farm and lands of Foynes Island with the appurtenances, but also of a coach house and stables on the opposite shore, and duly paid his rent thereout until his death, and that since his death John Hunt had continued in possession thereof, and that the title and interest of said Lord Conyngham had vested in Stephen E. Rice, Esq. The said Stephen E. Rice in pursuance of the said proposal leased and conveyed to said John Hunt, his heirs and assigns, "the said farm and lands of Foynes Island, and also the coach house, offices or stables immediately opposite thereto, or the beach or shore as therein, and since the date of said proposal or article, held, occupied, and enjoyed by the said John Hunt and his assigns, as appurtenant to or part of the said demised premises, together with liberty

to the said John Hunt, his heirs and assigns, to cut and use the seaweed thereof, in the same manner as he and they had hitherto enjoyed same," to hold same with the appurtenances unto the said John Hunt, his heirs and assigns for three lives, with covenant for perpetual renewal, saving and reserving unto the said Stephen E. Rice the shores surrounding the island, and liberty to enter and erect weirs thereupon, and to use all means for catching fish or drawing manure from the same. It was insisted on behalf of the appellant that this lease by its recital of the proposal of 1773 conclusively established the dealing with a fishing on that place as property in 1773, although the lease goes beyond the proposal in the matter of the coach house; and evidence was given, as will subsequently appear, that weirs were first erected in this part of the Shannon in 1810, 1811, and 1812. The appellant also produced the rent account book of the manor of Mount Trenchard, and read therefrom an account in the handwriting of the agent to the father of the appellant purporting to be of "the fishery opposite Foynes or Lehey's" from 1815 to 1823, shewing payments on account thereof; another account for "part of Lehey's fishery, (Shaughnessy and Haley,)" from 1822 to 1827, and a third account of "part of Lehey's fishery, (Timothy Gallaher and Godwin)" from 1823 to 1825; also an account also in the handwriting of a deceased agent of appellant's father of Mount Trenchard fishery, (I. Gallagher and Goodwin) for 1826, 1827; and a house account book also in a deceased agent's handwriting, containing the amount of salmon received at Mount Trenchard from Patrick Haley's weir at Mount Trenchard for 1816, and a letter from John Hunt of 1st March, 1832. The appellant then produced a lease of 20th October, 1842, whereby he demised to Samuel Keays and Christopher John Keays for a life and 21 years, at the yearly rent of £80, the fishing in the River Shannon upon and along the shores of (*inter alia*) Durnish, Foynes, Foynes Island and Mount Trenchard, reserving soil of the shores and seaweed, and saving out of said demise to and for the use of said appellant the site of one weir on the South West shore of the island of Foynes, permitted by said Lord Monteagle, to be fished from year to year by John Hunt, for which the said Lord Monteagle was to allow the said lessees during such reservation of such weir the sum of £10 a-year. Appellant also produced a proposal bearing date the 16th day of January, 1852, from Michael O'Shaughnessy to Lord Monteagle for a right of fishing in the River Shannon along the shores on his lordship's estate of (*inter alia*) Mount Trenchard, Foynes and Durnish, at the rent of £60 for seven years. It also appeared from deeds produced on said inquiry, that upon the 9th day of November, 1836, he said indenture of lease of the 22nd September, 1812, was assigned or surrendered to the said appellant. It was proved that the said Keays had possession of the fishing named in said lease up to 1852, that the said O'Shaughnessy was superintending the said fishing at that time. It was stated that in that year one Brown received a letter from Keays respecting the giving up the said fishery, which letter was probably in existence and was not produced; that O'Shaughnessy continued to fish the said weir until

1855 when it was taken out of his hands in consequence of neglect; that the said Brown was then acting as agent for the said Keays; that having so taken it out of O'Shaughnessy's hands, the said Brown conducted the fishery himself, and afterwards managed it with a man named Patrick Connor; that Brown then conducted the fishery again himself up to 1863 when he gave it up to Lord Monteagle. It was proved that the North Island weirs (Nos. 1 and 2) were put down about the year 1810, 1811, or 1812, when one Halliday came to the Shannon, and that before that time there was no fishing for salmon or any weirs or fixed nets on the island, and that from that time they appeared to have been fished by Hunt and parties who paid rent for them to appellant and his father; but in or about the year 1824, they had been cut down by the agent to the Limerick corporation in common with the other weirs in the neighbourhood, and that for one of those weirs which was cut down the tenant was allowed a year's rent and a sum of £2 10s. by the agent of the Mount Trenchard estate for the damage done to him by the cutting it down, and no proceedings were taken against the Corporation of Limerick or their agent for having cut down the weirs. It was proved that a man named Barret fished along the shore near Durnish weir about 1838; that the appellant took proceedings against him, and that Barret had continued to fish there until his death without paying rent or being interfered with. No weir appeared to have been erected at Durnish until after the said aggression by the corporation, probably about the year 1826, but the weir then erected was over 50 yards nearer to Durnish point than the present weir (No. 3). The time of the change of site does not appear, but the weirs were fished from the time of their erection by parties paying rent to appellant. It was further proved that the place where the Durnish Weir is, and adjacent to it, was good fishing ground for draft nets; that before the erection of those weirs it was commonly fished over; that the place adjacent to it, and particularly inside it was constantly fished at present, and that the poles of the weir or the stumps outside it had injured the nets of the fishermen in drawing their nets. It was attempted on behalf of the appellant to contradict this evidence respecting the public fishing, but the Commissioners after carefully considering the evidence found that it had been established. It was proved that in the vicinity of the Mount Trenchard Lodge weir, No. 5, are the remains of an old weir, the position and extent of which are marked on the said map; but there was no proof of such weir having ever been used; that about half a mile lower down the river beyond the weir (No. 6) which was abandoned by the appellant at the inquiry there was an old herring weir, called Madam Rice's Herring Weir, which as matter of history was said to have been fished by her for herrings; but her grandson aged 70 or upwards, who was agent of the estate since 1816, proved that she died before he was born, and that within his recollection that weir had not been fished. The weir (No. 5) appeared to have been erected as stated about or subsequently to the year 1826, and to have been since held under the appellant in the same way and generally by the same persons as the other weirs;

and except the documents heretofore stated, all the lettings of said weir were by parol, and not to parties occupying the land adjacent to the shore in which the weirs were placed. They were all fished in the year 1862, by Mr. James Brown who fished them as already stated, and it was proved that he held no land adjacent to either of the weirs, and held the weirs at a rent of £60 for his own profit. The appellant gave him an order for the poles, and he (Mr. Brown) supplied the nets and did the repairs, &c. The appellant for the purpose of proving a title to erect and maintain the weirs (Nos. 1, 2, and 3) under the 19th section gave evidence of the following facts to shew that he held and occupied land adjacent to the parts of the shore upon which said weirs were erected as already stated. It was admitted that the land with the exception of the strips of shore now described was in the hands of tenants. It was proved by the surveyor produced by the appellant, that at (No. 1) weir there is a distance of 52 feet from high water mark to the first pole of the weir; that from high water mark the shore slopes up and is rocky and shingly, and is, as he stated, in fact shore; that at (No. 2) weir there are only about 9 feet between the first pole and high-water mark, and 64 feet from high-water mark to the fence of the tenants' holding, as shewn by the tenant himself; that part of the fence is standing about two feet high, and the remains are distinctly marked; that part of the strip is covered at high springs; that at the widest part of it the grass may be 30 feet wide, and that the rest is gravelly, and is about 150 or 200 feet long; that at Durnish Weir (No. 3), there are about 23 feet between the first pole of the weir and what he called the tenant's bounds, (as pointed out to him in the absence of the tenant), but about half the 23 feet is grass, and that there was no boundary between the inner part of the 23 feet and the tenant's bounds, or between the tenant's lands and the shingle; in fact, that there was no boundary or fence whatever to the land adjoining this weir but the Shannon. It was proved that the tenants and labourers of the appellant used to take seaweed along the shore of Mount Trenchard demesne; that within the last fourteen years other persons had been allowed to take it by direction of the appellant's agent, and that parties had lately been prevented from taking it by a caretaker put to watch it. Upon the above evidence the majority of the Commissioners found, 1st, that the appellant had not established a title to a several fishery in the places where the weirs were erected, and that he had therefore failed to establish a title under the 18th sec. of the said statute. 2ndly, the majority of the Commissioners found that Durnish Weir was injurious to the public right of fishing. 3rdly, the Commissioners found that the appellant had no title to the weir under the 19th section, for that, except at No. 6 or Mount Trenchard Weir, appellant did not hold or occupy any land to satisfy the requirements of the 19th section of said statute, the space between the weirs and tenants' holdings being nothing more than the shore which in all cases must intervene between the land useful for tenants' purposes, and the varying mark of the tides; that the evidence did not prove that the said space was in the occupation of the said appellant, for it was not shown that any part of

it had been reserved from the tenants of the land, or used or occupied by the appellant, but rather that such use of it as was made was by the tenants, whose lands were not separated therefrom in cases of North Island (No. 1), and Durnish (No. 3) Weir at all; and in case of South Island (No. 2) by a fence only in parts two feet in length, in parts only visible, and that therefore the appellant had failed to establish a title under the 19th section to maintain the Foynes Island or Durnish Weirs. 4thly, that with regard to the Mount Trenchard Weir (No. 5), as well as the Durnish and Foynes Island Weirs, the person who in fact erected the weirs was the said Browne who held no land; and the Commissioners further submitted to the Court that in accordance with the decision of the Court in the case of *Vandeleur v. Malcolmson*, and upon the facts already stated, the said weirs were not erected in accordance with the 19th section of 5th and 6th Vic. chap. 106, for that the said weirs being incorporeal hereditaments, the said Keays who held them under the lease of 1842, which lease had not expired in 1862, could not divest himself of said weirs except by deed, and that therefore the payment of rent for said weirs by Browne to said appellant did not prove the surrender of said lease by Keays, even if Browne had not sworn that in 1855, three years after such surrender was supposed to have taken place, he was acting as agent for said Keays. Upon these grounds the Commissioners ordered the said weirs to be abated and removed.

*Jellett, Q.C.* and *Tandy* for the appellants, argued that upon the facts and deeds there was evidence of a several fishery, citing *Chad v. Tilson* (2 Brod. and Bingh, 406); *Malcolmson v. O'Dea* (10 H. of L. 618); *Blakeley v. Winstanley* (3 T. R. 230). As to the question upon the meaning of the word "land" there is nothing in the statute confining it to arable land. Upon the question of nuisance to the public right of fishing, *Regina v. Ryan* (8 Ir. L. Rep. 119) was cited.

*Longfield, Q.C.*, *Shaw, Q.C.*, and *Barry, Q.C.*, contra.—There was no evidence of a several fishery. The law requires evidence of a long enjoyment to establish a right to the exclusion of others; and there is evidence here of interruptions of the right claimed. As to the land question, the tenant impliedly holds all that the landlord can give him down to the river.—*Berridge v. Ward* (10 C. B. n.s. 400); *Lord v. The Commissioners of Sydney* (12 Moore, P.C.C. 473). Occupancy and tenure are both essential to the right, which only lasts as long as the occupancy, and ceases with it. The public right of fishing is similar to the public right of navigation. *Reg. v. Ryan*; *The Attorney-General v. Parmeter* (10 Pr. 378).

*Tandy* in reply.—The title to a several fishery can be sustained by evidence of long and uninterrupted user—*Goodtitle v. Baldwin* (11 East. 448); *The Queen v. Archdall* (8 A. & E. 281). The right has been before now established without shewing the existence of a patent.—*Mannall v. Fisher* (5 C.B. n.s. 856); *Jenkins v. Harvey* (1 Cr. M. & R. 877); *Deeble v. Lenehan* (12 Ir. C. L. Rep. 11). In a case of this kind, evidence of acts of ownership upon one portion of an extended property is evidence to shew a similar right upon other portions of the same pro-

perty.—*Stanley v. White* (14 East, 332); *Duke of Devonshire v. Hodnett* (1 Huds. & Br. 322); *Jones v. Williams* (2 M. & W. 326); *Gabbet v. Clancy* (8 Ir. L. R. 299). The rent here issues out of a fishing: that can only mean a several fishery, which *prima facie* carries with it the bed and soil of a river. *Marshall v. Ulleswater Steam Navigation Company* (3 Best & Smith, 732). There is ample "land" here to satisfy the 19th section.

*Cur. adv. vult.*

Nov. 17.—LEFROY, C.J.—In this case we have conferred upon the various views which have been presented in respect of the rights of the several parties, and we fully and entirely agree upon all the points raised and so ably argued, but one, and upon that one question I confess I had some doubts as to the propriety of the view taken by the other members of the Court. The other members of the Court are satisfied and unanimous upon that one point, and my own view is so very doubtful upon it that I should be sorry to differ with, and divide, the opinion of the Court; and therefore, as we are entirely agreed upon all the other points, I will acquiesce in the view taken by my learned brothers on that single question.

O'BRIEN, J.—The appeal in this case involves the right of fishing in respect of four different weirs, viz., Nos. 1 & 2, the Foynes Weirs; No. 3, the Durnish Weir; and No. 5, the Mount Trenchard Weir. As to No. 5, the Mount Trenchard Weir, the case has been given up by the respondents, and they thereby admit that the appellant, Lord Monteagle, has established a good title to it under the 19th section of the 5th & 6th Vict. c. 106. The question then remains for our consideration as to weirs Nos. 1, 2, & 3. The first claim made to these weirs is made under the 18th section of the 5th & 6th Vict., c. 106, which enables a party having a several fishery to erect such a weir; and, in our opinion, Lord Monteagle, the appellant, has not made such a case as would authorize us to interfere with the decision of the Fishery Commissioners as regards his claim in respect of his alleged right to a several fishery; and therefore their decision under the 18th section of the 5th & 6th Vict., c. 106, must be affirmed. It is not necessary for us to go so far as to say that Lord Monteagle has laid no evidence at all before the Fishery Commissioners such as might be submitted to a jury in support of his claim to a several fishery; but it is enough to say that we do not consider the evidence he has adduced such as would warrant us, as a Court of Appeal, in interfering with the decision of the Fishery Commissioners; and for myself I will say that I would be very much disposed, if acting as a juror, to come to the conclusion arrived at by the Fishery Commissioners. The right to a several fishery must be proved by certain ancient usage; but the evidence here does not, in fact, go back beyond the year 1810, and would not justify the sustainment of such a claim. As to the Foynes Weirs, the evidence was only from the year 1810; and as to the Durnish Weir, only from 1826. From the way the appellant puts forward his claim he rests it upon an alleged title to the whole fishery as a several fishery; but it is enough for us to say, that we do not think the evidence

adduced by Lord Monteagle, to sustain that claim, of such a character as would entitle us to interfere with the decision below upon the claim in respect of a several fishery. That disposes of the case under the 18th section of the 5th & 6th Vict. c. 106; and then comes the case of the appellant under the 19th section of the same statute, which authorizes a party, being the owner and occupier of land adjoining the shore, having a certain interest, to erect a weir on the shore. Upon this claim there is one question on which I had some doubt throughout the arguments, and upon which I may say I still have some doubt, namely, whether the unity of possession of the land and occupation should continue in order to legalize a weir. I had and have some difficulty about that question; but it is not necessary to pronounce any opinion upon it in consequence of the view which we take of the case. We think that Lord Monteagle does occupy land within the meaning of the 19th section of the 5th & 6th Vict., c. 106, to entitle him to maintain these three weirs, Nos. 1, 2, & 3. There has been no question raised as to the letting, by Lord Monteagle, of these weirs; and in reversing the decision of the Fishery Commissioners upon this 19th section of the Act of 1842, it is satisfactory to us to be able to say—without going into the evidence given before the Fishery Commissioners, but looking at the case, and at their judgment—that it is manifest that that decision of the Commissioners, which was pronounced before our decision as to what was land within the meaning of the Act was made, was given upon the supposition that land, to satisfy the requirements of the 19th section of this statute, *required to be "arable" or "pasture land,"* and was not satisfied by the existence of the space or strip of land referred to here. Mr. Commissioner Eden, and Mr. Commissioner Morris (who differed from his brother Commissioners), express that in their judgments, and they both refer to the fact that the question was then pending our decision in *Reeves's* or some other cases. Mr. Commissioner Eden expressed it as his opinion that, according to good law and common sense, his decision would be upheld; but we have, as I have said, the misfortune to differ with him. In looking into the case, it is open to the parties to maintain the decision below on any other grounds; and if the facts of the case show that Lord Monteagle *was not* in the occupation of that strip of land, the decision of the Fishery Commissioners should be maintained. Does the case show that? I will not go through the whole of the case, but will merely say that, as to Foynes Island, it is clear that strips of land intervene between the tenants' holdings and the shore. Lord Monteagle, the appellant, is the owner in fee of the land, and the lease of it was surrendered to him. He was in occupation, and what is to divest him of that occupation? With regard to weirs Nos. 1 & 2, the Foynes Weirs, the case is as clear as possible. Indeed, as to No. 2, there is a fence actually spoken of; and all through the case this land is spoken of as land intervening between high water mark and the tenants' holdings. We have no doubt, then, as to the appellant's right to the Foynes Weirs, and that the order of the Fishery Commissioners must be reversed. It is not so clear as to No. 3, the Durnish Weir; but still it is sufficiently clear that the

land between high water mark and the tenants' holding; was similarly situated with all these other strips of land, and that the weir should be retained. It was said that Lord Monteagle did not reserve this land in the leases which he gave, but it was not necessary for him to reserve it. As to Foynes he had in the leases an express reservation of the seaweed, &c., which rendered it necessary for him to have a passage or strip of land along the shore in order to exercise his reserved right; but the absence of a reservation as to Durnish is immaterial, as it was unnecessary. So far as regards section 19 of the 5th & 6th Vict., c. 106, we think that as to these three weirs, Nos. 1 & 2, Foynes Island Weirs, and No. 3, the Durnish Weir, Lord Monteagle has proved his right to sustain them. It now remains for us to consider the question as to the alleged interference with the public right of fishing; and upon this question we have had considerable difficulty; but we think the sound constitution of the law on that point to be as I will now mention. Mr. Longfield, in his very able argument, was right, I think, in saying that, in considering this point, we should not only consider the provisions of the Act, of 1842, but of all the subsequent Acts of Parliament. Now, section 19 of the 13th & 14th Vict., c. 88, should be carefully considered. It enacts "that nothing in the said recited Acts or this Act contained, shall take away, or in any manner lessen or impair the powers of Her Majesty's High Court of Admiralty, or any other court or jurisdiction in relation to the removal of abatement, of nuisances accruing or occasioned to navigation, fishery, or the passage of fish, by the placing, or maintaining, or using of weirs, fixed nets, or other contrivances." Then comes the 6th section of the last Fishery Act (the 26th and 27th Vict., c. 114), which grants certain certificates in respect of fixed nets, but provides that such a certificate "shall not, render any net legal: that would be otherwise illegal by reason of it being injurious to navigation, a common nuisance to the public right of fishing, or otherwise in violation of common law, or any Act of Parliament." The words used there are "a common nuisance," and it would be senseless to say that you interfere with the public right of fishing in a place where you cannot exercise the privilege of fishing. We therefore think the sound construction of the statutes is this, to say that if the possession of a weir is such as to be "a common nuisance," then the weir is illegal. That being so, what is the evidence? There is no such fact found here. It would be hard to say, that because parties fished about this locality, these nets should be all declared illegal. That would be putting a construction upon the Act of Parliament, which, I think, was not intended by the Legislature. We think the sound conclusion to arrive at is to hold, that if these nets or weirs are "a common nuisance" to the public right of fishing, they should be removed, but not otherwise. For all these reasons that we will declare Lord Monteagle has established his right to maintain the weirs numbered 1, 2, 3, and 5, under the 19th section of the 5th & 6th Vict., c. 106. And as to No. 3, the Durnish Weir, we will farther say, that our order shall not be held to prejudice any proceedings that may be taken by indictment, or

otherwise, on the ground that it is a "common nuisance" to the public right of fishing. If it is a "common nuisance," we think it should be removed; but there is no evidence before us to warrant us in coming to that conclusion. Our order will be to reverse the decision of the majority of the Fishery Commissioners, and declare that Lord Monteagle, the appellant, has established his title under the 19th section of the 5th & 6th Vict., c. 106, to No. 1 and 2, the Foynes Weirs; No. 3, the Durnish Weir; and No. 5, the Mount Trenchard Weir (which was abandoned at the hearing). And then to declare further that this order shall be without prejudice to, and not to affect any proceeding, by indictment or otherwise, to establish that the Durnish Weir is "a common nuisance."

FITZGERALD, J.—I only wish to add to what has fallen from my brother O'Brien as the judgment of the Court, that if the Fishery Commissioners had decided that Lord Monteagle was not in possession of that strip of land, I would have been very slow to interfere in reversing their decision, when I recollect that they have such superior means of judging. I do not think they did decide, or intended to decide that; and what they decided really was, that Lord Monteagle had not the occupation of the arable or pasture land.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM MONAHAN, O. J., CHRISTIAN, AND O'HAGAN, JJ.]

HEALY v. HEALY.—Jan. 16.

*Substitution of arbitrator within seven days after notice—Disagreement—C. L. P. Act, 1856, ss. 16, 17, 18.*

*A cause of action having been by consent referred to two arbitrators, with power to nominate an umpire, they, and the umpire nominated by them on the 21st August, adjourned the arbitration to the 29th August. On the 22nd August the arbitrator nominated by the defendant withdrew from the arbitration. On the 29th August the plaintiff, by notice in writing, called on the defendant within seven days to appoint a new arbitrator. On the 31st August the defendant's attorney received notice of an application to be made to a judge in Chamber to extend the time for making the award, and on the 12th September an order was obtained extending the time to the 20th October. On the 16th of September the plaintiff served the defendant with a notice that as the latter had failed to appoint an arbitrator by way of substitution; the former had appointed the arbitrator previously nominated by him to act as sole arbitrator, and on the 17th Oct. that arbitrator made his award in favour of the plaintiff. Upon cause shown by the defendant against making absolute the conditional order to confirm the award, the Court set aside the award.*

*Semble, that the refusal by one of the arbitrators to act, after having heard a portion of the case, constituted such a disagreement as devolved on the umpire the duty of making an award.*

THIS was a motion on the part of the defendant to show cause why the conditional order confirming the award made in this case should not be made absolute. The cause being ready for trial at the Summer Assizes, 1865, the plaintiff and defendant agreed to leave the settlement of it to arbitration, and a consent was signed by their attorneys respectively, referring the settlement of said case to Benjamin Purser, nominated by the plaintiff, and J. W. Pim, nominated by the defendant, with power to them to call in an umpire in case of disagreement, their award to be made in writing on or before the 2nd August, with power to said arbitrators to extend the time for making said award. This consent was made a rule of Court on the 22nd July. On the 26th July the arbitrators nominated James Marks to act as umpire, and the arbitrators and umpire entered on the arbitration, and from time to time adjourned the same by writing under their respective hands, their last adjournment bearing date the 21st of August, and adjourning the arbitration until the 29th August. On the 22nd August the defendant's arbitrator, J. W. Pim, wrote the following letter:—

"Dear Sir,—Since yesterday I have considered about the arbitration of Healy's, and have come to the conclusion of not again meeting, or having anything more to do in this case.

"Yours very truly,

"JOSEPH W. PIM."

In an affidavit made by Pim on the 4th September, he stated that he was induced to withdraw from the arbitration by the nature of the evidence adduced at both sides, and the difficulty arising out of the points of law connected therewith. On the 29th of August the plaintiff, by notice, called on the defendant within seven days to appoint an arbitrator in the place of J. W. Pim. On the 31st of August the plaintiff's attorney caused a notice to be served on the defendant's attorney of an application to a judge in Chamber to enlarge the time for making the award. On the 12th September the following order was made by O'Hagan, J., in Chamber:—"On motion, &c., it is ordered by the Right Hon. Judge O'Hagan that the time for making the award under the order of reference in this cause, bearing date the 22nd July last, be enlarged until the 20th October next, on the ground that Jos. W. Pim, one of the arbitrators in said order named, did at the time, and under the circumstances in said affidavit mentioned, decline to act further as such arbitrator." On the 15th September (the defendant not having appointed an arbitrator by way of substitution) the plaintiff, by writing under his hand, appointed Benjamin Purser to act as sole arbitrator, and on the 16th September served the defendant with notice of having done so. On the 17th October, Benjamin Purser, as sole arbitrator, made his award in favour of the plaintiff, and directed that the defendant should pay to the plaintiff his costs of the cause, reference, and award. The motion to discharge the conditional order confirming the award was made on the grounds

—1. That the order of reference and consent to refer were spent and expired before the plaintiff obtained the extension of the time from the Court. 2. That the seven days referred to in the notice served by the plaintiff on the defendant were not days within which the defendant could do any legal act, as at the time of serving the notice the time for making the award had expired, and that the plaintiff should have served the notice on the defendant after he had obtained an order enlarging the time. 3. That what occurred in the case was equivalent to a disagreement by the arbitrators, upon which the decision devolved on the umpire. 4. That the award as to costs was excessive, and beyond the power of the arbitrator.

Sidney, Q.C., and J. W. Harris for the defendant.

Chatterton, Q.C., and J. B. Murphy, for the plaintiff.

They cited *Browne v. Collyer* (20 L. J. N. S. Q. B. 426); *Ward v. Secretary-at-War* (32 L. J. N. S. Q. B. 53); *Cudliff v. Walters* (2 Moo. & Rob. 232); *In re Tunno and Bird* (5 B. & Ad. 488); *Russell on Arbitrators*, 2nd ed. pp. 231, 366; C. L. P. Act, 1856, ss. 16, 17, 18.

MONAHAN, C. J.—We have come to the conclusion that the award cannot stand. Assuming it most favourably for the plaintiff, and assuming that there was not a disagreement so as to authorize the umpire to act, the seven days' notice should have been served, and the party should have had seven days. The party serves the notice on the very last day when the authority expired. That day does not count. Two days elapse before the notice of motion is served. It is impossible to hold that the pending of the notice is sufficient to justify the proceedings. Therefore we are of opinion on that one point, even if the party had jurisdiction, that he was too rapid, and that there should have been seven days after the order for the extension of the time. It is unnecessary for us to go further, but it seems doubtful, to say the least of it, when one arbitrator, when he heard a portion of the case, refused to act, if that was not a disagreement, and if the time for the umpire to act had not then arrived. But it is unnecessary to give a decided opinion on any other portion of the case but the seven days' notice.

*Rule discharged.*

MEEHAN v. DUANE.—Jan.

[Reported by H. W. B. Mackay, Esq., Barrister-at-Law]

*Practice—Landlord and Tenant Law Amendment (Ireland) Act, 1860, s. 75—Meaning of the "foot of the summons and plaint."*

*The provision in the 23 & 24 Vict. c. 154, s. 75, that the notice addressed to the defendant (in ejectment for overholding) calling upon him to give security for costs, may be at the foot of the writ of summons and plaint, is not sufficiently complied with by pinning a piece of paper containing the notice to the end thereof.*

*Carson, in this case, which was an action of ejectment for overholding, moved on behalf of the plaintiff*

under the 75th section of 23 & 24 Vict. c. 154, that the defendant should within six days enter into a recognizance conditioned to pay the costs, damages, and mesne profits which should be recovered in the action.

*Lynch*, for the defendant, objected that the terms of the 75th section had not been complied with, as the notice was on a separate piece of paper, which had been pinned to the summons and plaint. The notice is not at the foot of the writ of summons and plaint within the meaning of the Act. The construction put upon 1 Wm. 4 and 7 Vict. c. 26, s. 75, shows the meaning of the word.

THE COURT refused the motion with costs.

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE BARONS FITZGERALD AND DEASY.]

WELSH v. COOKE AND OTHERS.—Nov. 13, 1865.

*Assault—Replication ambiguous—Right of burial—23 & 24 Vict. c. 32.*

*Plaintiff was a churchwarden. Defendant sought to bury a corpse in part of a churchyard where he was not authorized. Plaintiff quietly tried to prevent him, whereupon defendant assaulted him. Plaintiff replied to defendant's plea, alleging the above facts in extenso, and this replication was (after argument on a motion to have it set aside) ordered, on consent, to be amended, on the grounds that it did not sufficiently appear on the face of the replication whether plaintiff relied on his character of churchwarden for preventing defendant from burying the corpse where he was not authorized, or on authority given to him so to do by the incumbent.*

THE summons and plaint was for an assault. Plaintiff was churchwarden of the parish of Clontaskert in the County of Galway. Defendant wished to bury a corpse in part of the graveyard where he had no right, and plaintiff quietly sought to prevent him, whereupon defendant assaulted him.

*M. Mahon*, for defendant, moved to set aside plaintiff's third replication to defendant's second defence (one of son assault demesne). The replication, so far as need be stated here, was as follows:—"Plaintiff says that before and at the said times when and so forth he the plaintiff was a duly elected churchwarden of the parish of Clontaskert in the County of Galway, within which parish plaintiff avers there was a certain ancient parish burial-ground under the control and management of the incumbent of said parish, aided by the plaintiff as such churchwarden, and that just before and at the said times when and so forth he, the said George Cooke, assisted by the other defendants, was unlawfully, violently, indecently, and in an irreverent and unbecoming manner, endeavouring to bury a corpse in a part of said churchyard, in which he was not authorized so to do by the incumbent of said

parish, or by any other person entitled to give him such authority, and for the purpose of so burying said corpse in said part of said burying ground, he, the said George Cooke, so aided as aforesaid in a violent, indecent, and irreverent manner, commenced to open a grave in said part of said churchyard in which he was not authorised to open same, and in so doing irreverently and wrongfully disturbed the place of interment, and exposed a portion of the grave of a certain other person, who was theretofore interred, whereupon plaintiff so being churchwarden, and in the discharge of his duty as such churchwarden warned and required defendants to desist from so digging said grave, and from such violent, indecent, and irreverent conduct therein, and plaintiff required said George Cooke to dig said grave in another portion of said churchyard where defendant had been so authorised to bury said corpse, but which said defendant refused to do, but persisted in digging said grave, whereupon, and for the purpose of so preventing defendant from so digging said grave, and so disturbing said other grave as aforesaid, plaintiff did then peaceably and gently, and as he lawfully might for the cause aforesaid, lay hands on the said George Cooke, doing no more than was necessary for such purpose, whereupon said defendant, with force and violence, and in an indecent, riotous, turbulent, and irreverent manner committed the alleged trespasses, and in so doing did greatly violate and disturb the decency, reverence, and decorum, due and appertaining to such burying ground as aforesaid."

Counsel contended that as the freehold of a graveyard is in the incumbent, the plaintiff in this replication should aver that the alleged acts were done by plaintiff under the authority of the incumbent, and not as churchwarden. Counsel also objected to the word "indecently," and insisted that the particular acts alleged to have been indecent should have been set out. He then contended that the words "exposed a grave" were ambiguous, and that you cannot allege the committal of an indictable offence in a replication as you would not in a summons and plaint.

*Sidney, Q.C. contra*, (with him *Blake*) contended that the churchwarden has rights in him independent of the incumbent with regard to burials. The soil of the graveyard is in the incumbent; he is to protect the soil, but the duty of the churchwarden is to see that nothing be done irregularly or indecently in the churchyard. The churchwarden then, finding defendant violating the law in two respects, quietly laid hands on him to remove him. [*Fitzgerald, B.*—There is an ambiguity as to whether you mean to rely on the authority given by the incumbent, or in your character of churchwarden.] I mean to rely on both. [*Fitzgerald, B.*—You may then be depriving defendant of an opportunity of demurring to your replication.]

After some further discussion, it was agreed that the replication be amended.



[BEFORE THE LORD CHIEF BARON AND FITZGERALD AND DEASY, BB.]

MOLLOY, APPELLANT; CUNNINGHAM, RESPONDENT.  
Nov. 22, 1865.

*Licence to sell beer, &c.—Conviction quashed—17 & 18 Vict. c. 89.*

*Where A. got a licence to sell beer, &c. in premises described as "4 & 5 Gregg's-lane," and wishing to enlarge his establishment, took down the partition wall, and added another house to the above, without taking out a fresh licence—Held, on appeal from a conviction by magistrate for having beer on sale in his house, that the conviction must be quashed.*

THIS was an appeal from the decision of Mr. Stronge, divisional magistrate. The appellant had taken out a licence for premises described as "4 & 5 Gregg's-lane," and wishing after some time to enlarge his business, he took down the partition wall, and added the next house, "25 Sackville-street," to his original establishment without getting a new licence. The respondent, a police constable, summoned him for having beer, &c. for sale in the house 25 Sackville-street, an unlicensed house. From this conviction there was an appeal, and a special case stated by Mr. Stronge for the opinion of this Court.

*Sidney, Q.C.* (owing to the indisposition of \* *Orran*, who, with *Butt, Q.C.*, was with him) for the appellant.—The summons was issued under 17 & 18 Vict. c. 89. Molloy got a licence from the Recorder under 3 & 4 W. 4, c. 68, to sell upon the premises 4 & 5 Gregg's-lane. The duties of the licensee are set out by 4 & 5 W. 4, c. 51, 6 Geo. 4, c. 81, s. 10. The appellant made one large house of the premises 4 and 5 Gregg's-lane and 25 Sackville-street, and there is nothing to prevent a man from altering or re-modelling his licensed premises so long as he keeps to the same premises. [*Deasy, B.*—What is the use of a notice specifying the premises if you may add to them without getting a new licence?] In practice it is found that very many houses have been added to, and the licence remains the same as at first notwithstanding the original notice. [*Pigot, C.B.*—Suppose the licensee annexes a brothel?] Then he comes under the provisions of 17 & 18 Vict. c. 89, s. 11, and must show that his character and premises are good. Can it be contended that a man is to be so circumscribed with regard to his property that he cannot enlarge it.—18 & 19 Vict. c. 92. [*Fitzgerald, B.*—Take this test. Was the licence which you got for one or for two houses? For you say the licence is available for more houses joined to the original one.] That is the very point on which we want a decision in this case. Another question in the case is this—If we have not power to throw in the adjoining premises, then the offence we are charged with is not an offence within the 17 & 18 Vict. c. 89, but comes under 6 Geo. 4, c. 81, s. 26, and we should have been indicted under that Act. 17 & 18 Vict. c. 89, is directed against those who have no licence at all.—

\* It being the rule that the junior, in cases like the present, should begin.

*Cunningham v. Withers* and *Quinn v. Murray*, both in 8 Ir. Jur. N. S. 382. 27 & 28 Vict. c. 36, was passed in consequence of the decision in *Cunningham v. Withers*.—*Queen v. Guardians of Mallow Union* (12 Ir. C. L. R. 41); *Stephens v. Strangman* (1 Ir. Jur. 159); *Duggan v. Ahearne* (5 Ir. Jur. N. S. 398); *Cross v. Watts* (13 C. B. N. S. 239).

*Mills* (with him *Barry, Q.C.*) contra, in support of the conviction.—We say the licensee must enlarge his premises, if so minded, upon premises referred to in his licence; for instance, if he had a yard attached to 4 & 5 Gregg's-lane, however large, he might build on it to any extent without taking out a fresh licence.—55 Geo. 3, c. 19, ss. 6, 10, 29, 30, 31; 6 Geo. 4, c. 81; 3 & 4 W. 4, c. 68, ss. 2, 4, 10; 17 & 18 Vict. c. 89, ss. 4, 9, 12; 23 & 24 Vict. c. 107, s. 13; 24 & 25 Vict. c. 91. In the last two Acts we have the analogy of the wine licences.

*Barry, Q.C.* on same side.—The notice to be served by persons seeking for a licence must contain a description of the situation of the premises for which the person seeks a licence.—3 & 4 W. 4, c. 68, ss. 1, 2, 4. Can it be said that if Molloy had a public house in Balbriggan unlicensed, he might rely on his having 4 & 5 Gregg's-lane in Dublin licensed. The argument of the other side, if pushed, goes to this extent. "Duly licensed" has respect to the particular place licensed—27 & 28 Vict. c. 35, s. 7. With regard to the alleged defect in the summons, this is not a certiorari; if it were, we should stand or fall by the record, but this is a case stated by the magistrate, and no question was raised below as to the sufficiency of the summons. On the true construction of a case stated, I contend that the Court is limited to the questions raised below.—23 & 24 Vict. c. 114.

*Butt, Q.C.*, in reply.—Would it be an offence if Molloy lodged himself in 25 Sackville-street, and stored away spirits, &c., then transferring it, when required for sale, to 4 & 5 Gregg's-lane. [*Pigot, C.B.*—That would not be "keeping spirits for sale."] I contend that it would.

*Cur. adv. vult.*

Jan. 15, 1866.—The unanimous judgment of the Court was now given by

*Pigot, C.B.*—It is not necessary to refer to the facts in this case. We are all of opinion that our decision must be governed by *Cunningham v. Withers* (8 Ir. Jur. N. S. 382), and therefore that the conviction must be quashed, each party to pay his own costs.

[BEFORE THE FULL COURT.]

JONES v. HASLAM.—Jan. 15, 1866.

*Security for costs—Residence of plaintiff—Warranty of a horse.*

*On an application by defendant that plaintiff, a horse-dealer, having no fixed place of residence in Ireland, but merely temporary lodgings in Dublin, be obliged to give security for costs in an action on a*



*warranty of a horse—Held, that the motion must be refused, but without costs.*

THIS was an action brought by plaintiff, a horse-dealer, having no fixed residence in Ireland, but only temporary lodgings in Anne-street, in the city of Dublin, against defendant, on an alleged warranty given by defendant on the sale of a horse by defendant to plaintiff.

*Sidney, Q.C.*, (with him *Coates*) applied that plaintiff be obliged to give security for the costs of the action. The motion was grounded on an affidavit by defendant, setting out that plaintiff resides for the most part in England, out of the jurisdiction of this Court, having merely temporary lodgings at No. 12 South Anne-street in the city of Dublin.

*Seeds contra*, for plaintiff, relied on *Allain v. Chambers* (8 Ir. C. L. R. Ap. 7) *Redmond v. Mooney* (14 Ir. C. L. R. Ap. 17; a.c. 7 Ir. Jur. n.s. Q. B. 277); *Sisson v. Cooper* (4 Ir. C. L. R. 401, C.P.) When the summons and plaint was issued, plaintiff was within the jurisdiction of the Court. In the summons and plaint plaintiff was described as having a residence at Drumcondra, which was afterwards found to be a mistake, as he was only on a visit to a friend there.

*Coates* in reply.—The false address given to plaintiff in the plaint vitiates the writ.—C. L. P. Act, sect. 9. *Curry v. Johnson* (2 Ir. C. L. R. 641).

*Pigor, C.B.*—The plaintiff in this case is a dealer in horses. He is obliged to go to England on business. It is a mistake to imagine that a person having a residence elsewhere, and coming to this country to maintain an action, should be liable to give security for costs. *Tambisco v. Pacifico* (7 Exch. 816) establishes the contrary. Plaintiff here was in the country when the writ was issued, and living at Drumcondra; he left the country three days after, which defendant was aware of. Plaintiff could give no other residence than what he has given in the summons and plaint, and though he has now only lodgings which he may give up at any time, yet we cannot grant this application. As to the costs, plaintiff has misled defendant, and obliged him to bring this motion; plaintiff's attorney knew that defendant was under the impression that plaintiff was not in this country, he ought then in fairness to have apprized defendant of his mistake. Therefore the motion must be refused, but without costs.

[BEFORE THE LORD CHIEF BARON AND FITZGERALD AND DEASY, BB.]

BARRY v. THE MIDLAND GREAT WESTERN RAILWAY COMPANY OF IRELAND.—Jan. 23.

*New trial motion—Meaning in company's bye-law of words, "place where train originally started from."*

*A was a third class passenger by the train from Crossdoney, on the Cavan line, to Dublin. On the arrival of the train at Mullingar, it joined a train*

*which came from Ballinasloe, which was proved to be the main train. Plaintiff refused to give up his ticket on the arrival of the train in Dublin, whereupon the fare from Ballinasloe was demanded from him in accordance with the bye-law—"Every passenger not producing his ticket will be required to pay the fare from the place whence the train originally started." On plaintiff's refusal to pay the fare or give his ticket, he was brought to the police office. He then brought an action for false imprisonment against the company. The material issue at the trial was, where did the train start from? and the jury, by the direction of the judge, found that it started from Ballinasloe. Held, on motion for a new trial in pursuance of leave reserved on the grounds of misdirection, that the conditional order must be discharged, and that the judge was right in so directing the jury.*

THIS was an action for false imprisonment. Plaintiff was a third class passenger by the train from Crossdoney, on the Cavan line, to Dublin. When this train reached Mullingar it joined a train that started from Ballinasloe, the composite train then coming on to Dublin. On the arrival of the train in Dublin, plaintiff, though having his ticket, refused to give it up when demanded. Thereupon 7s. 7d., the third class fare from Ballinasloe, was demanded from him, and refused. It was stated in evidence at the trial that the fare from Cavan, third class, was 7s. 1d., from Crossdoney, 6s. 7d., and from Mullingar, 4s. 2d. The company demanded the above fare of 7s. 7d. in accordance with one of their bye-laws, which was as follows:—"Every passenger not producing or delivering up his ticket when required so to do by the servant of the company duly authorised to collect tickets, will be required to pay the fare from the place whence the train originally started, or in default of payment thereof shall forfeit and pay a sum not exceeding 40s. On plaintiff's refusal to give up his ticket, or to pay the 7s. 7d., he was arrested and brought to the police office, and this was the imprisonment complained of. The case was tried before the Lord Chief Baron at the sittings after Michaelmas Term, 1865. The only issue material to the present motion at the trial was, "Did the train originally start from Ballinasloe?" and his Lordship directed the jury to find that it did, and reserved leave to plaintiff to move to have the verdict entered for plaintiff or for a new trial, on the ground of misdirection.

*Carleton, Q.C.*, (with him *Exham, Q.C.*) for defendants, now showed cause against the conditional order, obtained in pursuance of the leave reserved. The short question in the case is, what is the meaning of the words "the train" in the bye-law—"the place where the train originally started from." This is a case of first impression, and the meaning of the words cannot be arrived at by any authority, but we contend that the words mean the train which arrives at the terminus at which the passenger leaves the train. It was proved at the trial that there were two trains which met at Mullingar, which then united and came on thence to Dublin. We say that "the train" started originally from Ballinasloe—plaintiff, that it originally started from Cavan, or else from Mullingar, the junc-

tion. Counsel concluded by citing the case of *Dear den, appellant; Townsend, respondent* (1 Law R., Q. B., 10), and referring to 8 & 9 Vict. c. 26, ss. 103, 111, the Railway Clauses Consolidation Act.

*Heron, Q.C.*, (with him *M'Kenna*) for plaintiff, in support of the conditional order.—The tickets are collected at Multifarnam, just before the train arrives at Mullingar, so that plaintiff could not have come farther than from Mullingar without a ticket; therefore the company could not be defrauded of any greater fare than that from Mullingar to Dublin. Defendants might as reasonably maintain that the train originally started from Galway, for part of it did come from that. The only reasonable construction that can be applied to the bye-law is to hold that the train originally started from Mullingar, unless you hold that Cavan was its original point of departure.

*M'Kenna* followed on the same side.

The Court did not call on *Exham, Q.C.*, to reply but intimated that they would commit their judgment to writing.

Jan. 25.—*Picor, C.B.*—We are all of opinion that, under the bye-law referred to, Ballinasloe was "the place where the train originally started from." At the trial the following facts appeared in evidence without contradiction. [His Lordship here referred to the evidence, and then proceeded thus].—At Mullingar the train became a composite one, and so proceeded to Dublin. At Mullingar the Cavan carriages returned by the Cavan line, and the other carriages came on to Dublin. A train leaves Galway at 4, and the Cavan and Sligo carriages join it at Mullingar. According to the practice of the company, the tickets are examined at Castletown and Multifarnam. It cannot be denied that the words in the bye-law, "the place whence the train originally started," may be in some cases very embarrassing, when a number of trains meet and unite before coming to the station, where a passenger refuses to produce his ticket. In the case of the Midland Railway Co. in England, it would be very difficult to settle what was "the place whence the train originally started." But there can be but little difficulty in the present case. The train in question was known as the "4 o'clock train from Galway," and the Cavan train came no further than Mullingar; therefore it could not have been the Cavan train. The evidence shows that the train from Galway was the main line, the others merely branches, and the circumstances which occurred on the night in question prove this; for the Cavan train depended on the Galway, and owing to the accident which occurred, the Cavan passengers were delayed for two hours at Mullingar to wait for the Galway train. It was urged on us by plaintiff's counsel that as the intention of the statute and the bye-law was to prevent fraud on the company, and as the tickets were examined just before the train arrived at Mullingar, we ought to hold that Mullingar was "the place whence the train originally started," and that thus there would be no possibility of the company being defrauded. But to hold this to be the construction would be to treat the train as starting from different places, according as the ticket of each passenger was examined, and thus there might be several different starting points,

which would be absurd. The argument put forward by defendant's counsel is a reasonable one. A number of passengers arrive in Dublin, and the company have no means of ascertaining where each passenger started from in the event of his refusing to give up his ticket. The passengers may have changed their carriages, and the guard cannot possibly tell where each has come from. We must give a reasonable construction to the bye-law, and we think that "the train" was that which did the service of "the 4 o'clock train from Galway" to Dublin. It follows, therefore, that the cause shown must be allowed with costs.

[BEFORE FITZGERALD, HUGHES, AND DEASY, BB.]

NOONAN v. HIGGINS.—Jan. 25.

*Practice*—Irregularity of notice—Waiver of objection  
174th General Order.

*Defendant's attorney served a notice on a plaintiff's attorney that counsel for defendants would show cause why a conditional order should not be made absolute, "which motion," the notice went on to state, "would be grounded on the said order, the award therein mentioned," &c. without stating any grounds of objection. After the receipt of this notice, plaintiffs filed two affidavits, and the matter came on in Chamber before two judges on two different occasions, when no objection was taken by plaintiff to the notice. Plaintiff now objected to it on the grounds that it does not specify the grounds of objection to the award which was made. Held, that this was a valid objection, and that the subsequent proceedings of plaintiff had not the effect of waiving the objection.*

THE summons and plaint was for £85 on foot of a promissory note made by defendant to plaintiff. The matter was afterwards, by consent, referred to arbitration, and an award was made that defendant should pay plaintiff £88 12s. 2d., which was the amount which the arbitrators found to be due by defendant to plaintiff, and the costs incurred. A conditional order was obtained by plaintiff on June 21st, 1865, that the said award should be confirmed unless cause was shown to the contrary, whereupon, on the 29th June defendant's attorney sent a notice to plaintiff's attorney that defendant's counsel would show cause, "which motion," the notice went on to state, "will be grounded on the said order, the award therein mentioned," &c. without specifying the grounds upon which the award was objected to. On the 3rd July plaintiff filed two affidavits, in neither of which was there any objection taken to the notice of June 29. The matter came before Christian, J., in Chamber, and subsequently before O'Brien, J., in Chamber, no objection being taken to the notice on either occasion.

*J. S. Green* for plaintiff, now objected to the notice of June 29, on the ground that the notice did not specify the objections to the award therein alleged to have been made, as required by the 174th General Order of 1864.

*Curtis, contra*, for defendant.—The irregularity in the notice is cured by plaintiff's subsequent proceedings, and plaintiff must be held to have waived his

objection by not at once raising it before taking any further step in the case.—*Cohn v. Davis* (1 H. Bl. 80); *Rogers v. Mapleback* (1 H. Bl. 107); *Brown v. Wildbore* (1 M. & Gr. 276); *De Burgh v. Thomson* (7 Ir. C. L. R. 32); *Cusack v. McCabe* (6 Ir. C. L. R. 383).

*Green* in reply.—What we have done does not amount to a waiver. We made the objection as soon as we could.

PER CURIAM.—The objection must be allowed.

[BEFORE THE FULL COURT.]

MAGRATH v. FLETCHER.—Jan. 26.

*Practice*—Motion to extend time for going to trial.

Plaintiff applied to the Court that they should extend the time for his going to trial to the next Michaelmas after-sittings, on the ground that a material witness was in America, and would not be here till then. Held, that the application must be refused with costs, plaintiff not giving any reason why the witness should not be here before the time stated.

*Monahan*, for plaintiff, applied to the Court that the time for plaintiff's going to trial should be extended to the sittings after next Michaelmas Term.—C. L. P. Act, s. 106. The action is on a bill of exchange for £55. Plaintiff is indorsee—defendant drawer and indorser. A material witness, George Magrath, plaintiff's son, is absent in America, but plaintiff has made an affidavit stating he will be here by next Michaelmas after-sittings? The plaint was issued Dec. 13, 1864, and the defence, imputing forgery to plaintiff, and denying that defendant got notice of the dishonour of the bill, was filed Jan. 13, 1865. [*Fitzgerald*, B.—Why did you not go to trial last Hilary after-sittings?] We could not; for George Magrath expected to go very soon to America, and we did not know that we would have time to go to trial before he left. He actually went in March, 1865.—*Jordan v. Martin* (8 Taunt. 104); *Chitty Archbold Prac.* 1435.

*Palles*, Q.C., (with him *Seeds*) contra, for defendant. —Plaintiff's affidavit is not correct in asserting that George Magrath went to America in March, for he did not go until July—thus plaintiff had six different opportunities of going to trial, and did not avail himself of any of them, and we ought not to have the action hanging over our heads any longer.—*Baldwin v. Padwick* (19 Law J., Q. B., 15); *Dowell v. Hussey* (6 Ir. C. L. R. 230).

*Seeds* on same side.—Plaintiff must show good cause why he has not already gone to trial.—*Gillman v. Connor* (1 Jebb & Sym. 673); *Powerscourt v. Brestin* (4 Ir. L. 283); *Wallace v. McClelland* (3 Ir. L. 199).

*Monahan* in reply.—It was a clerical mistake in the affidavit that March was put for July. [*Pigot*, C.B.—Would a shorter time, say Easter or Trinity after-sittings, be sufficient for you?] No; we could not undertake to go to trial before next Michaelmas after-sittings.

*Pigot*, C.B.—Then we cannot extend the time to such a distant date, and we must refuse this application. Plaintiff does not show any reason why George Magrath is not here, and should not be here before Michaelmas after-sittings.

*Motion refused with costs.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE PATRICK GREHAN.

*Duty of manager of bankrupt's estate*—Equitable lien on funds produced by sale of a portion of bankrupt's estate upon which the manager raised money—*The Factors' Act*.

Where in a composition after bankruptcy, a manager has been appointed by the resolution of the creditors, with a definite duty in the management of a grazing and farming estate, Held, that an auctioneer receiving from said manager the note mentioned in the case, and knowing the fact that he was then acting as such manager, had not thereby any specific lien on the property brought to sale by him in violation of the manager's duty.

Held also, that such letter did not give an equitable title against the assignees, and that neither under the *Factors' Act* nor in any other way could he make title to the proceeds of the sale of all the bankrupt stock taken possession of under color of the authority given him by the letter of the manager.

This case came before the Court upon charge and discharge. Mr. Ganley auctioneer filed a charge claiming £2510 advanced by him to Mr. Walsh manager of the estate to which the assignees filed a discharge.

*Coffey*, Q.C., and *Kernan*, Q.C., were for the assignees.

*Serjeant Armstrong*, Q.C., and *Sidney*, Q.C., were for Mr. Ganley.

*P. Martin* and *M'Dermott* were for the unsecured debtor. Cases cited,—As to equitable lien, *Re Ferrall* (10 Ir. Chan. Rep. 304); *Barrington v. Evans* (3 Young & Collier, 384); *Hackley v. Bantock* (1 Russell, 141); *Pinkett v. Wright* (2 Hare, 120). As to power of manager—*Hawthorne v. Bourne* (7 Meeson & Welsby, 595).

LYNCH, J.—The charge filed by Mr. Ganley in this matter claims a lien or specific charge on the funds produced by the sale of certain cattle advertised for sale by Mr. Ganley at Castlereagh, but afterwards sold by order of this Court, and the produce of which sale is now lodged in Court, subject to any right thereto, which Mr. Ganley may establish. It appears that Mr. Grehan was adjudged a bankrupt on the 28th October, 1864; that subsequently he called a meeting of his creditors pursuant to the 149th section, offering to them a composition, and that afterwards, on the 13th January, 1865, the offer of composition was finally

adopted and confirmed. By that arrangement all the estate and effects of the bankrupt remained vested in the official and trade assignees, and same were to be managed by Mr. Walsh under the superintendence of the trade assignee, and Mr. Walsh undertook on his part to provide a sum not exceeding £8,000 for the purpose of paying present and future outgoings, and to procure the necessary stock for the efficient working of said estate in addition to that already upon same, the said Mr. Walsh being declared a first creditor on the said estate and effects, subject to the mortgages already thereon, for the sum so to be advanced by him, with interest at the current bank rate of the day, and with such remuneration for his services in management of the estate as the trade and official assignees might fix upon, the said Mr. Walsh undertaking that at least the existing amount of assets available for the simple contract creditors, say £5,000, should be available for the unsecured creditors at any future time, less by payments of the dividends thereout, and by loss (if any) by extraordinary casualty to cattle, with permission to Mr. Walsh at any time to apply to the Court to discontinue the arrangement, and wind up the estate. By the arrangement it was also provided that a dividend of 3s. 4d. in the pound should be paid to the unsecured creditors on the 1st of August and 1st of February in each year, and the first payment was to issue on the 1st August last. This composition or arrangement was the act of the creditors themselves by virtue of the power vested in them by the statute, and the Court merely affirmed the act of the creditors. This arrangement has been complained of by Mr. Walsh by reason of its complexity, and has been attacked by Mr. Ganly, as was said, for its unreasonable provisions; however, these statements have, I think, no force now. Mr. Walsh should have looked into these matters before he deliberately entered into the agreement, and having express power to apply to the Court to discontinue the arrangement, he never took any such step, and as regards Mr. Ganly, he was present at the meetings held for carrying into effect this arrangement, and came expressly to recommend Mr. Walsh to the creditors. The extent of Mr. Ganly's knowledge of the provisions of the arrangement is in some doubt, and the testimony of Mr. Ganly is in conflict with that of Mr. Grehan, as to some acts of Mr. Ganly bringing accurate knowledge of the particulars of the arrangement home to him. Of course I do not for one instant question the veracity of either of these gentlemen. I am perfectly satisfied that each intended honourably and truthfully to depose according to his knowledge, and it is to me a satisfaction to feel that I am not bound even to balance or weigh the grounds of their memories, and the disturbing elements in their minds, as to the past transactions, so as to say on which evidence I will act; for taking merely Mr. Ganly's own evidence, I have established his knowledge of the character in which Mr. Walsh acted, namely, that he acted under the arrangement confirmed by this Court. Now, in my judgment, this arrangement, though complex, (and perhaps imprudent for the creditors to have adopted,) is perfectly intelligible. Mr. Grehan's estate was a farming and grazing estate, heavily mortgaged; the creditors were led to believe that the real estate was

in value considerably above its mortgage liabilities, and there was in possession stock and other assets amounting to in or about, as calculated, £5,000. It was then proposed to carry on the farming and grazing operations, money being advanced to enable the lands to be fully stocked, and the £5,000 there, as estimated, was always to remain useable for the purpose of discharging the debts due to the unsecured creditors. The primary intent manifest on the face of this arrangement was to continue the farming and grazing operations in full effect, and it was plainly palpable and knowingly in violation of his duty as manager that Mr. Walsh proceeded to make a clean sweep of all the stock on the lands. Indeed Mr. Walsh plainly confessed the purpose he had in contravention of his duty as manager. Mr. Ganly's rights are claimed to arise out of dealings with him by Mr. Walsh, which it is alleged created a lien or equitable title against the assets. The dealings were these:—On the 28th June last, Mr. Walsh, as manager of this estate, called on Mr. Ganly, and stating to him that he intended to hold a large auction of the stock under his management in August, asked for the loan of a sum then required by Mr. Walsh to meet pressing demands, and he asked for Mr. Ganly's note or bill for £2,500, to be applied by him in making payments required by him in working the estate; and he then promised that Mr. Ganly should hold the auction, and was to have the security of the stock which were on the lands, and could, out of the proceeds of the auction, retain a sum sufficient to discharge his liability on the bill. That bargain was carried out, by Mr. Ganly giving his promissory note for £2,500, payable on the 7th September, which note on the face of it, states that it was on account of the auction at Mount Plunkett. On that occasion Mr. Walsh handed to Mr. Ganly, as embodying the terms of the agreement between them, the following note:—"Dear Sir—When you hold the auction of stock at Mount Plunkett in August next, you can deduct from the proceeds the sum of £2,500 in discharge of your promissory note for that amount due on the 7th of September at the Hibernian Bank, Tullamore. Yours truly—WALTER H. WALSH.—To Messrs. Ganly and Parker." Now, I have here the terms of the agreement put into writing at the time between the parties, and showing the terms on which the advance was made. It is first argued that this agreement *per se* created a legal lien, or if not, was an equitable lien on the then existing stock; but in my mind no lien on the stock in the sense argued was ever created by this letter or by the agreement, nor was it ever intended that such should be. The dealing arose only out of the circumstances of the trade between the two gentlemen. Mr. Ganly was to be employed as auctioneer in the way of his trade, and Mr. Walsh, quite consistently with the proper discharge of his duty as manager, might have had a large auction of cattle at the end of the season; and according to ordinary trade operations, Mr. Ganly lent his name to raise funds to be discharged out of the auction, which was guaranteed to him. Mr. Ganly still had the confidence in Mr. Walsh that he formerly expressed to the creditors to induce them to adopt this arrangement, and he was content to take the assurance of his being the party to realise the assets by

ale, and so to have a power of retaining sufficient funds to meet the liability to fall due in September. It seems to me that it is straining the terms of this agreement to a purpose never intended to seek out of *it per se* to create a case of lien or specific charge. The terms stated by parol "as security," and "the advances being made on the faith of the cattle being there," are used popularly to express the intention of the parties. The advance was on the faith of Mr. Walsh's having in course of duty large sales to make, and on the faith that he would employ Mr. Ganly in making these sales, and on the faith that as a natural consequence therefrom Mr. Ganly would be put in funds to meet the happening of the liability then undertaken by him. Regarded as a claim of lien or specific charge then created, it seems to me to fail in every view suggested. Mr. Walsh had no power as manager to create any such specific lien. Mr. Ganly dealt with him knowing his capacity as being merely in management, and he knew that he should act under the superintendence of the trade assignee. The question put by Mr. Ganly to Mr. Walsh showed his full knowledge of his capacity and his duty; and the act which it now insisted was done—namely, specifically to bind the assets with this advance—would plainly be in violation of Mr. Walsh's duty, charging these assets with this liability in order to extricate his relative from the liability which fell upon him. The Factor's Act, and the more general Act of Victoria, seem to me to have no application to this case, Mr. Walsh was not any general agent to sell; he was an agent to manage, to which management certain operations of sales and purchases necessarily attached; but his powers were limited and confined, to the knowledge of Mr. Ganly—to selling and buying in the proper course of management. Then as a lien it should fail for not designating the subject-matter charged. It is hardly contended that this agreement bound all the cattle on the lands, and that any sale afterwards was a fraud on Mr. Ganly. Then what did it operate on immediately? Mr. Sidney has very ingeniously constructed a charge, to arise when the cattle were culled out for sale, and that when so appropriated the lien arose, and Mr. Sidney cited a great number of authorities to support this proposition. Now, I will not go through these authorities, because, in my judgment, the argument fails, on the ground of not having the basis of fact to support it. The agreement as little designates a future as a present subject-matter, and it is quite as definite as to the one, as to the other. It is clear enough, I think, in its plain meaning, a promise to give the future auction, and a right of retainer out of the assets; but it is equally incapable of supporting a future lien as a present one, and besides, Mr. Sidney's view would bring the validity of the future act, the assumed perfection of the lien, into consideration as regards this claim. Therefore, I think on plain grounds, as a lien, this claim fails; and indeed the short and pointed argument of Mr. M'Dermot put this part of the case in a most forcible, and, I think, conclusive point of view. Now I proceed shortly to consider the subsequent acts done, to see if Mr. Ganly has any claim arising out of his agreement by means of the future acts—now this may be regarded not

as lien, but as a contract to hold an auction, made by Mr. Walsh in the course of possible duty as manager—an advance on the foot of that contract by Mr. Ganly—and the property afterwards handed over to him to be disposed of, he having secured to him a right of set-off in respect of the produce of the sale. Were Mr. Ganly a stranger to all the matters—did he deal with Mr. Walsh in his apparent ownership as the real owner, and advance his money to him as such, and get from him afterwards this stock to sell,—the case would present itself to me in a very different light from that in which I now view it; and understanding this as the view in which the case was first presented, I must shortly state the evidence as to the dealing between Mr. Ganly and Mr. Walsh. In the first place Mr. Ganly was not a stranger; he knew of Grehan's bankruptcy, he knew of the arrangement, and he knew that Mr. Walsh was only the manager of this property, carrying on the grazing operations. He necessarily expected there should be large sales, and I have already stated my view of the transaction between him and Mr. Walsh, evidenced by the note then given and the letter of June. That was an undertaking that might possibly be carried out in pursuance of fair management, and therefore Mr. Ganly may have then not been cognizant of any intention in Walsh to act in violation of his duty of management. But, in my judgment, he got no title then to the property against the title of the assignees. The subsequent acts are, in my opinion, incapable of being regarded as creating a title in Mr. Ganly. He, it appears, early in July, wrote to Mr. Walsh, and got letters from him about the expected and intended auction. These letters show the expectation of the auction being held with due notice given, and regularly advertised, and until the message was left at Mr. Ganly's, and Mr. Ganly visited Mr. Walsh at Mount Plunkett, I see no grounds for saying that Mr. Ganly knew of Mr. Walsh's intention to act in violation of his duty of management; but until that day, and until the action of the Court stopped the sale, I am of opinion that Mr. Ganly must have known of the determination of Mr. Walsh to act in violation of his duty as manager, and in fraud of the trust undertaken by him. Mr. Ganly, it appears, visited Mount Plunkett on Saturday. On that occasion Mr. Ganly very plainly saw the position of affairs. The proposition was then made to him to give him a bill of sale of the property to secure him for his advances. A list of the property had been made out and valued. Mr. Ganly refused to accept this property, and returned to Dublin to advise with his solicitor. On Monday Mr. Ganly proceeded again to Mount Plunkett to meet Mr. Walsh, but before starting he gave orders to have printed auction bills of the stock he intended to sell. Now at that time I see no authority given to Mr. Ganly to hold that auction, and this step was plainly an act of his own, on his own authority, to try and save himself in the desperate state in which he then found matters, and Mr. Ganly admits, in answer to Question 43, at his first examination, that the whole stock was included in that advertisement—a clear sweep made of all the cattle that no course of management could justify. Well, on his way to Mount Plunkett, at Athlone, Mr.

Ganly received a telegram; it appears Mr. Walsh was in Dublin on that Monday, and after Mr. Ganly left, sent this telegram, viz.:—"Please inform Mr. Pilkington, Mr. Magrath, and Mr. Murphy you are instructed to remove the stock for the present. Mrs. Walsh will please send the plate to the bank." Is this the authority to select cattle to be sold at the auction? It is plain notice that Mr. Walsh was violating his duty and surreptitiously making away with the property of the creditors, and Mr. Ganly plainly knew then that he was in danger, and he then, I think, without authority from Walsh, and in violation of Walsh's duty, proceeded at once to act on this message, and under colour of it to hold an auction. The message to him was "to remove the cattle for the present." I see nowhere any authority stated to hold the sale. Mr. Ganly being in this position, took very active steps. That very Monday evening late, the whole stock of all the farms are collected and driven off, to be sold at the fair of Castlereagh on Wednesday. A great deal of evidence was laid before me as to the practice of advertising, and the usage of sales, and a Court is often compelled to hear strange theories advanced as to the modes of proceedings, on certain theoretic versions of modes of managing very common transaction. It is in evidence as not an unwise proceeding, to bring off a mixed stock of young and old cattle, sheep, lambs, horses, &c., by night of Monday, to a distant fair, to advertise the sale while the cattle are on their way, and to sell them the next day jaded and tired by a long journey. This is said scientifically to be in due management; but, in my judgment, common sense is a safer guide than this science misapplied, and in every point of view I hold this attempted sale to have been marked with such haste, such carelessness as to ordinary helps by due advertisement, and such anxiety to force their immediate disposition, as must have arisen from a thorough knowledge that it was a race for possession of the proceeds, thereby gaining all the points of law that possession is supposed to confer. The sale, however, did not take place, and Mr. Ganly has now only the right he had on the Monday before the sale. If he had that right on Monday, I am wrong in the earlier part of my judgment. If he had only an inchoate or incomplete title, I do not think he could rely on these latter transactions as perfecting his title. And I think he got possession of the cattle, and attempted their disposition, with full knowledge that Mr. Walsh was violating his duty of management, and therefore, in my judgment, Mr. Ganly has no title to the fund now in Court. In giving this judgment I must be understood as casting no blame on Mr. Ganly. I regret that he was led into this dealing by his confidence in Mr. Walsh, and I greatly regret that I am unable to help him to a repayment, but of course he has still Mr. Walsh to look to, or perhaps even some further remedies; but I think I would be aiding unfairly to defeat the unsecured creditors, did I yield to any feeling for Mr. Ganly in this matter. Mr. Ganly honestly lent his money, thinking all was fair and in due course of trade, and he has been disappointed, as the other creditors are, by the manner in which things have been managed; but though I disallow the charge of Mr. Ganly, I think he had such fair grounds to

make it, arising out of the dealings of one acting in a responsible capacity under this Court, that I will not give costs against Mr. Ganly. The assignees are to have their costs in the matter.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

FLOOD'S ESTATE.—Nov. 28.

ROONEY, APPELLANT; SALAMAN, RESPONDENT.

*Landed Estates Court—General orders of—Extension of time for filing objections—Affidavit to register judgment as a mortgage—13 & 14 Vict. c. 29.*

*A., a judgment mortgagee low down upon the schedule of incumbrances, became aware, after the day for filing objections to said schedule in the Landed Estates Court had passed, that there were defects in the affidavit of S. to register his judgment as a mortgage, which mortgage was prior, in said schedule, to that of A., said defects being an omission in the said affidavit of the sixpence costs found by the jury as appearing on the record of the judgment, and also that two several streets wherein were premises which said judgment mortgage sought to affect, were alleged in said affidavit to be in the parish of St. Mary, wherein no such two streets did exist, though they did in that of St. Mark. The Judge, after the said day for filing objections had elapsed, ordered that A. nunc pro tunc be at liberty to file objections to said prior incumbrance, and he declared said premises to be well charged with such judgment mortgage of S. Held, that said order should be discharged, so far as it declared that A. be at liberty nunc pro tunc to file objections to said prior incumbrance vested in S.; and that the premises in said two streets, if same were to be found in said parish of St. Mary, were well charged with said judgment mortgage; and as to the omission of the sixpence in the said affidavit the Court would not disturb the said judgment mortgage so vested as aforesaid in S. inasmuch as the time for objecting thereto had passed. But the Court intimated that had the objection been taken within the proper time, it would have been a fatal one.*

This was an appeal from an order of Judge Dobbs. The appeal was taken by Elizabeth Rooney and Mary Avenal Rooney, spinsters, administratrices *de bonis non* of Henry Nugent Rooney, deceased, and unadministered by Frances Rooney, widow. The facts of the case are fully disclosed in the petition of appeal, of which the following is a summary:—

That petitioners (the appellants) were incumbrancers on the lands sold in this matter for the sum of £733 18s. 4d., besides interest and costs, in respect of a judgment recovered by the said Frances Rooney as administratrix of the personal estate and effects of

the said Henry Nugent Rooney against the owner in this matter, in or as of Easter Term, 1861, for the sum of £733 18s. 4d., debt, with £7 14s. 7d. for costs, and duly registered as a judgment mortgage against the lands and premises sold in this matter in the office for registering deeds in Ireland, on the 17th Aug. 1861. The said judgment mortgage appeared on the draft final schedule of incumbrances in this matter, as No. 19 in point of priority.

That Maurice Salaman filed his claim in this matter, claiming to be a creditor on the lands sold in this matter for the sum of £547 19s. besides interest and costs, on foot of a judgment obtained by said Salaman against the owner in this matter, in or as of Hilary Term, 1861, for the sum of £547 19s. for debt, besides costs, as therein mentioned, and purporting to be registered as a mortgage against the lands sold in this matter on the 7th February, 1861.

That the said alleged judgment mortgage of the said Maurice Salaman appeared in the draft final schedule in this matter as No. 15 in point of priority. That in addition to the said judgment mortgage of the said Maurice Salaman, seven other judgment mortgages appeared on the said draft final schedule in priority to the said judgment mortgage of petitioners. The petition of appeal then stated that petitioners were not aware that there were any defects in the registration of any of said judgment mortgages, or that same or any of them were invalid until after the time limited for lodging objection to said draft final schedule had expired. That the time for lodging objections to said draft final schedule expired on the 6th day of March, 1865; and on the 28th day of April, 1865, and immediately on the petitioners becoming aware that there were defects in the registration of some of said judgment mortgages, petitioners made an application to Judge Dobbs for liberty to file objections to such of said judgment mortgages as they might be advised, notwithstanding that the time limited for lodging objections to said draft final schedule had expired. That the said application of said petitioners was refused, but the learned Judge gave liberty to petitioners to serve notice on such of the owners of said judgment mortgages as they might be advised, apprising them that on the hearing of the final schedule they would be required to produce proof of the said judgment mortgages, and that same were duly registered so as to be a charge on the said lands.—That petitioners, in pursuance of such liberty, served such notice on the said Maurice Salaman. That said final schedule came on for hearing before the said learned Judge on the 26th of May, 1865. That petitioners, on the hearing of the final schedule, produced in proof of the said judgment mortgage a certified copy of the affidavit registering such judgment as a mortgage from the office for registering deeds. That petitioners then objected to the said incumbrance claimed by the said Maurice Salaman, and submitted that the affidavit filed by him for the purpose of registering his said judgment as a mortgage was insufficient to make the said judgment a charge upon any of the lands sold in this matter, because the said affidavit did not correctly state the amount of the debt, damages, costs, or monies recovered by said judgment, because by the said judgment the said Maurice

Salaman recovered the sum of £547 19s. with 6d. for his expenses and costs, as found by the jury, with the sum of £23 18s. 9d. for costs of increase, making together the sum of £571 18s. 3d., and the said affidavit stated the said Maurice Salaman recovered the said judgment for the sum of £547 19s. for debt, besides £23 18s. 9d. for costs. That petitioners further objected to said claim in particular as to part of the premises sold, as Lot No. 1 upon the first sale in the matter (there being two sales in the matter), and as to the premises sold as Lot No. 2 upon the said first sale, and as to part of the premises sold as Lot No. 5 (being the premises hereinafter mentioned comprised in the lease of 5th March, 1776), and as to the premises sold as Lot No. 7, being premises herein-after mentioned comprised in a certain lease of the year 1805, and as to the premises sold as Lot No. 1 upon the second sale, that the said affidavit filed by the said Maurice Salaman as aforesaid was insufficient to create a valid charge upon the said several premises, inasmuch as it omitted to set forth in what parishes the said several premises are situate, the same being respectively in the city of Dublin; and the petitioners further objected that as to the premises sold as Lot No. 3 (being the premises at Grangegorman), the same were situated in the county of Dublin, and the said affidavit omitted to state in what barony they were situated, and therefore that the said judgment was not a charge on the said premises; and the petitioners further objected as to the premises sold as Lot No. 6 (being the premises comprised in a lease of the 3rd May, 1784), that same were situate in the city of Dublin, but said affidavit omitted to state either the parish or city wherein the same were situate, and therefore that the said judgment was not a valid charge thereon. That petitioners tendered in evidence to support said several objections, an attested copy of the judgment in the cause of *Salaman v. Flood* (being the same judgment obtained by the said Maurice Salaman against the owner, in this matter as aforesaid), and an attested copy of the affidavit filed by the said Maurice Salaman as aforesaid in the Court of Common Pleas, for the purpose of registering such judgment as a mortgage. That thereupon Judge Dobbs made the following order bearing date the 26th May, 1865—"It is ordered by the Honorable Judge Dobbs that Elizabeth Rooney and Mary Avenal Rooney be at liberty *nunc pro tunc*, and to enable them to appeal, if so advised, to file objections to the said incumbrance No. 15 vested in said Maurice Salaman, raising the several points argued by them, and thereupon on also reading said objections, it is declared that said judgment mortgage is sufficiently proved by the said affidavit of registry, and that the attested copy of the judgment in the cause of *Salaman v. Flood*, and another attested copy of the affidavit filed in said cause on the 7th of February, 1861, are not properly admissible, and shall not be receivable in evidence to prove that the said judgment is not duly registered as a mortgage affecting the said lands." (So much of this order as is between the brackets, following, disallowing the efficacy of the affidavits as against the premises therein-mentioned, was not not appealed from by Salaman); "and it is [further declared that



said judgment mortgage is not sufficiently registered against, and is not a valid charge upon the following premises, that is to say, the lands on the south side of Lazar's-hill comprised in the lease of 5th March, 1776; the premises situate on the north side of Townsend-street, formerly called Lazar's-hill, comprised in the lease of the 3rd of May, 1784; the premises on the west side of Lower Mount-street, in the city of Dublin, comprised in the lease of the            day of            1805; also the premises at Grangegorman, in the county of Dublin, and comprised in the lease of the 2nd May, 1796,] and it is declared that said judgment mortgage is sufficiently registered against, and is a valid charge on the residue of the lands sold in this matter, and mentioned in said affidavit of registry." That the objections filed by petitioners in pursuance of the liberty so given them by the learned judge, and on which the latter part of said order was grounded as aforesaid raised the points only which were then argued before him, as before stated, and which points are hereinbefore set forth. That by an order of the said Judge Dobbs, bearing date the 9th day of August, 1865, the time limited for petitioners appealing against the said order of the 26th May, 1865, was extended to the 26th of September, 1865. The petitioners then submitted that the said order of the 26th May, 1865, so far as same declares that the judgment mortgage of the said Maurice Salaman was sufficiently proved by the said affidavit of registry, and that the attested copy of the said judgment in the cause of *Salaman v. Flood*, and another attested copy of the affidavit filed in said cause were not admissible in evidence to prove that the said judgment mortgage was not duly registered, and that the said judgment was sufficiently registered against the residue in said order mentioned of the lands sold in this matter, and mentioned in said affidavit of registry, is erroneous, and ought to be reversed.

To this petition of appeal the respondent replied in his answer as follows: That the order of Judge Dobbs, made in this matter bearing date the 26th May, 1865, was right in all respects. That if the appellants proposed to shew that the affidavit of registry of the judgment of Hilary Term, 1861, recovered by this respondent, did not accurately state the sums recovered by said judgment, they should have produced and offered in evidence an attested copy thereof. That said appellants did not produce or tender any evidence whatever of said judgment, or of the affidavit thereof, filed in the Court of Common Pleas, on the 6th of February, 1861. That respondent was not bound to produce any evidence of said judgment mortgage, except the affidavit to register same as a mortgage, filed in the registry of deeds office, pursuant to the statute 13th & 14th Victoria, cap. 29. That there was no evidence whatever tendered or offered before Judge Dobbs, that the premises as to which said judgment has been decided to be well registered, or any of them, were or was not in the several parishes, baronies, counties, or counties of cities, in that behalf alleged in said affidavit of registry, produced on behalf of this respondent.

*Flanagan, Q.C.*, with *Law, Q.C.*, and *Beytagh*, submitted to the Court that the parties appealing had

no *locus standi* in this Court, and should not be heard, and that the matter was, in fact *coram non judice*. The ground of our objection is, that the Landed Estates Court (Judge Dobbs) had no right or power whatever to permit any party after the time had lapsed to come in and file objections as he had done in this case: and on this ground, independent of any other we submit that appellants having lapsed their time, this claim must fall to the ground. It is submitted that the general orders of the Landed Estates Court have the same powers as an Act of Parliament; those orders were framed in pursuance of the power given to the judges of that Court by the 30th section of the 21 & 22 Vict. c. 72, and the Lord Chancellor by that section must have approved of same before they became the law of the land. Well, those orders being made, Judge Dobbs had no power whatsoever to alter them. By the 39th of the rules framed under the said Act, and dated the 15th July, 1859, "any person may file an objection to the schedule within the time specified in the notice, which objection shall state the facts and documents relied on in support thereof, and shall be verified by the affidavit of the objector, or if the judge allow, of his solicitor. Notice of every objection must be served at the time of the filing thereof, on the solicitor having the carriage, and on the persons affected thereby; and on the hearing of the schedule such objections shall be heard and disposed of by the judge." [*The Lord Justice of Appeal*.—Has not the Court an inherent power to extend the time for filing objections?] No; the Court has no such power. The Court of Chancery has the power to extend the time, but the Landed Estates Court has not. The objection then to the schedule by petitioners must, they having lapsed their time, be treated as a nullity, and if a nullity they have no *locus standi* here, and further they cannot take advantage of the objections filed by any other party.—*In re Power's estate* (11 Ir Chan. 295), where the marginal note is that "An incumbrancer cannot avail himself of an objection filed by another party to the validity of a claim to which he has not himself filed an objection." *Calvert v. Gandy* (1 Phillips, 518) is cited to shew that even the Court of Chancery in England, when one of its orders (the 39th order of August, 1841,) limits the time for setting down a cause for argument, cannot enlarge that time except by consent.

*J. E. Walsh, Q.C.*, with *F. Walsh, Q.C.*, contra.—The Landed Estates Court has ample power to extend the time for making objections. By the 37th section of the Act (21 & 22 Vict. c. 72) the Landed Estates Court has all the powers of a Court of Equity, and by the 39th section power is actually given to the Court to rescind or vary its own orders. The word used in the 39th rule is that any person *may* file an objection—that is not *must* file an objection; then there is no positive command in this rule so to file an objection; the party merely may do it.

*Beytagh* in reply.—The petitioners, Rooneys, who have lapsed their time, should and might have filed their claim in due time. The expression "may" used in the 39th rule, that "any person *may* file an objection," shall be read "any person *must* file an objection," and so the word "may" is read "must"



in cases of assignment of breaches in a declaration—*vid.* note to *Gainsforth v. Griffith* (1 Saunders' Rep. 57 & 58), where it is laid down that by the 8 & 9 W. 3, c. 11, in all actions upon any bond "the plaintiffs may assign as many breaches as he shall think fit," nevertheless it has been held that the plaintiff must assign, &c. [*The Lord Chancellor*.—Undoubtedly the orders of the Court have the force of Act of Parliament, and they are not aided by any clause giving the judges power to vary or rescind them. They are not like the orders of the Court of Chancery. If the judges of the Landed Estates Court had drawn up an order enabling them to vary or rescind them, we would probably have consented to it, but they did not do so. Here the rule has been framed for the purpose of winding up the estate in the shortest possible time. The fact of the parties coming in late makes no difference; they had the usual notice served upon them to file objections within a certain time, and the subsequent rules appear to have contemplated that all objections should be filed within the specified time. It would be very inconvenient if at any time as long as money remained in Court the judges of the Landed Estates Court were to give permission to file objections *nunc pro tunc*. In the Court of Chancery as long as there is money in Court, a party may under circumstances come in, but no such power is given in the Landed Estates Court. What occurred here? The schedule was prepared, the claims lodged, the objections that were ready were lodged, and the judge proceeded as fast as possible to adjust those claims; the schedule was before the Court, and there were no objections by the parties who now object, but afterwards these parties applied by a regular motion for liberty to file objections. Well, by the rigorous rule, confessedly they were too late, and the judge refused that motion with costs, but the judge says, perhaps verbally, to the parties, I will give you leave to serve a notice calling on these parties when the final schedule comes on for final settlement to prove their claims. That notice is served, and the parties come before the Court, and then the question arises, what is the amount of evidence which may be required from the party whose claims are being considered. The judge decides in favour of the claimants. From that decision I do not see why the parties who served the notice of motion should not have liberty to appeal. But in addition to that, the judge without varying, rescinding, or discharging the former order, made a new order giving the parties that which had been before refused with costs. The proceedings appear very irregular, and not according to the Act. The first order never was reversed or discharged, and the second is contradictory to it. It seems to us that the second order cannot stand, being contradictory to the former order, and seemingly opposed to the Act. If the parties can go on striking out that part of the order, that is another case, but that first order must be expunged before they can do so.]

The affidavit, the subject of the present controversy, is as follows:—"Maurice Saloman, of Upper North Gloucester-street, in the county of the city of Dublin, jeweller, aged thirty years and upwards, the plaintiff in this cause, maketh oath and saith, that on

the 19th day of February, in the year of our Lord 1861, a judgment in this cause was entered up in the Court of Common Pleas against the defendant, James C. Flood, the person whose estate is intended to be affected by the regulation of this affidavit by the name and description of James C. Flood, of Hollymount, in the county of Down, clerk, for the sum of £547 19s. sterling, for debt, besides, £23 18s. 9d. for costs, as by the records of said Court may appear. . . . That James C. Flood, the person whose estates is intended to be affected by the registration of this affidavit, is, at the time of swearing this affidavit, seized, possessed of, or entitled unto, and has disposing power over, at law or in equity, which he may without the assent of any other person exercise for his own benefit, certain lands, tenements, and hereditaments hereinafter mentioned, that is to say, all that five lots of ground or strand, Nos. 1, 2, 3, 4, 5, belonging to the Corporation of Dublin, between Sir John Rogerson's quay and the late Mr. Mercer's, at the back of Lazar's-hill, situate in the parish of St. Mark, and city of Dublin. Also ground from Gloucester-street to the extent of the city of Dublin grounds, towards Lazar's-hill, situate in the parish of St. Mark, city of Dublin, as the same is comprised in and demised by the lease of the 25th of October, 1723. Also that plot of ground situate on the south side of Lazar's-hill, in the city of Dublin and described and demised by lease of the 5th of October, 1776." (The affidavit as to this last-mentioned plot of ground, the parish not having been mentioned, was held by the Court below insufficient, and for the same reasons the affidavit was held to be defective as to several other plots. The affidavit then continues). "Also houses and premises Nos. 4 and 5 College-green, in the city of Dublin; also dwelling-house and premises Nos. 1, 2, 3 on the east side of Lower Dominick-street, and of 175, 176, 178, and 184 in Great Britain-street, all in the county of the city of Dublin and parish of St. Mary's." [*The Lord Chancellor* did not wish to be understood that he had made any positive decision as yet on the point which was argued before him last, namely the power of the Landed Estates Court to extend the time for filing objections; he would now have the case argued on the sufficiency of the affidavit.]

J. E. Walsh, Q.C., with Carton, now appeared for the appellants on the merits of the affidavit made by Saloman.—This affidavit is defective, and the judgment must fall. Judge Dobbs has already pronounced it defective as to a portion thereof [*viz.* the said portion of said order of Judge Dobbs contained between the brackets as above]; and as to the other portion, we submit that that affidavit is defective. One of the vices of the affidavit is this: that by the judgment, as it appears on this record, the sum appears to be £547 19s., and 6d. costs, together with £23 18s. 9d. for costs of increase, making a total of £571 18s. 3d. debt, for which judgment was recovered; while the affidavit represents the recorded judgment thus: £547 19s. debt, besides £23 18s. 9d. for costs, making the sum for which judgment was recorded at the figure of £571 17s. 9d. This is a case of *nul tiel* record, inasmuch as the affidavit pretends to give the record accurately, and it omits the sum of sixpence altogether which was found by the jury, and it merely

gives the costs of increase.—*Pilson's case* (7 Ir. Jur. N. S. 68). *Grispi's estate* (7 Ir. Jur. N. S. 119) was exactly in point; the marginal note there is that "In an affidavit to register a judgment as a mortgage, sixpence appearing on the record of the judgment to have been awarded by the jury for costs was omitted; held that this registration was void"—*Fitzgerald's estate* (11 Ir. Ch. 278). We also complain that the judge was wrong in allowing that the judgment mortgage was sufficiently registered against the lands in incumbrance No. 15. The premises in College-green, in the city of Dublin, and the premises in Anglesea-street, had no parish whatever attached to them; nor was it said in what parish said College-green or Anglesea-street were in; and upon this ground the mortgage cannot be held to affect those premises. But Judge Dobbs referred the parish of St. Mary's to embrace those premises, although there were several houses in Great Britain-street interposed between Anglesea-street and Britain-street, and St. Mary's parish embraces Great Britain-street. No doubt, Great Britain-street is in St. Mary's parish. You must then hold that no parish at all is added to College-green and Anglesea-street; and if the Court take that view of the affidavit, of course it must fail, inasmuch as it is defective in not giving the parish.

*Flanagan, Q.C.*, with *Beytagh*, contended that the order of Judge Dobbs was correct; and beginning with the last objection, this Court will not take judicial notice without evidence that Grafton-street is not in the parish of St. Mary's; in fact, the Court will not now go into that question. [The Lord Chancellor assented to this proposition.] But next, this parish need not be named at all in the affidavit. The sixth section of the 13 & 14 Vic. c. 29 does not require parish to be stated. The words being that "When such lands lie in two or more counties or baronies, or parishes, or streets," the same shall be stated in the affidavit. The directions in this section are evidently in the disjunctive conjunction; but should the Court read it otherwise, then the Court will hold that the parish of St. Mary's on evidence being laid before it, has reference to College-green and Anglesea-street. Now, as to the sum of sixpence costs. This sum was merely formal; and if the jury had omitted to find it, the *postea* would have been amended as of course. The cases cited on this point on the other side, *Pilson's estate* and also *Grispi's estate* (7 Ir. Jur. N. S. 68 and 119), were cases from inferior courts. The Landed Estates Court and this Court may overrule those decisions. Lastly, the argument of *nul tiel record* has no application here at all, and we have a right to waive that sixpence on the record if we choose.

THE LORD CHANCELLOR.—My Lord Justice of Appeal and I are both of opinion that in this case we must discharge the order of the Landed Estates Court so far as it gives liberty to the appellants *nunc pro tunc* to file objections to this incumbrance numbered 15, and vested in Maurice Salaman. Now, as to those premises in Anglesea-street and in College-green, it has been said that they are not in St. Mary's parish at all; that may be very true, but that is no reason why we should disturb the order of the Court below. That Court has made an order declaring the

affidavit to be well registered as against those premises, which, with Great Britain-street, are in St. Mary's parish. Well, if it turns out that such places as College-green and Anglesea-street are not to be found in that parish, of course the judgment, no matter how well and cautiously otherwise worded, must fall to the ground if it has nothing to operate upon. There is another point that has been argued at the bar, and that is the judgment mortgage is defective, because the affidavit omits to mention the sixpence costs. That objection was also not raised until after the time for filing objections had passed; and we cannot now set aside the order of the Court below, though it appears to us that had the objection been taken in time that it would be undoubtedly fatal. I shall then affirm the order of the Court below, save so far as liberty was given to file objections *nunc pro tunc* to incumbrances, each party to pay their own costs.

The Court then made the following order:—"The Court doth order that the said order of the Landed Estates Court of the 26th of May, 1865, be, and the same is, hereby discharged so far as it declares that Elizabeth Rooney and Mary Ann Rooney shall be at liberty *nunc pro tunc* to file objections to incumbrance No. 15, vested in the said Maurice Salaman. And the Court doth declare that the judgment recovered by the said Maurice Salaman has been sufficiently registered, and is a charge on the premises as lot one in the second sale, being the premises in College-green and Anglesea-street, so far only and no further as said premises are or may be found to be situate in the parish of St. Mary, this Court being of opinion that the said judgment doth not affect any premises in College-green and Anglesea-street save and except premises situated in the parish of St. Mary's aforesaid, if any there be. And the Court doth affirm said order in all respects save as aforesaid. And it is further ordered that with the foregoing declaration this case be remitted back to the Landed Estates Court, to proceed thereupon as shall be just and consistent with this order; parties respectively to abide their own costs."

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

ARDREY v. GARDNER.—Nov. 9, 1865.

*Practice—Particulars of slander.*

*Particulars of the occasions on which slanderous words were spoken, refused, it not appearing that the information was necessary to the defendant in order to enable him to defend the action.*

*Tottenham* on behalf of the defendant, moved for an order requiring the plaintiff to give particulars of the occasions on which the slanders for which the action was brought were uttered. The action was for oral slander, complaining of words spoken to the plaintiff

himself, and of words spoken to his wife. He referred to *Early v. Smith* (12 Ir. C. L. R. App. xxxv.)

*O'Driscoll* for the plaintiff.—This case is different from *Early v. Smith*. The defendant cannot require the particulars for which he asks; he has made an affidavit to ground a motion for liberty to plead double matter, in which he states that he did not, on the occasions mentioned, speak the words at all, and also that the words, in the sense in which they were spoken, were true. That affidavit was served on us, with notice of the present motion, and plainly shews that the defendant does not want these particulars.

LEFROY, C.J.—There never was such a thing, in my opinion, as a Court of Law assuming a jurisdiction to entertain a bill of discovery to make the plaintiff disclose his case to his adversary. There is, at all events, no difficulty in the present case, and without expressing any opinion, though I have an opinion of my own upon it, we do not, with the exception of my brother O'Brien, think that this case at all comes within the principle of *Early v. Smith*. My brother O'Brien, however, thinks that this does come within the principle of that case.

O'BRIEN, J.—I confess I do not see the distinction: the application in that case, as here, was for the particulars of the occasions on which the slanderous words complained of were spoken, and in that case the application was granted. There is an observation of Lord Wensleydale's to the effect that where a statement is made in a vague and general manner, the defendant is entitled to a specification of the occasions to which that statement particularly applies.

HAYES, J.—I adhere to the principle acted upon in *Early v. Smith*, and for that very reason I do not think that the order sought should be made in the present case.

FITZGERALD, J.—I concur in the views enunciated by the majority of the Court in *Early v. Smith*, and I think that that case was rightly decided; but I think that Mr. Tottenham has failed to shew that the information for which he asks is necessary to him. His case, as it appears, is, first, that he never spoke the words complained of at all, and, secondly, that on the occasions on which he spoke them they were true in the sense in which they were spoken. That is his case. *Early v. Smith* was a very peculiar case; there was in that action only one count, and it appeared that there were three slanders on three different occasions, which were not specified with particularity. Here there are two occasions ear-marked—one on which certain words were spoken to the plaintiff's wife; another, on which similar language was used to the plaintiff himself; so that, to a certain extent, the two occasions are, as I have said, ear-marked. That distinguishes this case from *Early v. Smith*, and therefore, in my opinion, the motion ought to be refused. It will still be open to Mr. Tottenham's client to exhibit interrogatories to get the information if he really thinks that he requires it.

*Motion refused, but without costs.*

[BEFORE LEFROY, C. J., AND O'BRIEN, J.]

THE QUEEN v. THE JUSTICES OF TIPPERARY.—Jan. 20.

*Magistrate—Certiorari—Attachment.*

*Conditional order for an attachment granted against a magistrate, who had been personally served with an order to make return to a writ of certiorari, the order not having been obeyed.*

Lover, for the prosecutor in this case, renewed an application for a conditional order for an attachment against Mr. John Fleming, the resident magistrate at Nenagh, for not making formal returns to certain writs of *certiorari*. The writs had issued to the justices to bring up four several convictions which had been made against one John Dwyer, three for alleged trespasses, and one a decree for possession. It appeared that Dwyer had applied to this Court for the writs of *certiorari*, and had obtained conditional orders, against which cause had been shown by Mr. Walker as the agent of the prosecutor below, Mr. Searle. Upon discussion the Court, on the 7th of November, disallowed the cause shown, and upon that occasion it was intimated on the part of Mr. Walker, that it would not be sought further to sustain the convictions. Thereupon, upon the terms of Dwyer not bringing an action, the costs of setting aside one set of convictions was given to Dwyer. Those costs were being taxed, but the convictions were not returned, and until they were, the costs could not be enforced against Mr. Walker. On the 16th December, Mr. Fleming was served personally with the order directing to make a return to the writs of *certiorari*, and bring up the convictions. On the 3rd Jan. he sent to the crown office certificates of the convictions, but did not return the convictions themselves, or make any return to the writs. Then the Clerk of the Crown wrote, sending back the certificates, and apprising him that a formal return should be made. To this he gave no answer, and Lover had two days ago applied for a conditional order for an attachment. O'Brien, J., before whom the application had been made, thought that the better course would be for the Clerk of the Crown to write again, which he did, and then the magistrate sent the certificates of the convictions to the attorney for Dwyer, but made no return to the writs of *certiorari*.

Lover now renewed his application, suggesting that the duty to make the return lay on the magistrates; that although practically it would be done by the Petty Sessions clerk, still they were answerable for his default, and that it was upon one of the magistrates that the order should be served.

LEFROY, C. J.—We must adopt some principle in these cases. The magistrates are entitled to appoint a clerk, and pay him an adequate salary, which I understand has been lately increased; but the orders of the Court will not be directed to him, for he is only a subordinate. The orders of the Court will be directed to any one of the magistrates, and he will, at his peril, be liable to be attached for disobedience. There is no hardship in this, for he has his clerk. This order of attachment shall be directed to the magistrates, and may be served upon any one of them, and any

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that are served may be made liable for non-compliance, for it is their duty to appoint a proper clerk.

O'BRIEN, J.—I am glad that I mentioned this matter; I suppose this is the first instance of a case of the kind. Mr. Fleming does not appear to have wilfully disobeyed, the order of the Court, and I would suggest that this order be granted now, not to be issued for a certain time. The Clerk of the Crown will communicate with Mr. Fleming. If the clerk of Petty Sessions is incompetent, the magistrates have themselves to blame for it. The motion will be granted with costs of this application against Mr. Fleming.

## Court of Common Pleas.

Reported by H. W. B. Mackay, Esq. Barrister-at-Law.

[CORAM MONAHAN, G.J. CHRISTIAN AND O'HAGAN, JJ.]

WALSHE v. BROWNE.—Jan.

*New trial motion—Slander—Judge's notes—Notes of rejection of evidence.*

*Upon the argument to make absolute a conditional order for a new trial, the Court will not go into a question of the improper rejection of evidence unless at the time of the trial the judge before whom the action was tried was asked to take a note of such rejection.*

THIS was an action for oral slander. The first count of the summons and plaint contained an innuendo in support of which it was admitted at the trial that there was no evidence to go to the jury. The second count complained that the plaintiff carried on the business and profession of an attorney, and the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said profession and the carrying on and conducting thereof by him, and in the presence and hearing of one Thomas Kent Cray, Esq., a client of the plaintiff, the words following, that is to say, "He (meaning the plaintiff) is a public robber (meaning that plaintiff robbed the public in his said professional capacity, and by means thereof). He (meaning the plaintiff) is living by that (meaning that plaintiff obtained his subsistence thereby)." The third count was in substance the same as the second, with the innuendo that plaintiff conducted his said professional business in a fraudulent manner; that plaintiff obtained his livelihood by such fraudulent conduct in his profession. It also complained of these additional words—"He (meaning the plaintiff) is a dirty, scheming, little blackguard (meaning thereby that plaintiff conducted himself in his said profession in a disgraceful, dishonest, and tricky manner)." The defences pleaded were—1. A traverse of the speaking of the words, except the words "He is a dirty, scheming little blackguard." 2. A traverse of the defamatory sense alleged; and the issues were in the terms of the defences. At the trial before Fitzgerald J. at the Mayo Summer Assizes, 1865, one witness for the plaintiff, a solicitor, who with others was produced to sustain the innuendoes, after two or three questions

were put to him was, withdrawn. In the plaintiff's counsel's certificate upon which a conditional order for a new trial was subsequently obtained, it was stated that the judge rejected this evidence, but the report of the learned judge stated that the withdrawal probably arose on an objection by the defendant's counsel that the witness was not present when the words were spoken, and that the learned judge had no note of any evidence having been rejected, nor of any objection to any rule which he made, and that he had no recollection of any such objection. The jury found for the plaintiff on the first issue, and for the defendant on the second. In the Michaelmas Term following, the plaintiff obtained a conditional order to set aside the verdict, and for a new trial for improper rejection of evidence, and because the verdict was against evidence, and the weight of evidence, against which

Carleton, Q.C., and Jordan, for the defendant now showed cause.

Bourke, Q.C., and Robinson, Q.C., contra, urged that the witness was withdrawn in deference to the opinion of the learned judge, and that his evidence had not been pressed upon the Court on behalf of the plaintiff.

THE COURT said that it must be distinctly understood that they could not go into a question on the rejection of evidence unless the judge who tried the case had been asked to take a note of it, and as to the other ground, they did not think sufficient grounds existed for ordering a new trial, although they were inclined to think that the jury had put a mistaken construction upon the words used.

*Rule discharged.*

PARKER, BY NEXT FRIEND, v. CATHCART.—Jan. 25, 30.

*Covenant—Remoteness of damages—Continuing breach—Costs.*

*In an action brought by an apprentice against his master for breach of the covenant to instruct and provide with board and lodging, the jury cannot take into consideration the damage to plaintiff's character resulting from the mode and circumstances of the refusal.*

*But the breach is a continuing one, and successive actions may be brought upon it. But in each action the jury can only take into consideration the damages that have been sustained previously to the commencement of the action.*

*Where a new trial is granted on the ground of misdirection, each party abides his own costs of the former trial as well as of the motion.*

THIS case was tried before Mr. Justice Hayes at the last assizes for the County of Louth. The plaintiff, who is a minor, was apprenticed to the defendant, who is an hardware merchant, in 1861. The plaint contained five counts. The first count was framed on the covenant contained in the indenture of apprenticeship, dated 12th July, 1861, and complained that in breach thereof, and during the term, the defendant

would not teach or instruct plaintiff, nor provide him with board and lodging, but discharged him from defendant's service, and would not suffer him to remain. The second count was framed on a parol agreement to maintain plaintiff during the term. The third count complained of an assault and false imprisonment; the fourth was in detinue, and the fifth for money had and received to plaintiff's use. The defendant lodged in Court £10 on the first, £1 10s. on the third, and 10s. on the fourth count, and traversed the other counts. It appeared in the evidence that plaintiff had been frequently ordered by defendant not to stay out after half-past 8 o'clock at night, and that having, in disobedience to those orders, staid out one night until half-past 9 o'clock, he was refused admittance on coming back, and was informed next morning that he would not be permitted to return. Mr. Justice Hayes, in charging the jury, left the case generally to them as one of damages on the first and third counts, but afterwards, at the request of defendant's counsel, informed them that they could only take into consideration the damages which had already accrued up to the commencement of the action. He however told them that they might consider the injury to plaintiff's character consequent on his having been dismissed, and to this direction defendant's counsel objected. The jury then found for the plaintiff on the first and third counts, with £40 damages beyond the sums lodged in Court, and on the other counts for the defendant. In answer to the learned judge they informed him that they had estimated the damages chiefly in reference to the injury done to plaintiff's character, which they considered was ruined once for all when plaintiff was dismissed. It was then suggested that they should find the damages separately on the first and third counts, and they accordingly did so, finding £30 on the first, and £10 on the third count. On 4th of November, 1865, Mr. Falkiner obtained a conditional order for a new trial, on the ground of misdirection of the learned judge in telling the jury that they were at liberty to give damages for supposed injury to the plaintiff's character.

Harrison, Q.C. now showed cause.—It is true that the jury were bound to consider only the damages up to the bringing of the action—*Lewis v. Peachey* (1 H. & C. 518); but this does not affect the question. The jury did so restrict themselves, but the damage to character was not like a continuing breach—the character was injured once for all at the moment of the dismissal. [*Christian, J.*—If the element of damage to character cannot be taken into account on the first count, the verdict must altogether fail, for if the *chief* damage was to character, the damages to character could not have been the lesser sum. *Monahan, C.J.*—The judge directed the jury that they might take the injury to character into account in considering the first count.] The rule as to the measure of damages is laid down in *Hadley v. Baxendale* (9 Ex. 354), and from the circumstances the defendant must have had the injury to character in his mind at the time of the dismissal. Nor is an action in *tort* necessary, for all the precedents are in *assumpsit*. The jury may take into consideration the mode and circumstances of the dismissal, and the consequences necessarily resulting

therefrom.—*Smith v. Thompson* (8 C. B. 44, 61, 62). Nor did the misconduct of the apprentice give the master any right to discharge him.—*Winstone v. Lynn* (1 B. & C. 460, 469).

*Falkiner* (with him *Ferguson, Q.C.*)—I shall divide my argument into five propositions.—1st. This is not a case of wrongful dismissal, and by this the case in C. B. 44 is distinguished, but this is a case on an independent covenant—*Winstone v. Lynn* (1 B. & C. 460); *Phillips v. Clift* (4 H. & N. 168); and there was therefore a continuing right of action for each moment during which the breach continued.—*Lewis v. Peachey* (1 H. & C. 518); *Hambleton v. Veere* (2 Wms. Sand. ii. 170). 2nd. The damage must not be too remote, but must be the natural and legal consequence of the act complained of.—*Vicars v. Wilcocks* (2 Sm. L. C. 5th ed. 461); *Kelly v. Parkington* (5 B. & Ad. 645). 3rd. Damages incapable of appreciation cannot be recovered in an action on contract, except a contract to marry.—*Hadley v. Baxendale* (9 Ex. 354); *Hamlin v. Great Northern Railway Co.* (1 H. & N. 408); *Williams v. Reynolds* (34 L. J. n. s. Q. B. 221); *Mayne on Damages*, 18; *McKean v. Cowley* (7 L. T. n. s. 828). 4th. Character was not in issue on the record, and so it was impossible for me to show that plaintiff had no character to lose. 5th. If plaintiff is entitled to damages for general injury to character, he must *a fortiori* be entitled to damages for special injury, and yet the contrary appears by the analogy of slander.

*McBlaine* replied.—It is laid down in Chitty on Contracts, 7th ed. 789, that in an action to recover general damages for breach of contract, the jury may take consequential damages into consideration. Where the contract partakes of the nature of *tort*, they may take a wider view. And where substantial justice has been done a new trial will not be granted even on the ground of misdirection, for a bill of exceptions might have been tendered.—*Moore v. Tuckwell* (1 C. R. 609); *Edmondson v. Machell* (2 T. R. 4).

Jan. 30.—*MONAHAN, C.J.*—We held over our decision in this case since last Saturday, in hopes that some arrangement would have been come to by the parties. As that, however, has not been done, it becomes our duty to decide it according to the principles of law. It was tried at the last assizes at Dundalk before Mr. Justice Hayes, and comes before us in consequence of an objection taken to his charge. It appears that at first he left the case to the jury without any direction as to the principle on which the damages were to be calculated. Afterwards Mr. Falkiner asked him to direct that they could only take into account the damages up to the commencement of the action. There is no doubt that he was right, because it is settled that in an action on an apprenticeship deed brought either by master or apprentice before the time when it would expire, the contract is a continuing one, and the party is only entitled to damages up to the time when the action is brought, and if he wants to recover for the whole time he must wait till the apprenticeship expires. The judge agreed to this, and the jury afterwards asked him whether they might give damages for the loss of character. The judge told them they might, and they brought in a verdict for £40 without distinguishing how much was given upon each count. Mr. Falkiner objected

to that portion of the charge, and suggested that the true criterion for damages was the actual injury received from the breach of the covenant. To this the judge did not assent, and the question is, can the verdict be sustained? Two cases in particular have been referred to—*Lewis v. Peachey* (1 H. & C. 518), and *Phillips v. Clift* (4 H. & N. 168). These two cases clearly establish that the covenants are continuing, and that the misconduct of the apprentice will not justify the master in refusing to employ him. It is also clear that the true criterion of damages is merely the loss he sustains from the specific breach of this obligation. There is no ground for saying that the damages were excessive, but upon the ground that the jury were wrongly directed we must grant a new trial. We must administer the law, and in the case of a mistake amounting to misdirection there is not the same discretion as in other cases, and therefore we must set aside the verdict for misdirection, but the result will be that if the plaintiff should be advised that he has a right to bring a further action, this action will be no bar. Of course I give no opinion as to whether the facts would support a further action, but we must set aside the verdict, and let the parties respectively abide their own costs of the former trial and of this motion. In an action *ex contractu*, the damages are not a criterion, and we decide this case entirely on the ground that the jury were not at liberty to consider the damage the plaintiff's character sustained.

*Rule absolute.*

On Mr. Harrison requesting that the costs of the former trial should be allowed, the Chief Justice stated that each party always abides his own costs when the judge makes a mistake at the trial.

O'FLAHERTY v. COOKE.—Jan. 25, 31.

*New trial on account of the weight of evidence, although judge is not dissatisfied with verdict.*

*In an action on a bill of exchange, and for money paid to defendant's use where the question on the acceptance was whether it was a forgery, and depended on the credit of the witnesses, and where there was no evidence except that of the parties as to whether the other moneys were paid in discharge of a prior debt or advanced, and where the jury made a clear mistake on a special defence of estoppel, the Court granted a new trial on the ground that the verdict was against the weight of evidence, although the judge who had tried the case reported that he saw no reason to be dissatisfied with the verdict.*

THIS was an action to recover the sum of £38 17s. 8d. The first count in the plaint was by the plaintiff as drawer against the defendant as acceptor of a bill of exchange for £15 5s. There were also counts for money lent by plaintiff to defendant; for money paid to defendant's use; and on accounts stated. On foot of these latter counts plaintiff claimed £19 2s. 8d. for cash paid for provisions supplied to defendant through

various parties. The defendant traversed the acceptance of the bill and the causes of action alleged in the other counts of the plaint. He also pleaded a special defence to all the causes of action, alleging that he had sued the present plaintiff by civil bill before the Chairman of Quarter Sessions for the County of Galway on a bill of exchange for the sum of £89 4s: that the case was heard on the 29th June, 1868; that notice of set-off was given by the now plaintiff for the sum of £38 17s. 8d., being the same identical bill of exchange, and sums of money and causes of action as those for which the present plaintiff was now suing; that the cause was tried before a jury; that the set-off was disallowed, and that the present defendant obtained a decree for his whole demand.

The case was tried at the last Summer Assizes for the County of Galway before Mr. Baron Deasy, and a verdict was returned for the defendant on all the issues. The learned Baron stated in his report that he saw no reason to be dissatisfied with the verdict.

On the 6th November, 1865, Mr. Robinson, Q.C., obtained a conditional order for a new trial on the ground that the verdict was against the weight of evidence. The facts of the case, so far as they are essential, will be found stated in the judgment.

O'Moore now showed cause, and cited *Allaway v. Bennett* (6 Ir. Jur. N. S. 347).

Robinson, Q.C., and *Baytagh*, contra, commented on the facts, and remarked that motions of this sort had received a new sanction in the Common Law Procedure Act, 1856, s. 50, and that Fitzgerald, J., in *Irwin v. Callwell* (12 Ir. C. L. R. 147), while objecting to such trials, as a general rule, admitted that there should be exceptional cases.

McDermott replied.—The judge has stated he is not dissatisfied, and this is the usual form in which judges intimate their opinion that a verdict should not be disturbed.—*Gibbs v. Hooper* (2 Mylne & K. 355-6). The English practice in such cases is not to disturb the verdict.—*Ashley v. Ashley* (2 Strange, 1142); *Archbold's Pract.* 11th ed. 1513; *Irwin v. Callwell* (12 Ir. C. L. R. 147). [*Monahan, C.J.*—Does this apply to cases where the verdict is without evidence?] Counsel referred to 2 Lush's *Pract.* 3rd. ed. 636; *Scott v. Scott* (9 Jur. N. S. 1251), and the observations of Tindal, C.J., in *Mellin v. Taylor* (3 Bing. N. C. 111).

*Cur. adv. vult.*

Jan. 31.—MONAHAN, C. J.—This case comes before us on a motion for a new trial on the ground that the verdict was against the weight of evidence. The action is brought by the plaintiff on a bill of exchange for £15 5s. alleged to have been accepted by the defendant, with interest, and also for a sum of £19 2s. 8d. alleged to have been money expended by the plaintiff for the use of the defendant. The plaintiff lives in Galway, and the defendant in Connemara. The action arose thus:—Cooke was the owner of some dividends in the case of Montgomery, an insolvent, and an agreement was entered into between O'Flaherty and him, in which, in consideration of £60, he was to assign to O'Flaherty certain rights under the insolvency. A deed was drawn up by Mr. O'Shaughnessy. The way they were paid was by two notes

passed by O'Flaherty to Cooke for the sum of £60 [£30 each.] One of the notes, it is alleged, was paid. There was some little controversy as to how it was paid. The case of the plaintiff was that after the execution of the deed an agreement was entered into that the £60 should be paid for the dividends, but that the defendant should indemnify the plaintiff for any loss he might sustain by the creditors of the defendant attempting to attach these dividends under the garnishee clauses. The first allegation was that though a bill of exchange for £15 5s. was in fact accepted by the defendant in order to indemnify him accordingly, yet he had in fact sustained the costs himself, and was entitled to recover the whole amount of the bill of exchange. This does not appear in the judge's report,\* but from the nature of the case some such evidence must have been given to show the particular loss that was sustained. The plaintiff swore positively that the acceptance was in the handwriting of Cooke, and that he was present when Cooke signed the bill in pursuance of the contract that had been entered into; the admittedly genuine deed was also given in evidence, and Mr. Robinson insists that nobody who compares the two documents can doubt that the signature on the bill is genuine. We can only say that it is either genuine or a very good forgery. But Cooke swore he never had signed the bill, nor seen it until the proceedings taken by him against O'Flaherty in respect of one of the promissory notes for £30, and that O'Flaherty then had attempted to rely on the bill in question, and other items as a set-off. He swore most positively that he had not accepted the bill, and the young lady [defendant's daughter] swore that it was not even like his writing. It also appeared that the plaintiff having served notice of a set-off, did in fact produce this bill and adduce evidence of the other items for the set-off; and that eventually a verdict was had and a decree pronounced for the present defendant. The defendant, accordingly, has relied on something in the nature of an estoppel, and says that the plaintiff ought not to be allowed to recover in this action by reason of the failure of the set-off, even if the jury had found for the plaintiff on the merits. An objection was taken also that even though he had advanced this money it was intended as a payment on foot of the second promissory note, and that the principle of preventing litigation would of itself preclude him from recovering it. This is a difficult case; it is a case of downright perjury on the part either of the plaintiff or defendant. Character is involved to a great extent, for if Cooke's statement is true, O'Flaherty has committed forgery also, inasmuch as the jury have found that it was a forgery, and the learned Baron is not dissatisfied with the verdict. I fear that if the matter rested there, our hands would be tied. But there are circumstances that we think enable us without violating any rule of law to submit this case to another jury. With respect to the subject-matter of the demand of the £19 2s. 8d. we are of opinion that there was no evidence apart from that of the parties themselves as to whether it was advanced to the defendant or intended as

a payment of one of the promissory notes. Receipts and documents were produced which clearly established that some at least of the items were paid by the plaintiff for the defendant. Then there is the evidence of Mr. Macnamara, the attorney employed by the plaintiff at Quarter Sessions. That gentleman proved that a set-off to the amount of £12 was admitted, and that the chairman offered to allow the set-off to that extent, and that with respect to the question of forgery the chairman said that he would not allow it to go to the jury. With respect to the legal objection that if the payments were made in discharge of the second promissory note, the plaintiff is precluded from recovering them by the decree of the chairman, we are of opinion that these payments were not made in that way. There was no pretence for the verdict on the second defence, for it is conceded that the question of set-off was never submitted to the jury at quarter sessions at all. There has been a clear mistake of the jury, so clear that though we have not the opinion of the learned judge who tried the case, we think there was no evidence at all on the question of estoppel to sustain the present verdict. It is a case in which grave charges have been bandied backwards and forwards, and we think it right to submit it to another jury. The parties will abide their own costs. The costs of the motion and of the former trial will be a portion of the defendant's costs in the cause. If he should ultimately succeed, he gets them.

DONOHUE v. THOMPSON.—Jan. 27, 29, 31.

*Magistrate—False imprisonment—Information taken and followed by continued attention.*

*Where a man was arrested by a constable under the direction of a county inspector of constabulary, and taken before a magistrate, before whom an information was sworn, asking for the further detention of the prisoner, and the prisoner was accordingly detained, Held, that the fact of taking the information with the knowledge that the prisoner would be detained, did not render the magistrate acting without malice liable to an action for false imprisonment. Semble, if the taking of the information were the causa causans of the detention, or if it had been taken for the purpose of the detention being continued, the magistrate would have been liable.*

THE plaint contained three counts. The first count complained that defendant, being a justice of the peace for the County of Longford, had assaulted plaintiff, and caused plaintiff to be arrested, and compelled to go to a prison in the town of Granard in the County of Longford, and to be unlawfully imprisoned for one day and a night, and that afterwards defendant caused plaintiff to be again assaulted and laid hold of, and compelled to go into the court-house of Granard, and to be unlawfully committed to the gaol of the County of Longford, and that defendant then ordered plaintiff to be imprisoned for three months next following. The second count complained that defendant, as one

\* It was however stated in the counsel's certificate.



of the magistrates for the County of Longford, had maliciously, and without reasonable or probable cause, caused plaintiff to be assaulted, beaten, and ill-treated, and to be arrested and taken to a prison in Granard, and there imprisoned for one day and a night, and to be afterwards brought before defendant and other magistrates to be examined on a false charge of having threatened and used intimidating language towards one Michael Dolan, deterring him from working in defendant's employment; and that defendant had afterwards caused plaintiff to be taken to the court-house at Granard, and then and there falsely, maliciously, and without reasonable or probable cause, procured the plaintiff to be brought before defendant, and the other magistrates, and unlawfully convicted on said charge, and caused and ordered him to be committed for three months with hard labour. The third count complained that defendant assaulted plaintiff, and caused him to be imprisoned in a police-office at Granard, as well as in the county gaol as above-mentioned. The defences were several traverses of the grievances complained of in each count as therein alleged. The case was tried before the Lord Chief Justice of the Common Pleas at the Nisi Prius sittings of last Trinity Term. It appeared by the evidence of defendant, &c. that plaintiff, after being arrested had been taken to the residence of defendant at Clonfin, but not into his presence, and that at the request of Mr. Rooney, county inspector of constabulary, defendant had taken an information from a constable named Tate, and that defendant had been then removed to Granard, where he was imprisoned during the night and taken next morning to the court-house. It was stated in evidence that the trial was conducted with closed doors. It appeared by the entry in the Petty Sessions book that defendant was one of the committing magistrates, but this was contradicted in evidence. There was a conflict of testimony as to whether the original arrest had been ordered by Mr. Rooney on his own responsibility, or under the directions of another magistrate. The Lord Chief Justice in his charge directed the jury that there was no evidence sufficient to render defendant liable for the original arrest or conviction of plaintiff, but left it to them to say whether defendant was responsible for the remand of plaintiff at Clonfin, and for bringing him to Granard, and detaining him there till the next day, when brought to the court-house, and informed the jury that if the defendant had directed the remand of plaintiff he was responsible, but that his taking the information, if merely for Mr. Rooney's satisfaction, would not render him responsible. To this direction Mr. Harkan, for plaintiff, objected, and asked for a direction that taking the information, knowing at the time that the result would be the detention of plaintiff, would render defendant responsible, and he further submitted that the remand having been in consequence of the detention, defendant was responsible in the absence of any justification on the record. The Chief Justice declined so to direct the jury, and they found a verdict for the defendant. On 6th November, 1865, Mr. Serjeant Armstrong obtained a conditional order for a new trial on the grounds of the verdict being against the weight of evidence, and of misdirection.

*Macdonogh*, Q.C., now showed cause.—On the question as to the weight of evidence, he referred to *Lacy v. Forrester* (3 Dow. Pr. C. 668); *Walton v. Laud* (9 Jur. 972); *Lake v. Deer* (1 Jur. 983). On the question of misdirection, although a remand for an unreasonable time is void—*Davis v. Capper* (10 B. & C. 28)—yet where the time is reasonable, the act is *prima facie* lawful, and trespass *vi et armis* will not lie—*Dickson v. Capes* (5 Ir. C. L. 182); *Beck v. Young* (3 Dow. Pr. C. 283); and consequently no plea of justification is necessary, notwithstanding the C. L. P. Act, 1853, s. 71, for such a plea ought to confess *in modo et forma*, and would be in this case an argumentative traverse [*Sed per Cur.* that he should have pleaded specially]. Nor was defendant bound to form any opinion on the effect of receiving the information, nor responsible for the consequences—*Sowell v. Champion* (6 Ad. & El. 407). The question whether defendant is liable depends on whether he would have been liable in any of the old forms of action (1 Smith's Leading Cases, 5th edit. 407), and he would not have been liable in trespass for the act of the police-officer.—*Sharrod v. London and North-Western Railway Co.* (4 Exch. 580). Besides, Mr. Rooney was himself presumably a magistrate by 2 & 3 Vict. c. 75, s. 14, and 6 & 7 Wm. 4, c. 13, s. 7.

*M. Morris*, Q.C. contra.—By 14 & 15 Vict. c. 93, s. 21, the entry in the Petty Sessions book is itself the conviction, and it appears by it that defendant was a committing magistrate. The commitment must, by the statute, be in writing, and the Court must be open to the public—s. 9. The original custody having been illegal, the detention was illegal, and a new trespass, and defendant who authorised it responsible. *Sowell v. Champion* (6 Ad. & El. 407) is distinguishable, for there the attorney did not know that the house was out of the jurisdiction, but here the magistrate knew that the information was really an information, and that it could not have been legally executed. If, indeed, the bailiff in that case had communicated his intention with regard to a house which the defendant knew was out of the jurisdiction, the attorney's acquiescence might have made him responsible. Assuming Mr. Rooney to have been a magistrate, this would not exonerate the defendant. And at all events defendant ought to have pleaded specially.

*Harkan* followed.—If defendant had been ignorant of the object of the information, he would not have gone the next day to the Petty Sessions court-house. But the arrest was void in its inception, and whoever takes part in an illegal proceeding is responsible for the consequences. His motive is immaterial; he had no right to act without investigation.—*Griffin v. Coleman* (4 H. & N. 269, 270); *Edwards v. Ferris* (7 Carr. & P. 542); *Rex v. Birnie* (1 Moo. & Rob. 161).

*Purcell*, Q.C. replied.

*CHRISTIAN, J.*—In this case we have had an opportunity of considering the question during the argument, and we are all of opinion that the cause shown must be allowed. With respect to the original arrest and subsequent conviction of Donohoe, they were withdrawn from the jury upon the ground that there was no case in that respect sufficiently substantial to



be submitted to them. Mr. Harkan is under the impression that he made an objection to that ruling. I have no doubt that he said something to that effect at the time, but, however, not only are the judge's notes entirely silent on the subject, but they are entirely corroborated by Serjeant Armstrong's certificate. Putting these subjects out of the case, there arises the question whether Mr. Thompson was liable for the continued imprisonment of the plaintiff until he was brought before the magistrates. There were two grounds for the motion—weight of evidence and misdirection. As to the first—the question left to the jury was not any constructive authorizing of the arrest, but whether directly and in terms Mr. Thompson had remanded the prisoner. Mr. Rooney swore directly that he did, and Mr. Thompson swore as directly that he did not. The jury had a conflict of testimony. They had the fact that Mr. Thompson had taken an information, of which the concluding sentence was a request to grant a remand. On the other hand Mr. Thompson had refused only a short time before to have anything to do with the arrest—that is proved by another witness as well as by Mr. Thompson. The jury thought proper to believe Mr. Thompson, and not Mr. Rooney—the Chief Justice says he is not dissatisfied—and so it is utterly impossible for us to disturb the verdict on the ground that it was against the weight of evidence. The other objection was that the Chief Justice did not tell the jury that the mere fact of taking the information made Mr. Thompson responsible. I could understand *this*, that he might have been asked to leave the question to the jury whether the information was the thing that caused the man to be detained. And if they had found that the taking of the information was the *causa causans* of the detention, or that Mr. Thompson had taken the information for the purpose of the detention being continued, I apprehend that notwithstanding their finding that Mr. Thompson had not in terms said, "I remand him," he would be just as responsible as if he had gone on in terms to say, "I order the arrest." But he was not asked to submit any such question to them, and we are now to consider whether the bare taking the information with the knowledge that the prisoner would be detained in custody, was sufficient. My opinion is, that Mr. Rooney made the arrest on his own authority, and certainly he did it without any authority from the defendant, who expressly refused to give any. Mr. Rooney, who had on his own authority arrested the man, brings him to Mr. Thompson. And now the most extraordinary fact in the case comes before us. If he had brought him there to be dealt with according to law, and in order that he might divest himself of the responsibility, and Mr. Thompson might do as he thought fit, it would have been different. But he never was brought before Mr. Thompson at all; he was kept all the time in the laundry. What then happened? I think here we must take the facts from Mr. Thompson's evidence, because the jury have believed Mr. Thompson's evidence, and not Mr. Rooney's. He says, "Mr. Rooney then told me he had arrested the two men. He did not say Mr. Webb had directed him. I in effect asked by what authority; his reply was that he had ordered it, and I demurred to the propriety of his having done

so. He said on a former occasion he had a number of people arrested for a similar offence in Cork or Waterford. I saw the prisoners brought by the house, and shortly afterwards heard Mr. Rooney blame Tate for not having arrested them earlier. Tate appealed to me if I had desired him to arrest them, when I said, so far from it I told him not to do so; that I had not thought there were grounds for so doing. It is the fact that I desired Tate not to arrest them. Mr. Rooney asked me would I have any objection to take an information as to what Tate had heard Dolan swear in the morning before Mr. Webb. I declined to do so, as I did not know the object, and I asked him what he wanted with it. He said for his own satisfaction. I took the information, but by oversight omitted to sign it." That is to say, being pressed by Mr. Rooney to take the information, and being reluctant to do so, he yields to Rooney's importunity, and takes it for his (Rooney's) satisfaction. In other words, it was taken for the purpose of fortifying Mr. Rooney in doing what he had done before, and would persist in doing. Under these circumstances there was no reason to think that the taking of the information would any more render Mr. Thompson responsible than the taking of a statutory declaration would render the magistrate who took it responsible; therefore we are of opinion that the cause shown must be allowed, and of course with the costs of the motion.

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-law.

[BEFORE THE LORD CHIEF BARON, FITZGERALD, B.,  
AND DEASY, B.]

LEDLIE V. POWER.—Nov. 20.

*Demurrer—Duty of Clerks of the Peace in issuing a Civil Bill decree—14 & 15 Vict. c. 57, and 27 & 28 Vict. c. 99.*

*A brought an action against the clerk of the peace, for negligently and injuriously issuing a decree in a civil bill proceeding. Held—on demurrer to summons and plaint, that the clerk of the peace could not (on the state of facts disclosed in the plaint) be held liable, and that the plaint be set aside, with leave to amend, on payment of costs.*

Concannon (with him Morris, Q.C.) for defendant, demurred to the summons and plaint. The facts were as follows: plaintiff was defendant in a civil bill before Brereton, Q.C., chairman of the county Galway, who made a decree for £25 against the then defendant—plaintiff in the present action. The decree was to be executed contingently on an award not being made within two months. Defendant here was clerk of the peace and registrar to the chairman; and the plaint averred that being such, he negligently and injuriously issued the decree against the then defendant—plaintiff here—within the period of two months. Counsel cited 14 & 15 Vict. c. 57, s. 8,

10, 91, as defining the duties of the clerk of the peace, and contended that he had no other duties. The duties of the chairman were settled by s.s. 110, 114, with regard to the issuing of decrees. It is not necessary to give validity to a decree that it should be signed by the clerk of the peace or attorney for plaintiff, notwithstanding schedule 26, which would seem to lead to the contrary inference, although in practice, the decrees are actually signed by the clerk of the peace and plaintiff's attorney. Section 133 provides that the decree, when signed by the chairman, shall be final; and nothing is said about the signature of the clerk of the peace. See also s.s. 139, 141. *Dilane, appellant; Sullivan, respondent* (Ir. C.C., 855); *Crawford, appellant; Ahearn, respondent* (Ir. C.C., 860); 27 & 28 Vict. chap. 99, sec. 4; 14 & 15 Victoria, chap. 57, section 127, schedule 31—*Curran, appellant; Shee, respondent* (1 C. & D. C.C., 131); *English v. Dunne* (13 Ir. C.L., 562); *Whitelegg v. Richards* (2 B. & C., 45); same case in 3 Bro. & Bing., 188. Counsel concluded by contending that the demurrer should be allowed, as the clerk of the peace had nothing to do with the issuing of decrees, and could be in no way responsible for their issuing improperly.

*Beytagh, contra.*, in support of the summons and plaint, cited 27 & 28 Vict. c. 99, s. 57. In the forms given in the schedule, the signature of the clerk of the peace is everywhere required, and a blank left for it. In the schedule of fees, it is enacted that the clerk of the peace get three pence for every decree he signs. [*Pigot, C.B.*—The decree confers no authority on anyone unless signed by the chairman. This decree was executed. Can we then determine otherwise than that this decree was executed by one who had lawful authority from the chairman so to do, unless we are to imagine that the clerk acted so improperly, as to issue the decree, without the signature of the chairman to it? Then if it was signed by the chairman, does not his signature absolve the clerk from all responsibility whether the decree was right or wrong? Must not the clerk issue every decree signed by the chairman? *Fitzgerald, B.*—Either the decree was signed by the chairman or it was not. If it was signed by the chairman then the clerk is absolved; if it was not, you have not averred in your plaint that it must have been subsequently and improperly signed (which it must have been in order to be executed); you ought to have averred that the clerk improperly procured the chairman's signature; you suffer damage only from the execution of the decree. This could not be executed without the signature of the chairman, which signature absolves the clerk from all blame.] Counsel then cited 27 & 28 Vict. c. 99, s. 33—*Whitake v. Williams* (3 Leonard, 99); *Ferguson v. Kinnoul* (9 Cl. & Fin., 251); *Ward v. Freeman* (1 Ir. C.L., 677; same case in error 2 Ir. C.L., 460); *Henley v. Mayor of Lyme Regis* (5 Bing. 91); *Crawford v. McCann* (9 Ir. C.L. App. 3.)

*Morris, Q.C. in reply.*—The averment of defendant's duty, in the plaint, is by the rules of pleading mere surplussage, unless it is proved also that such was his duty. There are duties existing between the chairman and the clerk, also between a judge of the Superior Courts and his registrar; but

these are private and have nothing to do with the public. The postea after having been signed by a judge is sometimes wrong; could it be maintained then that the registrar should be held liable for this. The allegations on which the judgment in *Whitelegg v. Richards* depended are wanting here, viz:—(1.) That the act complained of was fraudulently and maliciously done. (2.) That it was done without the authority of the Court.

*Cur. adv. vult.*

*Nov. 25th.*—THE LORD CHIEF BARON now delivered the unanimous judgment of the Court.—There has been some difficulty in the framing of this plaint, and I would be glad to uphold it if possible, but I do not see how it can be done. The summons and plaint may be divided into three parts. (1.) The allegation of the adjudication after the hearing of the civil bill. (2.) That of the duty of the clerk of the peace to see to the proper issuing of the decree. (3.) That there was an issuing of another thing which is called "said decree." In the first instance there was an adjudication, by consent, that the plaintiff, in the civil bill, should recover against the then defendant—plaintiff in this case—a sum to be fixed by an award, provided that award was made within 2 months from that date, or in the event that such award was not made within the time specified, that then the plaintiff should recover against the then defendant—present plaintiff—the sum of £25. There is then an allegation that it was the duty of the clerk of the peace not to issue "said decree" until the expiration of the two months. Finally, the plaint alleges that the clerk did, within the two months, negligently and injuriously issue "said decree," signed by him, and purporting to be a decree which was to be executed, unless an award was made within one month. We must collect what the duty of the clerk was, solely from the allegations in the plaint. Now if the words "said decree," in the plaint, means that the decree was to be executed unless an award was made within two months, it is totally inconsistent with the decree which was actually issued within one month. But in order to support the plaint I am willing to consider that they meant merely that there was a decree for £25 against the defendant in that civil bill; and that plaintiff here complains that the clerk wrongfully issued that decree within the specified time, two months. Now the decree which was executed, was executed only by the authority of the sheriff, grounded on the signature of the chairman, with or without the signature of the clerk of the peace. Can we then consider that it was not the duty of the clerk to issue the decree when he is the officer of the chairman who signed that decree? Are we not to hold that the chairman was warranted in signing the decree? If that be so, we must presume that everything was rightly done. I was thinking if we could sustain the plaint by holding that as there was an adjudication, and as that was recorded in the clerk's book, and he was cognizant of that record, he was obliged not to issue anything contrary to that recorded decree, and even that he ought not to have obeyed the chairman as against that record. But we cannot assume that the chairman was not warranted in issuing the

decree. He may, before the sessions were over, have made a different ruling, changing the time from two months to one, and thus have cancelled the former record, in the clerk's possession, and thus that may have been done, which took away the variance between the record and the decree actually issued by the clerk. Again, after the chairman's order and the faithful entry of that order in the clerk's book, though that record may have remained unchanged; yet the plaintiff's attorney, in the hurry of business, may have subsequently sent to the clerk a wrong decree, inserting one month instead of two; and then the clerk may have negligently sent that wrong decree to the chairman, and so misled him into signing it. But we cannot assume all that. If anything of the kind happened it should have been averred in the plaint. The plaint cannot be sustained, but we will allow plaintiff to amend on payment of costs.

FITZGERALD, B.—I would merely remark that I can give no consistent meaning to the plaint, except this—that it means to aver that the clerk of the peace made an alteration in the decree. The only other explanation would be that the clerk by his signature induced the chairman to sign a decree different from the former one.

[BEFORE THE FULL COURT.]

MATTHEWS v. DUBLIN AND DROGHEDA RAILWAY CO.  
Jan. 26.

*Motion to set aside plea as embarrassing.*

*In an action against a railway company for not delivering plaintiff's cattle in reasonable time, defendants pleaded inter alia "that the reasonable time in plaint was such that defendants should not contract to be in time for any fair in the conveyance of the cattle." Held, that this plea should be amended as being embarrassing.*

THE summons and plaint was for not delivering plaintiff's cattle in reasonable time. Special damage, that plaintiff lost the profit he would otherwise have made at the fair of St. Ives in England. There were three pleas, the third of which was as follows: "And for a further defence, defendants say that the reasonable time in said contract in plaint mentioned was such that defendant should not contract to be in time for any fair in the conveyance of the said cattle."

Palles, Q.C. (with him *Lyster*).—I object to this plea as embarrassing. You cannot plead to the special damage when special damage is not material, and this is what defendants have here done. This would be a good plea if we averred that they contracted to have us in time for St. Ives' fair.

Ferguson, Q.C. (with him *Boston*) contra, for defendant, in support of the plea.—Defendants have an absolute right to state in their plea what the contract was, and that they then fulfilled it. Where matter extrinsic exists to qualify a contract, defendant may plead it. *Mosley v. McMullen*, (6 Ir. C. L. R. 69.)

We cannot give the qualification in evidence unless we plead it. It is said that this is pleaded to the special damage; if it be so, let them demur to it—but it is not. It is a complete answer to the action—true, we did contract, and we fulfilled our contract as qualified by yourself.

PICOT, C.B.—We think this plea is somewhat embarrassing. Let the motion stand until to-morrow, and meanwhile let defendant's counsel try if they can amend the plea.

Jan. 27.—After considerable discussion the plea was ordered to be amended as follows:—

"Defendants say they did contract with plaintiff to carry his cattle from Kells to Huntingdon in a reasonable time, but said contract was made subject to this qualification—that in determining what was reasonable time, no reference should be made to any fair or market; and defendants say they did carry the cattle, although not within the reasonable time in plaint mentioned, yet within the qualification added to the original contract."

[BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.]

DUNBAR v. O'BRIEN.—Jan. 27.

*Money had and received—Agent.*

*An action for money had and received will lie for a balance of rents in the hands of an agent appointed by a power of attorney.*

THIS was an action for £105 10s. for money received by defendant as plaintiff's agent or receiver of the rents of the lands of Annaghderriag and others in the County of Antrim. The plaint contained a count for money had and received, and another on an account stated. Defendant traversed these, and pleaded a set-off to plaintiff's claim for work and labour done by him as plaintiff's agent, and for money paid as head rent, &c. He also pleaded that the accounts between plaintiff and defendant had been left to arbitration, and that there was an award made that defendant should pay plaintiff £120 15s. 10d., which he did pay, and lastly, he pleaded that the action was brought by plaintiff as trustee for one Mrs. Margaret O'Brien, and for her use and benefit. Plaintiff replied, traversing the set-off. The case was tried at the last Trinity after-sittings before Deasy, B. A power of attorney to collect rents, &c. of the lands in question from the Rev. John Dunbar, plaintiff, and Alexander Walsh, trustees of the marriage settlement of Mrs. Margaret O'Brien to defendant, William O'Brien, was put in evidence. It was an ordinary power of attorney directing defendant to lodge the balance of the rents, after paying all charges, &c., in the Provincial Bank at Longford, to the credit of Mrs. Margaret O'Brien. There was a conflict of evidence at the trial, and at the close of plaintiff's case, Morris, Q.C., for defendant, called on the learned judge to non-suit the plaintiff, or to direct a verdict for defendant, because there was no evidence

to go to the jury that defendant received any of the monies claimed to plaintiff's use, and because it appeared by the declarations of trust in the deed poll under which defendant acted, that after paying the outgoings he was to lodge the surplus in the Provincial Bank at Longford to the credit of Mrs. Margaret O'Brien, and because it appeared further by the evidence that Mrs. O'Brien and her attorney always demanded in her name payment of the £105 10s., and because the amount claimed in plaint was not received by defendant for plaintiff's use, but to be applied pursuant to the trusts of said deed poll. His Lordship refused so to do, but reserved leave to defendant's counsel to move the Court for a new trial, on the grounds of misdirection. The jury found for the plaintiff with £47 4s. 9d. damages.

*Walker* (with him *Sidney*, Q.C.) for the plaintiff, now showed cause against the conditional order obtained in pursuance of the leave reserved.—It is contended by the other side that the action for money had and received will not lie here, but there can be no doubt that it will.—*Taylor v. Lendey* (9 East. 49); *Parry v. Roberts* (3 A. & E. 118); *Fletcher v. Marshall* (15 M. & W. 755); *Scott v. Surman* (Willes, 400). Counsel then referred at length to the evidence,\* and contended that the learned Baron was right in allowing the evidence to go to the jury.

*Morris*, Q.C. (with him *M'Mahon*) for defendant, in support of the order.—An action for money had and received will not lie here.—*Case v. Roberts* (1 Holt. 500); *Edwards v. Bates* (7 M. & Gr. 590); *Bartlett v. Dimond* (14 M. & W. 49; *Ehrensperger v. Anderson* (3 Exch. 148).

*M'Mahon* on same side.—Plaintiff's only remedy would be by a cause petition for a settlement of accounts, and payment of balance found to be due.—*Frühling v. Schroeder* (2 Bing. N. C. 80); *Lilly v. Hays* (5 A. & E. 548) *Edmunds v. Harris* (2 A. & E. 414).

*Sidney*, Q.C. was not called on to reply.

*PIGOT*, C.B.—Since I was a student I have always learned that the employer of an agent is entitled to obtain from the agent all the balance not disbursed on the estate. It was contended that this is not a mere power of attorney, but a deed creating trusts, and that no action in law would lie for the non-execution of those trusts. But we think there are no trusts mentioned, and that this is only a power of attorney empowering defendant to receive the rents, and perform the ordinary duties of a receiver or agent. If defendant paid the money to Mrs. M. O'Brien instead of lodging it to her credit, I would yet hold that to be a substantial fulfilment of the direction, although not strictly within the power of attorney. It was necessary that the accounts should be settled in order to ascertain what was due to Mrs. O'Brien. We have not a shadow of a doubt that the action for money had and received will lie. We are of opinion that the judge was perfectly right in his charge to the jury, and on no grounds can the conditional order be sustained. We must, therefore, discharge it with costs.

*M'Mahon* for defendant asked leave to appeal.

*PIGOT*, C.B.—You do not want leave to appeal; you have it of right on a point reserved.

PRENTY v. MIDLAND RAILWAY Co.—Jan. 27.

Lien—8 & 9 Vict. c. 20.

*Defendants contracted with plaintiff that they would carry 44 pigs for him. Plaintiff engaged a waggon and a half for the pigs, putting 26 in the waggon and 18 in the half waggon. There was a bye-law of defendants that no more than 15 pigs shall be at any time put in a half waggon, or if more were put, that the excess should be charged for at the rate of 2s. 3d. per head. On the arrival of the train at its destination, defendants demanded 6s. 9d. for the three pigs in excess; plaintiff refused to pay it—whereupon defendants kept the whole of the pigs, conceiving they had a lien on all for the 6s. 9d. Plaintiff then brought an action against the company for not delivering the pigs in time, and for trover, and the jury found for him with £11 damages. Held, on motion for a new trial, that defendants had no lien on the 44 pigs for the 6s. 9d., the Court giving no opinion as to whether they might have had a right of lien as against three of the pigs.*

THIS was an action for not delivering 44 pigs in time: there was also a count in trover. Plaintiff brought 44 pigs to be conveyed to Dublin by defendants. In the first instance he put 40 in one waggon, and wished to pay the sum of 2s. 3d. per head, as by Act of Parliament settled, for the remaining four, which defendants refused, stating that plaintiff should pay for half a waggon for the four pigs; this he consented to do, and 26 pigs were placed in one waggon, and the remaining 18 in the half waggon. There was a bye-law of defendants, which provided that when a half waggon was engaged, no more than 15 pigs should be put in it, and that if more than 15 pigs were put in it, they should be charged for at the rate of 2s. 3d. per head. When the pigs arrived in Dublin, the defendants demanded 6s. 9d. for the three pigs, which plaintiff refused to pay, and thereupon defendants detained the whole number of pigs for the 6s. 9d. though the stipulated fare for the waggon and a half, £4 17s. 6d. had been paid to them by plaintiff. Plaintiff then brought an action against the company for not delivering the pigs in time in Dublin, and in trover for taking and converting them to their own use. Defendants traversed these counts, and the jury found for the plaintiff with £11 damages, the Lord Chief Baron reserving leave to defendants to move that the verdict be entered for defendants, or that the damages be reduced to £6 10s. The latter alternative was, however, now given up by defendant's counsel.

*Palles*, Q.C. (with him *Butt*, Q.C., and *Lyster*) now showed cause against the conditional order obtained in pursuance of the leave reserved.—The bye-law with regard to the half waggon is in opposition to the Act of Parliament, 8 & 9 Vict. cap. 20, sec. 97, the Railway Clauses Act, which fixes a rate at which the pigs should be taken per head. It was the duty of the defendants, as carriers, to pack the pigs whatever

\* Which is not material for the purpose of reporting, being altogether conversant with the facts.—Rep.

way they wished. As to the trover—*Baldwin v. Cole* (6 Mod. Rep. 212); *Burroughs v. Bayne* (5 H. & N. 296); *Pillott v. Wilkinson* (2 H. & C. 72).

*Carleton, Q.C.* (with him *La Touche*) contra, for defendants, in support of the conditional order. The contract is an entire indivisible one, and the regulation about the waggons was adopted for the convenience of customers, and to make the fare cheaper, for in this case 2s. 3d. per head for the 44 pigs would be £4 19s. and plaintiff was charged only £4 17s. 6d. exclusive of the half third-class fares, which his drovers accompanying the pigs had to pay. As this was an indivisible contract, defendants were entitled to their lien on all the pigs for the 6s. 9d.—*Harden v. Smith* (8 Term R. 17); *Yorke v. Greenough* (2 Ray. 867); *Blake v. Nicholson* (2 Mau. & Sel. 167). The lien is parted with when the possession ceases.—*Chase v. Westmore* (5 Mau. & Sel. 180) *Allen v. Smith* (31 Law J., C. B. 306); *Higgins v. Breather-ton* (5 C. & P. 2); *Wolfe v. Summers* (2 Camp. 631); *Powell, Carriers*, 199. With regard to the trover count, there was here no conversion, because conversion signifies a wrongful act, and here it cannot be said there was a wrongful act.

*La Touche* on same side.

*Butt, Q.C.*, not called on to reply.

*PIGOT, C.B.*—We must consider what was the contract here. It is argued by defendant's counsel that it is one indivisible contract—so indivisible that the right of lien was 'co-extensive with the whole number of pigs to carry which was the subject-matter of the contract. The contract made at the station must be taken to have been incorporated with the bye-law. The terms of that contract were that plaintiff was to pay £4 17s. 6d. for the hire of a waggon and a half, and defendants to supply that waggon and a half, and carry the pigs in the waggon and a half to Dublin. In the contract was the stipulation that no more than 15 pigs should go in the half waggon, or if they did, 2s. 3d. per head was to be paid for the excess above 15. The contract was entire, no doubt, but it consisted of two parts on plaintiff's side—one that he should pay the fare, £4 17s. 6d. which he did—the other that he should pay something in addition if he did an act which, in the contemplation of defendants, he was likely to do, viz., to put more than 15 pigs in the half waggon. This is the test to be applied—Suppose defendants were the plaintiffs, and this was an action for part of the fare, 6s. 9d., the remainder, £4 17s. 6d. having been paid, how would defendants here sue? They would set out the contract, and assign as breach the matter of the three pigs in excess. The 6s. 9d. would be the only sum recoverable in that case, and that would be specifically for the three pigs in excess, which violated the stipulation annexed to the contract. Prenty would be liable in that case only because he put the three pigs into the half waggon. We are guided in our decision here solely by the facts, and not by any of the authorities cited. We express no opinion as to whether defendants might have had a lien on any three pigs. The cause shown must be allowed with costs.

SWAN v. READE.—Jan. 29.

*Practice*—Motion to compel plaintiff to give security for costs.

*The fact that the Court of Chancery has directed that an action shall be brought, is no ground for not obliging a plaintiff to give security for costs.*

*Boston* (with him *Purcell, Q.C.*) for defendant, applied to the Court that plaintiff, who was resident in England out of the jurisdiction of this Court, should be obliged to give security for costs. Counsel moved on an affidavit of defendant. The question in the action was one merely of account.

*O'Driscoll*, contra, for plaintiff.—Plaintiff sues only as administratrix of her late husband. The matter was before Master Litton, and he directed that the present action should be brought; he then stood in the place of the Lord Chancellor, and when the Court of Chancery direct that an action shall be brought, the Courts of Common Law will not oblige a plaintiff to give security for costs.—2 Lush. Practice, 930, referring to *Oliva v. Johnson* (5 B. & Ald. 908); *McCulloch v. Robinson* (2 Bos. & Pul. 392). [*Pigot, C.B.*—The text-book cited is one of very high authority, but on looking at the two cases it refers to, I cannot find that any such proposition is laid down in them, as Mr. Justice Lush seems to have deduced from them.]

*Purcell, Q.C.*, in reply.—The point is expressly ruled the other way in *Lilly v. Stafford* (3 Ir. L. R., 300), and *Stafford v. McDonnell* (2 Jebb & Sym. 602).

*PER CURIAM*.—The application must be granted with costs. Defendant's costs to be costs in the cause.

McLAUGHLIN v. CRAWFORD.—Jan. 31.

*Practice*—Motion to change venue.

*When defendant has undertaken to accept short notice of trial, the court will not grant a motion to change the venue.*

*Hamilton* for defendant, applied to the Court that the venue in this case be changed from the city of Dublin to Londonderry. Counsel moved on an affidavit of defendant. The action was for goods sold and delivered. Nearly all the witnesses on both sides live in Londonderry.

*W. R. Miller* contra, for plaintiff.—This motion is brought after the issues have been settled, the record lodged, and the cases actually in the list for to-morrow, and our witnesses are on their way to Dublin for the trial. Defendant has undertaken to accept short notice of trial on condition of getting an extra day to plead. That short notice refers to the after-sittings, and he has now no grounds for this motion.—*Jackson v. Kidd* (8 C. B. N. S. 354); *Clutze v. Bradley* (13 C. B. 604) decide this very point.

*Hamilton* in reply.

*PIGOT, C.B.*—It would be a very inconvenient practice to grant such a motion as this after defendant's undertaking, and now at the eleventh hour. We must refuse the motion with costs.

## Registry Appeal Court.

Reported by William Woodlock, Esq., Barrister-at-Law.

[BEFORE O'BRIEN, J., HAYES, J., O'HAGAN, J., AND FITZGERALD, B.]

JOHN WHITLEY, APPELLANT, M'CLEANE, RESPONDENT.  
Nov. 28, 1865.

*Franchise—Rated occupier—Destruction of premises by fire.*

*A party rated as occupier of "houses and yard," does not lose his right to appear on the list of voters by reason of the houses being destroyed by fire, he still continuing to hold the site on which they stood.*

APPEAL from a decision of the chairman of the county of Armagh. The case stated was as follows:—In this case the appellant's name appeared on the list, No. 7, of persons entitled to vote at the election of a member for the borough of Enniskillen. The premises out of which he claimed as a jointly rated occupier with Thomas Richard Whitley and Joseph Boothe Whitley, were rated in the rate made on the 21st July, 1863, at £35 sterling, and are therein described as "houses and yard No. 29 High-street." That he was duly registered as a voter at the October sessions in the year 1864, out of said premises as a jointly and rated occupier with Thomas Richard Whitley and Joseph Boothe Whitley for said premises, under said description of "houses and yard No. 29 High-street." That on the 2nd August, in the year 1864, a rate was struck, in which said John Whitley was jointly rated with said Thomas Richard Whitley and Joseph Boothe Whitley for the sum of £62 sterling, for premises therein described—"house, stores, offices, and yard, No. 29 High-street." That said John Whitley, on said 2nd August, was in possession (jointly, as aforesaid) of the same premises which he possessed at the period of making the rate of the 21st July, 1863, neither more or less. That the rate of the 2nd August, 1864, was struck after the lists for the revision of October sessions in the year 1864 were published, and that revision did not proceed on the rate of the 2nd August, 1864. On the 8th October, 1864, almost the whole of the premises mentioned in said rate of the 2nd August, 1864, were burned to the ground, and John Whitley and his co-occupiers had to transfer their business to other premises in place of those portions which had been burned. John Whitley and his co-occupiers never parted the possession of the ruins, or of anything included within the ambit of the premises mentioned in said rate of the 2nd August, 1864. John Whitley was duly objected to on the ground that he was not rated on the last rate (that of the 2nd August, 1864) at a sum of not less than eight pounds sterling in respect of premises lying within the borough, which had been occupied jointly by him for the twelve months next preceding the 20th July, 1865. This question depends on the question, whether within the meaning of the Act 13 & 14 Vic. c. 69, s. 5, the premises, after they were so burned, continued within the meaning of that Act as those mentioned in the rating of the 2nd August, 1864. I,

held they were not, and struck off the name. If I am right, the name remains off; if I am wrong, the name should be put on the list.—P. J. Blake, Chairman for the County of Fermanagh.

*Whiteside, Q.C., and W. Irvine* for the appellant. The authorities all show that the appellant is entitled to have his name on the register. Where the premises in respect of which a vote was registered were burnt down between the registration and the election, and were not entirely rebuilt till after the election, the qualification was held not to be lost—*Cosen's case* (Barron and Austin's Election Cases, 463); *Meyrick's case* (Knapp and Ombler, 153); *Father's case* (Falconer and Fitzherbert, 449). The test here is, could the appellant have refused to pay the rates. Where a voter had been registered for a house and foundry, but previous to the election he had parted with the house, retaining the foundry, it was held that the vote was good—*Savary's case* (Falconer and Fitzherbert, 300). There also it was held that the party impugning the vote should show insufficiency of value—*Browne's case* (4 Ir. Jur. N. S. 105), *Bruden's case* (4 Ir. Jur., N. S., 106), show what is considered a sufficient occupation. Use and occupation will lie, though the premises are burnt—*Ison v. Gordon* (5 Bing. N. C. 501). *Ford v. Corcoran* (10 Ir. C. L. R. 539) decided that the chairman was not bound by the town-clerk's list, but should have looked into the original list. St. 13 & 14 Vic. c. 69, ss. 32, 33, and 53, st. 15 & 16 Vic. c. 63, st. 17 Vic. c. 8, ss. 4 and 5, shew the machinery provided for a case like this.

*J. A. Byrne and J. C. Neligan* contra.—The qualification is an occupation qualification. Occupation is necessary to it, therefore the premises must remain in such a state as to be capable of the occupation for which they were designed. The qualification here was a house. True, there is a yard added to it; but if the house is gone the valuation is broken in upon; there is no machinery for apportioning it, and the vote is lost. Therefore the entire occupation is essential to the appellant's right; but a part of it gone, inasmuch as it no longer exists in a state capable of occupation. Where a voter seeks to register a vote out of a house, capability of inhabitancy is necessary. The judgment in *Cooke's case* (1 Cr. & Dix. C. C. at pp. 605 and 606) shows that a personal occupation was intended. The words of the Act are—"hold and occupy." *Ison v. Gordon* is distinguishable because under the statute of G. II. the action of use and occupation is given in all cases where the premises have been held or occupied by the defendant; therefore a mere holding will satisfy the statute. On the case, as stated by the chairman, there is no evidence of any intention to re-occupy on the part of the appellant. *Hicks' case* (Bar. & Aust. 460) is to be taken as an authority on the status of the parties there in July, 1841. The house there was not rebuilt till September—*The King v. Dicheat* (9 B. & Cr. 185).

THE COURT holding that the appellant was entitled to have his name put upon the list, notwithstanding the burning of the house, reversed the Chairman's decision.

## Consolidated Chamber.

Reported by H. W. B. Mackay, Esq., Barrister-at-Law

[BEFORE MR. JUSTICE O'HAGAN.]

DOHERTY v. M'DAID.—Jan. 31.

*Garnishee order—Smallness of debts attached.*

*A conditional order under the Common Law Procedure Act, 1856, s. 63, will be made against garnishees, although some of the debts which have been attached do not exceed £4.*

In this case judgment had been recovered against defendant at the last Londonderry Summer Assizes for £85 6s. 4d. Defendant had afterwards gone to America, the judgment being still unsatisfied. On a previous day, Mr. M'Conchy had obtained from Mr. Justice O'Hagan an order under the Common Law Procedure Act, 1856, s. 63, attaching seven debts varying in amount from £3 to £7, and owing by different persons to defendant, but the learned judge had refused, in the absence of authority, to grant the further order that the garnishees should appear to show cause why they should not pay over the debts, on account of the smallness of the sums due by them.

M'Conchy now renewed his application for the further order, stating that £4 was the smallest debt against which the order was now sought. He read the copy of the order in *Murphy v. Walsh* in the Exchequer (not reported) from which it appeared that Mr. Keogh had obtained an order similar to that now sought against debts, some of which did not exceed £4.

O'HAGAN, J. then granted the further order.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF WILHELM AUGUST VON REITZENSTEIN.  
Feb. 12.

*Foreign will—Hanover—Mutual will.*

*The mutual will of a domiciled Hanoverian subject and his wife not attested, having been, on the husband's death, duly decreed for in the proper Court in Hanover, the Court here gave administration of his goods with a certified translation of the same to the nominee under a power of attorney from the widow (no executor being named, and there being no issue save a minor under 21), who was by the Hanoverian law the party entitled in her own right, and as guardian to the minor.*

G. R. Price for the Baroness Von Reitzenstein, moved for letters of administration of the goods of the deceased, with a translation of his will, dated the 5th day of February, 1852, annexed, to be granted to a nominee of the applicant, his widow. In her affidavit she stated that the deceased and she had made a mu-

tual will of that date, of which a translation was annexed. No executor was named in it, and there was only one child the issue of their marriage, a minor under 21. The following is a copy of the will:—

"We the undersigned, viz.—I, Captain Wilhelm August Von Reitzenstein, and I, his wife, Georgina Margaret Von Reitzenstein, *née* Halkett, hereby make in the event of our death the following will. In the event of our marriage proving childless, I, the testator, appoint as heirs—first, my wife; second, my mother, but only as regards that part of the inheritance which is due to her. Should my mother die before me, my wife then remains my sole heiress. In this case I, Georgina Margaret Von Reitzenstein, *née* Halkett, appoint as heirs, first, my husband; second, my father, but only as far as regards the inheritance due to him; should my father die before me, my husband then remains my sole heir. In the event of issue resulting from our marriage, we mutually appoint those descendants our heirs in equal portions, whereby however we determine that the surviving consort shall retain the usufruct of the whole inheritance for life. And I, the testator, determine more especially that my wife shall be the sole guardianess, and neither obliged to make an inventory, nor render an account, as in this and every case, I expressly forbid all and every interference of the Court. Hanover, 5th Feb. 1852. Signed—Wilhelm August Von Reitzenstein; Georgina Margaret Von Reitzenstein, *née* Halkett."

The will was enclosed in a sealed cover, bearing the following superscription:—

"Herein is our mutual will.—Hanover, 5th February, 1852.—Wilhelm August Von Reitzenstein; Georgina Margaret Von Reitzenstein, *née* Halkett."

The will was handed over by both testators according to the protocol of 18th Feb. 1852, of the Court of the Garde du Corps at Hanover to the said Court, and was deposited by the said Court with the protocol of deposition enclosed in a sealed cover, bearing the following inscription—"Herein is the will of Captain Von Reitzenstein of the Royal Garde du Corps, and of his wife, *née* Halkett, to be opened after the death of the one who shall die first. Handed over to the Court du Corps on the 18th of February, 1852." In attestation. (Two witnesses.) On the death of the deceased on the 5th of December, 1864, the validity of said will was decreed for by the Royal Hanoverian District Court of Hanover, and the widow thereby was declared competent on the part of the Court of Chief Guardianship of the said Kingdom, to receive all demands of the inheritance, and to give an acquittance and discharge for the same. The deceased was a domiciled Hanoverian, and by the law of that kingdom, as certified by the Minister for Foreign Affairs at Hanover, whose signature was duly verified by the Charge D'Affaires and Envoy Extraordinary for England at Hanover, the will was a valid one, and the widow and the child are the testator's sole heirs, and entitled to all his property, and that the widow on her own part absolutely, and as guardian of her daughter as appointed by said Court, had the right to the disposal of same. The deceased left £1,301 17s. 3d. Government New 3 per Cent. Stock in the Bank of Ireland, standing in the name of an attorney for him under a power of attor-



ney. The deceased had not any debts in Ireland, as alleged. The widow had nominated Mr. Samuel Campbell as her attorney to get administration. The translation had been made and certified by Mr. Dove, the official translator to the Embassy at Hanover, and his signature, as well as his official status, had been certified by the British Envoy there.

KEATINGE, J.—I think you are entitled to the grant you ask for, but you must give justifying security.

*Order accordingly.*

NOTE.—See the following authorities as to the judgment of a competent foreign tribunal binding the Court here.—*Goods of Veiga* (3 S. & T. 15); *Goods of Deshaix* (34 L. J. Pr. 58); *Goods of Da Cunha* (1 Hag. 237); and see also *Goods of Klingeman* (3 S. & Tr. 18) as to the certificate.

WOODS v. MURPHY—Feb. 20.

*Practice—Striking Special Jury.*

*The Court will not order a Special Jury to be struck according to the old system, unless an affidavit be filed to shew the necessity for doing so.*

E. Beytagh for the plaintiff, an executor, applied to have the case tried by a special jury.

Samuel Walker, for the defendant, impeaching the will, asked for a special jury to be struck according to the old system. The assets were alleged to be about £30,000, and the will purported to give legacies to charities and religious orders amounting to £21,000. No affidavit had been filed.

KEATINGE, J.—I do not see any reason for making the order asked by Mr. Walker, unless his client makes an affidavit making some case for it. I have made such an order in a very few cases, and in all of them I did so on the consent, or on the application of all the parties.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

FLOOD'S ESTATE.—Dec. 1, 1865.

ROONEY, APPELLANT; THE NORTHERN BANKING COMPANY, RESPONDENTS.

*An affidavit to register judgment as a mortgage—Insufficiency of—St. 13 & 14 Vict. ch. 29, sec. 6.—Omission in the affidavit of the costs.*

*An affidavit to register a judgment as a mortgage, which stated "that the amount recovered by said judgment is £258 11s. 10d. besides costs . . . and that the sum of £258 11s. 10d. sterling, secured by the said judgment, together with the costs of ob-*

*taining said judgment still remains justly due, and owing to the N.B.," was held defective in not stating what was the amount of the costs recovered.*

THIS was an appeal from an order made by Judge Dobbs, and the question was entirely upon the sufficiency of insufficiency of an affidavit to register a judgment as a mortgage. The following is the affidavit, or so much thereof as it is requisite to consider for the case in hands:—"James Thomas Preston maketh oath and saith, that in Hilary Term, and on the 17th of January, judgment was entered up in the Court of Queen's Bench in Ireland, at suit of deponent as plaintiff, against the Rev. Jas. Cuthbert Flood, the defendant, and deponent saith that the title of said cause of action in which the said judgment was so entered up, is as follows—that is to say, James Thompson Preston, of Belfast, in the county of Antrim, Esquire, one of the registered officers of the Northern Banking Company, plaintiff, the Reverend James Cuthbert Flood, of Holywood, in the county of Down, Clerk, defendant, and deponent saith that the amount recovered by the said judgment is £258 11s. 10d. sterling for debt, *besides costs.*" The affidavit then, which is a very lengthened one, having complied with the various other requisites of the Judgment Mortgage Act, thus concludes:—"Saith that the sum of £258 11s. 10d. sterling, secured by the said judgment, *together with the costs* of obtaining said judgment, still remains justly due, and owing to the Northern Banking Company, and that the said judgment is still in full force and effect in law." Judge Dobbs made an order, dated the 26th May, 1865, whereby he declared that this judgment mortgage was a valid charge on the lands which it was sought to affect by the above affidavit, which judgment mortgage his lordship held was sufficiently proved by the said affidavit of registry. The grounds upon which it was contended that this affidavit was insufficient were, that the said affidavit to register the judgment as a mortgage did not state the *costs* recovered by said judgment. On the other hand, it was contended that the costs need not have been stated, and this was the narrow question now for consideration.

Frederick Walshe, Q.C., with Samuel Walker, now appeared in support of the appeal. This affidavit appearing on the registry in this case is insufficient. It does not comply with the provision of the 6th section of 13 & 14 Victoria, chap. 29. The party registering his affidavit might have waived his costs if he chose; then he would have nothing for costs; but it is absurd to say that this judgment, of which the affidavit of registry is sufficient evidence, was complete, that it was a complete record, until the costs were either added, being taxed, or waived—here waived they were not. Now, no execution could ever issue on a half-completed judgment. Suppose the judgment only contains two lines, and for some reason or other was not yet perfected or made up, without even mentioning the debt, could execution issue—issue on an incomplete judgment? It is absurd, it is superfluous to cite cases on this point; however, cases have been decided on this point, namely:—*Butler v. Bulkeley* (1 Bingh. 233); *Slater v. Slack* (3 N. & M. 717); *Pierce v. Derry* (4 Q.B. N. s. 635); in fact, if it were otherwise, the certainty of the incumbrances



secured by judgments would never be arrived at, because no one would know whether the judgment would, if ever, be complete, and mortgages might be in existence on a half-complete judgment. Why, a £50 debt might appear on the judgment roll as recovered—a statutable mortgage had thereunder—and no costs being included, a lender of money would never be secure who had this £50 judgment before him with costs unascertained, for at any subsequent moment the judgment creditor for a paltry sum of £30, might append his costs to the roll, which costs might be £500, as if he had to bring a multitude of witnesses to prove the debt from England, whose position might be that of noblemen, or the witnesses might be brought from Hong Kong; that would swell the costs to, nay, even thousands. If the Court take an opposite view of this case, there will be no certainty of incumbrance on any estate as appearing on the record.

*Law, Q.C., with Andrews, for the Northern Bank.*—It is submitted that the issuing of execution is a waiver of costs. It is an unheard of proposition that a judgment is bad until the taxation of costs. Let us suppose that instead of "besides costs," our affidavit had a blank for costs, and that same was on the judgment roll. [*Lord Chancellor.*—That would clearly be nothing for costs; that would be no claim made for costs.] See the enormous evil that will be worked if this judgment is condemned to fall on this ground. After the Summer Assizes each year it would be absolutely impossible for the successful party to tax his costs until the November following, and in the meantime in place of hurrying to register the judgment as a mortgage, as we have done, the successful party, after obtaining his judgment in August or at the end of the month of July, would be compelled to hold over until the taxing master would sit in November, and meanwhile, of course, the property would be swamped or made away with elsewhere. The judgment then would be absolutely useless. But the words of the sixth section of the Judgment Mortgage Act are "The creditor under any such judgment decree, order, or rule shall know or believe that the person against whom such judgment decree, order, or rule is entered up, obtained, &c. . . . It shall be lawful for each creditor to make an affidavit." Now a great deal depends on the meaning of the expression "entered up." We contend that it means the entry of the judgment on the record. It was from ancient times the custom not to complete the roll by transcribing the whole proceedings into it, but to enter only what is called the *incipitur*, but the roll was not then completed. By the 1 & 2 Vict., c. 110, interest runs on a judgment debt in England from the time of the entry of a judgment; and a question arose in *Newton v. The Grand Junction Railway Company* (16 M. & W. 139) as to what "the term of the entry of a judgment" meant, and from what time interest was to be calculated in reference to signing the judgment the 1 & 2 Vict., c. 110, giving interest "from the time entering up judgment;" and the contention there was whether interest ran from the entry of the *incipitur* or from the time of perfecting the judgment after the taxation of costs, and the Court there held that interest runs on a judgment debt from the time of the

entry of the *incipitur* and not merely from the final completion of the judgment after the taxation of costs.

*THE LORD CHANCELLOR.*—The question is here whether the affidavit to register a judgment as a mortgage complies with the Act which requires the amount of debt, damages, and costs to be stated in the affidavit. This is a species of execution substituted for all other forms against the lands, and the party so obtaining execution is entitled to hold them until the demand is paid. The principal object of the Act is that persons lending money on the estates can go to the registry office and may know that they are safe in so lending, and therefore it is that the Act requires it to be stated what the debt, damages, and costs for which the lands are taken, as it were, in execution are. Now if a man is about to lend money on an estate which is so taken in execution, or more correctly to speak, upon which a mortgage is to be found for a paltry sum, how does this give either the lender of the money or the owner of the estate any information as to what sums are exactly charged as judgment mortgages thereon, for the costs until they appear on the judgment are unascertained, and may be one hundred times greater than the debt. In this case no costs whatever appear on the affidavit of registry. It is true that if the party waived his costs that there would be no question about it, for it would appear to so by the affidavit, and the judgment would be made up to the day. It has been urged strongly upon us the inconvenience that would flow from disallowing the claim in this case, from deciding that the judgment is incomplete until either the costs are taxed or waived as the case may be. Well greater inconveniences would arise if we decide in favour of the Northern Bank. If a man recovering a judgment is desirous to take immediate advantage thereof, he must forego his costs: he must waive all rights thereto—here it does not appear that there was any waiver, but on the contrary it says that a sum of £

has been recovered besides costs, that is together with costs; why that is an averment that costs were recovered, and it implies that no waiver takes place, the very words, besides costs, show that the costs were not waived. We are both then of opinion on these grounds that the affidavit is defective in this instance, and that the security must fall. It can't be helped, and is to be regretted.

*THE LORD JUSTICE OF APPEAL* said that he had listened with considerable attention to the case, and he could not conceive anything more disastrous than this, that an execution could issue on an inchoate judgment; all certainty of discovering incumbrances would disappear. His Lordship entirely concurred in the opinion arrived at by the Lord Chancellor.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

*JAMES EDWARD THORNTON—Feb. 8.*

*Bankruptcy—Advances of moneys to bankrupt on security of goods consigned to consignee—Notice, absence of.*

*Where a bank made advances to T. upon the faith*

that said bank was to be repaid said advances out of the proceeds of certain goods which were shipped by said T. to certain foreign consignees, and where T. had instructed said foreign consignees to remit to said bank the proceeds thereof, but the goods were at the time in the order and disposition of T. (who afterwards became a bankrupt), with the consent of said bank—Held (reversing the order of Judge Berwick), that the bank not having given to the consignees notice of their said transactions with T. the property was not taken out of the order and disposition of T., and therefore the proceeds of said shipments vested in the assignees.

There was an appeal from an order made by Judge Berwick in the Court of Bankruptcy. The struggle here was between the assignees, who are the appellants, on the one hand, and the Merchant Banking Company of London on the other. The facts of the case are stated in the judgment of Judge Berwick, *supra*, p. 16, from which the following is gathered—Judge Berwick held that the said bank were entitled to retain in their hands, to the prejudice of the assignees, certain sums amounting to £666, received from foreign consignees by them the said bank since the bankruptcy of Edward Thornton on the 24th July, 1864, on account of shipments, or consignments made by the bankrupt to his said foreign consignees, and said learned judge further held that said bank was also entitled, to the prejudice of said assignees, to receive any further sums that might be made available from those parties, for monies due by them to said bankrupt.

Heron, Q.C. (with Murphy) appeared for the assignees, and relied upon *Thompson v. Speirs* (13 Sim. 471), and the cases collected at that page.

Kernan, Q.C., and J. E. Walsh, Q.C., were for the assignees.

As the authorities here are identically the same as those cited below, and as the Lord Chancellor takes a view opposed to Judge Berwick, the arguments on both sides are collected in both judgments.

THE LORD CHANCELLOR.—I think in all the authorities referred to by Judge Berwick, there was a specific appropriation of the cargo for the purposes of the debt due. The question is, does this specific appropriation apply to these particular cargoes? It occurs to me that the dealings in all probability amounted to nothing more than an undefined indefinite arrangement. I call it an indefinite arrangement, because it was not pointed to any particular goods, but an arrangement to make advances which should be covered by the proceeds of the consignments by the bankrupt. Now, reaching that stage of the case, I would have no difficulty in affirming the order of Judge Berwick, but then there is the latter part of the argument—namely, were those goods at the time of the bankruptcy, in the order and disposition of the bankrupt? Now that they were is very plain; he could do with them as he liked even after that memorandum or paper of the 4th of July, 1864 (*supra* page 17); he could have given them any destination he pleased; he could have written to have them sent to any other persons or to any other place in the world he wished, and therefore they were

in the order and disposition and power of the bankrupt. But that would not affect the case unless we come to the conclusion that they were in the order and disposition of the bankrupt, with the consent of the true owner. The true owners, the bank, could, as Mr. Kernan has informed us, have filed a bill in this Court to restrain the bankrupt from tampering with that property or dealing with it in a manner adverse to their interests. On the 20th July the bankruptcy of the party takes place, but up to that time the bank did not give any notice whatever to the consignees, nor for nearly a month afterwards, not until the 10th August, do they give any notice. There was in this manifestly no intention on their part to give any notice, or to take any step to apprise the consignees, no doubt, relying upon the proceeds of those goods coming to them in the usual way, and upon the honest dealings of the bankrupt, and it is pretty plain that the bankrupt himself had no intention of sending notice to these consignees. The consignees themselves never knew that in making those consignments any advances had been made by any body to the bankrupt, and therefore there was an absence of intention to give notice by either party, either the banking company or the bankrupt. Now that notice was essential, and cannot be controverted. It is sustained in every case that has been cited. In the case of *Hunt v. Mortimer* (10 Barn. & Cress. 47), the reason the notice became unnecessary was because the money was received before the bankruptcy. Each particular case depended very much on the nature of the transaction; in some cases there is a specific appropriation, and in some the contrary. All the cases depend upon their own particular facts, but they all lay down the proposition, and I cannot find it anywhere omitted, that notice of some sort is necessary to the person who has the dominion of the property, in order to take it out of the order and disposition of the bankrupt. In all the cases it is laid down that you are bound either to obtain possession or to go as far as you can to obtain possession. If you send your notice in time, and that it reaches the party to whom it is directed there the transaction is complete; but if by the delay of post or the distance of the place, you cannot be certain that notice did reach in time, still you did your part, and you can rest satisfied that the notice will reach the party sometime. You having despatched your notice to the consignees, the goods were no longer in the order and disposition of the bankrupt. That notice must be given by somebody to the consignees, is incontrovertible. The question here is, what is the effect of the whole of the transaction? The counsel for the banking company have argued that it was part of the contract between the bank and the bankrupt that he should give notice to the consignees himself. Now, if such a rule as that were admitted, there would be no security for the commercial world. It has always been understood that that should be the act of the party making the advances. The bankrupt otherwise could keep the goods in his order and disposition by promising to give notice, and not doing so; and in my mind it would put an end to the whole doctrine as to giving notice if that course could prevail. Then again it was contended that there was a fraud in this case by the bankrupt not giving notice. Now, the term "fraud" is very difficult to apply

here. The bankrupt did not withhold the notice in contemplation of bankruptcy in order to defeat his general creditors through the assignees. It was neglect, on the confidence of the bankrupt that he was a solvent person, and that nothing was going to happen to him to frustrate his arrangement with the bank. In the case of *Re Jones*, the party was an attorney, and he was bound to tell his client that notice should be given in the transfer of the certificates of the railway company. He practised a fraud—a gross fraud—on his client in the matter, a much higher species of fraud than we have here. The attorney omitted to register the deed so as to give validity to the note. That appears to me to be a higher and stronger case than this; for here we have nothing more than too great confidence, security, and trust that the bankrupt would be able to carry out the arrangement with the bank. Upon the whole of the case I am clearly of opinion that this order in the suit cannot be sustained, and the case must be remitted back to the Bankrupt Court to be in this respect amended. The Lord Justice of Appeal was unable to attend to-day, but from what he heard yesterday he was of the same opinion. If I had formed a different opinion to-day, I would have adjourned the case to have it fully re-argued before him; but what I have heard to-day has only gone further to strengthen the opinion in which he joined me. I myself have no doubt whatever on the subject, and therefore I am bound to say that I cannot sustain the order of Judge Berwick.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

CLELLAND v. RITCHIE.—Nov. 10, 13; Dec. 18, 1865.

*Landlord and Tenant—Waste—Injunction to restrain—Removing sand off demised premises for sale.*

*Lessor, by indenture bearing date the 28th day of February, 1863, demised certain premises, "together with the right of digging, lowering, levelling, and removing" any portion of the said premises, so as to make same suitable for building or ornamental purposes, to hold to said lessee for 9999 years, and said indenture contained a covenant that said lessee "would not commit any wilful or voluntary waste, spoil, or destruction upon said premises." Lessee commenced to build upon and improve the surface of the grounds, but to aid him in doing so he "removed" sand therefrom, and sold same for profit. Master Brooke, to whom the case was referred, reported that the sand was removed bona fide. Held, allowing exceptions to said Master's report, that although the lessee might remove the sand bona fide, yet that he was not empowered to sell any portion thereof, and that his doing so was waste; and that too though the monies realized by the sale thereof were expended on the improvements of the said demised premises.*

THIS case came before the Court on report, exceptions,

and merits. By an order, bearing date 11th of November, 1864, it was ordered by the Lord Chancellor that an injunction should issue to restrain the respondent, his servants, workmen, and labourers from levelling, lowering, or removing any portion of the premises leased to said respondent by lease of the 28th of February, 1863, save *bona fide*, in order to render said premises suitable for building or ornamental purposes, and it was thereby referred to Master Brooke to take an account of any sand already removed save for such purposes. Said Master having examined into the several matters referred to him, found that the respondent had not removed any sand, except *bona fide*, for building and ornamental purposes. To this finding of the Master the petitioner excepted; and the first exception so taken was, that the Master ought not to have so reported, but should have reported that no part of the sand removed by the respondent had been removed *bona fide* for such purposes; secondly, that the Master should have found that large quantities of sand had been removed not *bona fide*, and that he should have taken an account of what was so removed; and thirdly, that the Master should have found that sand to the value of £271 12s. 8d. had been removed by the respondent otherwise than *bona fide* for such purposes. The petition upon which the injunction was granted was presented by John Clelland, of Stormount Castle, in the county of Down, against the respondent, William Barry Ritchie, of Mount Pottinger, in the same county. The petition prayed that said respondent might be restrained by injunction, and also his servants, workmen, and agents, from committing waste in the premises demised by a certain lease of the 28th of February, 1863, and from carrying away the sand and gravel therefrom, or removing the same save for levelling said premises in such a way as might be necessary for the purposes of building, or the ornamental disposition of the same; and that an account might be taken of the several quantities of sand and gravel so worked, raised, and taken away out of and from the said premises by said William Ritchie, his servants, &c. The facts of the case are very shortly these:—That by indenture bearing date the 28th of February, 1863, and made between the petitioner of the one part, and the respondent of the other, the said petitioner did thereby demise to the said respondent, William Barry Ritchie, his executors, administrators, and assigns, all that piece or parcel of land in the townland of Ballybrackamore, containing seven acres and fifteen perches, English statute measure, as in a map to the lease annexed, "together with the right of digging, lowering, and levelling and removing any portion of the aforesaid piece or parcel of ground thereby limited or appointed by way of lease or otherwise so as to make the same suitable for building or ornamental purposes . . . excepting thereout unto the said John Clelland, his heirs and assigns, all minerals and fossils, and all royalties whatsoever," *Habendum* all and singular the premises subject to the yearly tenancies unto said William B. Ritchie, his executors, administrators, and assigns for 9999 years, subject to the rent of £42 11s. 3d. The indenture then contained a covenant that said Ritchie "should nor would do, suffer, or commit any wilful or voluntary waste,

spoil, or destruction whatsoever in or upon the said premises thereby demised." Said lease contained also a covenant that he, the respondent, would within two years from the date of this lease, at his or their expense, erect and build on the said piece of ground and premises, one messuage or dwelling-house, with offices, at an outlay of £300. Such being the lease, the contention here was what was the meaning to be put upon that covenant above mentioned which gave respondent the right of "digging, lowering, or removing" the soil. It appears that in the centre of the lands so demised, and on an axis or line running from east to west, is a valley or trough, into which dips, on the northern side thereof at a high angle, a hill, the strike or horizontal line of whose ridge likewise runs from east to west and parallel with the said strike of said valley; and on the southern side of said axis a like hill slopes, whose contour was exactly similar to the said hill on the northern side. The eastern end of said valley was terminated by a hill connecting the said two parallel hills. The petitioner alleged that on the northern slope the respondent had dug up and removed about eight thousand cubic yards of sand, and that he had sold same at an enormous profit, and had realized thereby several hundred pounds; that respondent had dug a pit into which he had constructed a road forty feet below the level of the valley. That petitioner was apprehensive that the removal of the sand would be calculated to deprive him of the security for his rent; and further, petitioner was apprehensive that the digging of this pit would deteriorate petitioner's land adjoining by cutting off the springs of water from houses built thereon. The respondent's case was, that such removal was entirely for the improvement of the lands, as fitting them out for building grounds; that it was utterly impossible to build thereon without cutting into the side of said slope and carting same away, which he did, and he then formed a terrace along the side of the hill; and that for the purposes of carrying out his plans he was of necessity obliged to cart off the premises a quantity of sand and that the sale of the sand greatly reduced the costs of all those buildings and ornamental improvements. That with respect to the deep sand-pit complained of by petitioner, respondent admitted the digging thereof, and the carrying sand thereout; but while he admitted so doing, he alleged that he merely dug a pit for the purpose of filling up same with useless rubbish from the said hill, for which rubbish he could obtain no price whatever, while the sand dug from the pit was valuable; and, in fact, the money obtained therefrom went towards the making of the several improvements on the very demised lands; and it was agreed upon all hands that those were improvements; and that being in the immediate neighbourhood of Belfast, the value of the premises would be greatly increased, and that such acts of the respondent could not be held to be waste.

*John E. Walsh, Q.C., Chatterton, Q.C., and Randall M'Donnell*, appeared in support of the exceptions. —Master Brooke should have found that the sand taken out of this deep hole or pit was not taken *bona fide*, and the principle the Master should have acted upon was this, that the removal of any portion of the sand for sale was not to be presumed or taken to be

done as *bona fide*. The lease contained no power of removal of sand from the premises, and the power given to the tenant of digging, levelling, and removing could never be held to give the tenant the power to remove the sand off the land. But at all events the tenant had no power whatever to sell any portion of the soil—*Whitfield v. Bewit* (2 P. Wms. 240); Co. Lit. 33-6; *Gower v. Eyre* (Cooper's Cases in Chancery, 156.)

*The Solicitor-General (Sullivan), Law, Q.C., and W. D. Andrews*, were heard contra.—We have changed those demised premises into most valuable grounds, terraces, landscape gardening; in fact, the face of what was comparatively worthless, quite altered. Under the reservations in the lease we were empowered to remove the sand. Waste will not lie for cutting down trees for repairing.—Co. Lit. 53, b. "The tenant may dig for gravel or clay for the reparation of the house as well as he may take convenient timber trees."—Bacon's Ab. vol. viii. 386.

*Dec. 8, 1865.—THE LORD CHANCELLOR*.—In this case, which was argued at considerable length on the 11th of November last, a decretal order was made on the 10th day of Nov. 1864, granting an injunction against the respondent to restrain him from removing sand of very considerable value from the premises, save for purposes *bona fide*, in order to render it fit for building and ornamental purposes. I then referred the case to the Master, and he has found that no sand had been removed, save *bona fide* for building purposes. In other words the Master's opinion was, that the suit ought to be dismissed, because if the sand had been removed *bona fide* the decree ought never have been made. Well, then, the question we have here to sift is, was that done which ought not to have been done? Now the case is very simple indeed. [His Lordship here stated the case as given above.] The lease is here for 9999 years, a term that puts out of the question anything concerning the reversion. There is a covenant to pay rent and a covenant against waste, and other covenants, but the most important part of the demise is contained in these words, which conveyed to the lessee "the right of digging, lowering, levelling, and removing" any portion of the demised premises. There is a reservation by Mr. Clelland of all minerals and fossils, and it was insisted by the petitioner that the sand so removed was a mineral or fossil. I do not give any weight whatever to this portion of the argument. But the pith of the case lies in the meaning of the word "remove;"—that is a word of very general meaning—first of all it means to take away; to remove is to take the thing removed off the land, and do what you choose with it—that is the meaning of the word in the English language, and if the power of removal were uncontrolled by any other clause in the deed, I would clearly hold that the power of removal was large enough to give the respondent liberty to do whatever he wished with the thing removed, if what was so removed was for the purpose provided for in the lease, for example, the tenant could cut out the sand from the hill to make way for the terrace or house that he was to build, but beyond that he cannot go, and if he does go, he violates the landlord's rights. Well, here we have Ritchie, the lessee of those premises,

and he had also the adjoining lands, and Ritchie was about building and converting both those lands into building ground arranged in terraces and highly ornamental too—all that plan is before me in a map. Well, all those plans, or how same may be carried out, do not meet the vital question in the case. The question comes round to this, what has the respondent done as tenant, and what waste, if any, has he committed? The lease does give a full power of removal of sand off the lands; *prima facie* the removal for sale is waste. Was there a removal here for a purpose not contemplated by the lease? All the affidavits agree that the plan is a good one; but we are not here to try is the plan good or bad. An owner in fee can do as he likes, but a tenant cannot do as he likes with the lands of which he is tenant. If the tenant is bound to build houses, he can remove whatever stands in the way of his plans, but does that give a tenant right to dig a hole in any part of the lands he may chose, and dig out of that hole valuable sand, and fill up that again with rubbish which he has removed from the surface, and which is not worth a farthing? There are many things a tenant cannot do. If a tenant cut trees, and if he himself buys them, that is waste, and if the tenant applies the trees he has cut to repair the mansion-house, that is waste clearly.—*Whitfield v. Bewit* (2 P. Wms. 240). A man may repair a house far better by the trees he might cut down, and more economically, but economy has nothing on earth to do with it. Well, then, can a tenant sell sand dug out of a hole on the place where the lease empowered him so to do for the purpose of selling same? I think he can do no such thing. This was hilly ground, and the hills, the tenant says, must be removed. That removal is not to be done by the tenant wasting other parts of the premises, and he cannot be allowed to obtain money from destroying a valuable stratum of sand. 8 Bacon's Abridgment, tit. Waste (C., p. 382), lays down "that a lessee or tenant cannot change the nature of the thing demised though in some cases the alteration may be for the greater profit of the lessor." Now if this is to be continued, there is nothing to prevent all the rubbish of the hill to be swept into it, and the valuable sand to be removed and sold to make way for worthless rubbish. I then am of opinion that Ritchie had no right to remove this sand for sale from this hole; it is one thing to remove, and it is another thing to remove and sell; and that being so, I must allow the exceptions.

ORMSBY v. ANDERSON.—Jan. 15 & 16; Feb. 15.

*Will—Construction of—Expression "die without issue"—Fee in trustees.*

In 1825 testator left "all his property" to his executor, and he did thereby nominate ——— as his executor "for the purpose of paying the following bequests, first paying debts and funeral expenses." He then bequeathed the hill of Knocknarea for ever to his illegitimate son Thomas, giving him full

power to will and dispose of same if he have a family, "but if he shall die without issue," then to go to the use of his (illegitimate) daughter, Jane, without further words of limitation. At the close of his will testator appointed W. his executor. Held, that the executor took the fee in the lands of Knocknarea, and that Thomas took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation to the executors conferred the fee upon Jane on indefinite failure of Thomas, Jane taking the entire estate remaining in the executor.

Held also, that W., who was appointed executor at the close of the will was the executor and trustee whose name the testator had intended to fill in the said blank with.

THIS was a cause petition, which prayed that John Ormsby, the petitioner, be declared entitled as heir-at-law of Nicholson Ormsby, deceased, to certain lands and premises which were demised by a lease of the 20th of September, 1780, and that Charles Anderson, the respondent, might be directed to deliver up possession of same to petitioner. The petition also prayed for an account of the rents and profits of the lands which have been received by Charles Anderson, and that he be directed to pay same when ascertained to petitioner. The facts upon which this prayer was grounded were these.—That Nicholson Ormsby was seised to him and his heirs of certain lands called Primrose Grange, in the county of Sligo, in quasi fee, under a lease made by one James Nicholson of the 20th of September, 1780. That being so seised and possessed, said Nicholson Ormsby made and published his last will and testament in writing, bearing date the 15th of December, 1824, whereby he demised the said lands to his illegitimate son, Thomas Ormsby, in the words following:—"I, Nicholson Ormsby, of Castledargan, Esquire, being of sound mind and memory, do make this my last will and testament. First, I do hereby nominate and appoint ——— as sole executor, leaving him all my property of whatever nature and kind I am or may be entitled to at the time of my decease, for the purpose of paying the following bequests, first paying all my just debts and funeral expenses. Secondly, I leave and bequeath to Mary Irwin the sum of £40 sterling during her natural life, and after my decease to go to my children, Thomas and Jane Ormsby, share and share alike. . . . I leave and bequeath to my son, Thomas Ormsby, the hill of Knocknarea for ever, which George Blackman holds from me, together with the rent and arrears now due me on said hill; and if in case the said Thomas Ormsby shall marry and have a family, the said Thomas Ormsby shall have power to will or otherwise dispose of the same as he shall think proper; but if he shall die without issue, then the said hill of Knocknarea shall go to the use of my daughter, Jane Ormsby." The testator having then bequeathed to his daughter a sum secured by a bond, and having also devised other real estates in the county of Kildare to his said two children, and also having bequeathed small annuities to other objects of his bounty, thus closed his will: "I nominate and appoint William Weir, Esq., of Lake-

view, my sole executor to this my last will and testament.—NICHOLSON ORMSBY." The petition then stated that the testator died in the month of January, 1825, without having ever married, but leaving his said two illegitimate children him surviving, and also leaving John Ormsby (the present petitioner), the only son of William Ormsby, who died in 1805, the brother of said Nicholson Ormsby, the said testator, him surviving; and that the petitioner was heir-at-law of said William and of said Nicholson Ormsby. Said Jane Ormsby, the said illegitimate daughter of testator, died in the lifetime of her said brother, Thomas Ormsby, and he too died unmarried, and without having issue, on the 1st of August, 1849, who by his will devised the lands to one James Morrisson, who upon the death of Thomas Ormsby went into possession of said lands, and who by deed of 22nd of January, 1863, conveyed the same to the respondent, Charles Anderson. Petitioner now submitted that said Thomas Ormsby's will was inoperative to devise these lands, he, Thomas, being in as tenant in *quasi* tail under the above will of Nicholson Ormsby; and that he never having done any act to bar said *quasi* entail, had therefore acquired no devisable interest therein. To this petition the respondent filed his answering affidavit in due course; and he thereby denied that Thomas Ormsby was entitled merely to an estate in *quasi* tail; and he also asserted that said Thomas Ormsby had a devisable interest in said lands. The respondent also claimed to hold said lands as a purchaser for valuable consideration, and without notice from the said James Morrisson, the devisee under the will of Thomas Ormsby, who as aforesaid was the devisee of said Nicholson Ormsby deceased. Respondent insisted also that upon the true construction of the said hereinbefore recited will of Nicholson Ormsby, said Thomas Ormsby was entitled thereunder to an absolute estate, with a gift over, on general failure of his issue, but that such gift over was too remote and failed, or that said Thomas Ormsby would have been entitled to such absolute estate, with a gift over to said Jane Ormsby, his sister, on failure of his issue in her lifetime; and as the said Jane Ormsby predeceased the said Thomas Ormsby, that said Thomas Ormsby was on her death absolutely entitled to the entire of said estate or interest in said lands.

*F. Walsh, Q. C., Ball, Q. C., and Harkan* were heard in support of the petition.—This will was made before 1838. Thomas Ormsby was clearly tenant in *quasi* tail under Nicholas Ormsby's will; that being so, and he never having done any act to bar said *quasi* tail [as to what acts will bar an estate in *quasi* tail see *Bonyng v. Finucane* (10 Ir. Jur. N.S. 145, 2nd column)] was unable to devise it, as he had attempted to do, by will; and therefore he having died without leaving issue, and he being illegitimate, the heir-at-law of Nicholas Ormsby must be held to take those lands. The testator clearly did not think he was disposing of the fee, for he said that if Thomas "shall have a family, he shall have power to dispose of same;" thereby implying that if he had no family, Thomas Ormsby would not have the power of disposing of same. An estate for life was limited to Jane after the estate tail. This was an estate tail in Thomas Ormsby—*Bamfield v. Papham* (1 P.

Wms. 67, note). That being so, and no act done to bar the entail, the respondent's title is invalid.

*Brewster, Q. C., and G. O. Malley*, were heard for the respondent.—The effect of the devise contained in this will was to give Thomas Ormsby the fee; and if he had the fee, the petition here must be dismissed. He was, we submit, either in as tenant in fee, having the legal estate in him, or if he had not, then Robert Weir, the executor of said will, had, because testator left him as sole executor of his will—"All my property of whatever nature or kind I may be entitled to at the time of my decease, for the purpose of paying the following bequests, first paying all my just debts and funeral expenses." This devise to the executor was amply sufficient to give him the fee; for it is long settled, that when a devisee whose estate is undefined is directed to pay the testator's debts or legacies, he takes an estate in fee, on the ground that if he took a life estate only he might be damaged by the determination of his interest before reimbursement of his expenditure—*Doe v. Holmes* (8 T. R. 1), Co. Lit. 9 b. Again, the trustee had the fee, because the devise to him was of the testator's property, and the word "property" is an expression as large as the word "estate," which is synonymous with a devise to the trustee and his heirs—*Barnes v. Patch* (8 Vesey, 604). Subject, then, to the legal estate in fee being in the trustees, Thomas Ormsby took an estate in fee, with an executory devise over to Jane Ormsby; and she having predeceased Thomas Ormsby, he was in as tenant in fee, and consequently any conveyance made by him was valid—*Heath v. Heath* (1 B. C. C. 147).

*Ball, Q. C.* in reply.—The respondent's counsel are in error when they contend that the devise of the testator's "property" to the trustees gives to them the fee; there is a blank left where the testator intended to fill in the names of the trustees, and therefore no estate was left to them, and we are unembarrassed, therefore, by a devise to trustees and their heirs; but apart from this view, the lands were devised for particular purposes, and that does not give a fee, the rule being that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. *Smith v. Smith* (11 C. B. n. s. 138) is in point to show that the trustees will only take that quantity of interest which is requisite for the purposes of the trusts. *Doe v. Nichols* (1 B. & Cr. 336). The appointment in the end of the will is an appointment of an executor, and not of a trustee. The argument then on the other side, that the trustees took the fee, fails, and all the cases show that he was in as tenant in tail.—*Dansey v. Griffith* (4 Maule & Selw. 61).

THE LORD CHANCELLOR.—The petitioner in this case is John Ormsby, who claims to be heir-at-law of Nicholson Ormsby to an estate in *quasi* fee in the lands of the Hill of Knocknarea, on the ground that the words the testator had used in his will were such as would give an estate in *quasi* tail to his illegitimate son Thomas Ormsby, and that he, having survived his sister Jane, and he having died without issue, the fee or *quasi* fee goes to the heir-at-law of Nicholson

Ormsby. There is not a doubt in my mind but that under the terms of the will Mr. William Weir was executor and trustee of the personal and real estate of Nicholson Ormsby, and that he took as such trustee the legal estate in *quasi* fee in those lands. It has been pressed with considerable warmth by counsel for the petitioner that Mr. Weir was merely executor, but not trustee. In the opening of his will the testator leaves a blank to be afterwards filled up by him, and to that person that was to be afterwards inserted in this blank he devised all his property of what nature and kind soever, thereby of course devising his real estate, which comprehended the hill of Knocknarea. Well, that blank he never filled up, but he did what exactly amounted to the same; he did appoint an executor at the end of his will, and whether that executor was named at the beginning or at the end makes no difference, if he was, as he was executor, of course he must have taken whatever was devised to the executor. I then am of opinion that these lands vested in him as trustee; that being so, what equitable estate had Thomas and his sister Jane in these lands. The words of the will are, "I leave to my son Thomas the Hill of Knocknarea for ever, and in case Thomas shall marry and have a family he can do as he shall think proper with them; but if he shall die without issue, then the said Hill of Knocknarea shall go to the use of my daughter, Jane Ormsby." Beyond a doubt this was a devise of an estate tail to Thomas; he took thereunder an estate in *quasi* tail, this will being made before the Wills Act, and that Act alters the meaning of the words "dying without issue" from an indefinite failure of issue to dying without issue at the death of the devisee; that is, that since the Wills Act if no contrary intention appear, the devisee would take an estate for life. Then Thomas took an equitable estate tail clearly, but then the devise did not rest here, because there was a devise after that estate tail over to Jane, without any words of limitation to her. Well, petitioner insists that under this limitation Thomas took an estate tail, with an executory devise over to Jane only for life, and that therefore he comes in as heir-at-law, to Nicholson Ormsby, the testator, Thomas, having done no act to bar the entail, and Jane having died in the lifetime of Thomas. In support of this proposition, plaintiff relies on the case of *Roe v. Jeffreys* (7 T. R. 589). That was a devise to T. F. and his heirs for ever, but if T. F. died without issue, then to E. M., and Lord Kenyon held that that devise to E. M. was a good executory devise. Well, if I were to follow that case, I should hold that there was a fee in Thomas with an executory devise over to Jane, but that case of *Roe v. Jeffreys* has been very much spoken of, and Sir John Romilly, in *Feakes v. Stanley* (24 Beav. 489) tells us that it has been repeatedly doubted, and at last overruled, and therefore Thomas took not an estate in fee, but an estate tail with remainder to Jane. I pay no respect whatever to *Roe v. Jeffreys*. It is well settled law that where lands are devised to trustees in fee, in trust for a person, without any words of limitation, the *cœtui que trust* takes an equitable interest co-extensive with the legal estate of the trustees—*Chalinger v. Shepherd* (8 T. R. 597)—and it is equally well settled that where the devisee, in this case the trustee or

executor, is devised lands to pay thereout debts and legacies that he takes those lands in fee—that he takes the estate in fee.—*Doe v. Holmes* (8 T. R. 1). Here then we have the legal fee in the trustees. Thomas takes then an estate tail with a vested remainder in fee in Jane. That case of *Smith v. Smith* (11 Scott N.R. 138) cited by Mr. Brewster, is very strong indeed. I shall in this case hold that the testator devised the entire fee to the trustees—that Thomas took an estate in *quasi* tail with remainder in fee to Jane, and not an executory devise. She takes this fee through the trustees, and that being so, the petitioner cannot succeed in establishing his proposition that the fee resulted to Nicholas Ormsby. I shall, then, make a decree dismissing this cause petition with costs.

## Court of Criminal Appeal.

Reported by William Woodlock, Esq., Barrister-at-Law.

THE QUEEN v. ROBERT WALLACE, AND FOUR OTHER CASES—Nov. 18, Feb. 12.

[BEFORE MONAHAN, C.J., PIGOT, C.B., KEOGH, CHRISTIAN, O'BRIEN, HAYES, and O'HAGAN, J.J., and FITZGERALD, HUGHES, and DEASY, B.B.]

*Evidence—Proclamation—Dublin Gazette—Statutes, 11 Vict., c. 2, s. 21; 28 & 29 Vict., c. 118, s. 3.*

*Upon the trial of an indictment for unlawfully carrying arms within a proclaimed district, the Crown, as evidence of the proclamation, and that the district was proclaimed, gave in a printed paper (which contained what purported to be a proclamation), purporting to be "The Dublin Gazette," and purporting to be "printed and published at the Dublin Gazette office by A. T." Under the title of the paper were the words "Published by authority," but the paper did not, in any other way, purport to be printed and published by the Queen's authority, or to be printed by the Queen's printer. The prisoner having been convicted, it was held that this paper was not sufficient evidence, under St. 11 Vict., c. 2, s. 21, and 28 & 29 Vict., c. 118, s. 3, of the proclamation, and of the district having been proclaimed, and the conviction was quashed.*

*Quære—Might parol evidence have been given to shew that the paper was printed by the Queen's printer, or printed and published by the Queen's authority?*

THESE were cases reserved by Fitzgerald B., from the last Summer Assizes for the county of Antrim. They all involved the same question, and the case stated in *The Queen v. Wallace* was as follows:—The prisoner was tried before me at the last Summer Assizes for the county of Antrim, on an indictment charging that he, on the 15th July, 1865, at Belfast, within the proclaimed district of Shankhill, unlawfully did carry and have a pistol, an ounce of gunpowder, and certain ammunition, to wit, &c.

The indictment was founded on the 11th Victoria, c. 2, sec. 9.



The first section of that Act enacts, that whenever in the judgment of the Lord Lieutenant, or the Chief Governor or Governors of Ireland, by and with the advice of the Privy Council of Ireland, it shall be necessary, for the prevention of crime and outrage, that this Act should apply to any county, county of a city, or county of a town, or any barony or baronies, half barony or half baronies, in any county at large, or any district of less extent than any barony or half barony in Ireland, it shall be lawful to and for the Lord Lieutenant, or other Chief Governor or Governors of Ireland, by and with the advice of the Privy Council of Ireland, to declare by proclamation, *to be published in the Dublin Gazette*, that from and after a day to be named in such proclamation, this Act shall apply to any county, county of a city, or county of a town, or county at large, or any barony or baronies, half barony or half baronies, in any county at large, or any district of less extent than any barony or half barony in Ireland.

The 9th section enacts, that from and after the day named in any such first-mentioned proclamation, and thenceforth during all the time for which any such proclamation shall be in force, it shall not be lawful for any person whomsoever (with certain exceptions not applying to the prisoner), to carry or have *within the district specified in any such proclamation*, elsewhere than in his or her own dwelling-house, any gun, pistol, or other fire-arm, or any part or parts of any gun, pistol, or other fire-arm, or any sword, cutlass, pike, or bayonet, or any bullets, gunpowder, or ammunition; and every person carrying or having any gun, pistol, or other fire-arm, or any part or parts of any gun, pistol, or other fire arm, or any sword, cutlass, pike, or bayonet, or any bullets, gunpowder, or ammunition, contrary to the provisions of this Act, shall be guilty of a misdemeanour, and shall be liable on conviction to the punishment therein mentioned.

The 21st section enacts, that the production of the "Dublin Gazette," *purporting to be printed by the Queen's printers*, containing the publication of any proclamation, warrant, or notice, under this Act, shall be deemed and taken to be conclusive evidence in all Courts of Justice in Ireland, of all such facts and circumstances as were or shall be necessary to authorize the issuing of any such proclamation, warrant, order, and notice; and every such proclamation, warrant, order and notice shall be deemed and taken in all such Courts respectively, to all intents and purposes whatsoever, to have been issued in conformity with this Act.

The Act of 11th Victoria, which was originally in force only until the 31st December, 1849, and from thence until the end of the then next Session of Parliament, was continued, with certain amendments, by several subsequent Acts, of which it is only material to mention the 19th and 20th Victoria, c. 36, called the "Peace Preservation Ireland Act, 1856;" the 23rd and 24th Victoria, c. 138; and the 28th and 29th Victoria, c. 118.

The 3rd section of the last-mentioned Act enacts, that the production of a printed copy of the *Dublin Gazette*, *purporting to be printed and published by the Queen's authority*, containing the publication of any proclamation, warrant, order, or notice, under the said recited Act (i.e., the Peace Preservation Ireland Act, 1856)

or this Act shall be conclusive evidence of all such facts and circumstances as were or shall be necessary to authorize the issuing of any such proclamation, warrant, order, or notice; and every such proclamation, warrant, order, and notice, shall be deemed and taken in *all such Courts* respectively, to all intents and purposes whatsoever, to have been issued in conformity with the said recited Act and this Act.

By the 5th section, the "Peace Preservation Ireland Act, 1856," as amended by this Act, is continued until the 1st July, 1866, and from thence until the end of the then next Session of Parliament.

The 19th and 20th Victoria, c. 36, was the continuing Act in force at the time when it was alleged that the district of Shankhill was proclaimed.

The 23rd and 24th Victoria, c. 138, was the continuing Act in force when the offence charged was alleged to have been committed.

And the 28th and 29th Victoria, c. 118, was the continuing Act in force at the time of the prisoner's trial.

At the trial it was proved that the prisoner had, and carried the arms, &c., mentioned in the indictment, within the parish of Shankhill, in the barony of Upper Belfast, and county of Antrim.

The only proof offered that the said parish was a district specified in any proclamation mentioned in the said Acts, was a printed paper, purporting to be the *Dublin Gazette*, of Friday, September 18, 1857, and containing what purported to be a proclamation by the Lord Lieutenant and Privy Council of Ireland, declaring that from and after Friday, the 18th day of September, 1857, the "Peace Preservation Ireland Act, 1856," shall apply to and be in force in and for the parish of Shankill, in the barony of Upper Belfast, and county of Antrim; and the said proclamation purports to be given at the Council Chamber, Dublin Castle, on the 15th September, 1857.

The said printed paper, to which I beg leave to refer, purports to be "Printed and published at the *Dublin Gazette* office, No. 87 Abbey-street, by Alexander Thom, of Nos. 87 and 88 Middle Abbey-street, in the parish of St. Thomas, in the city of Dublin."

But it did not, in any other way, purport to be printed by the Queen's Printers or Printer.

The said printed paper also contained, under the title thereof, that is to say, under the words "The *Dublin Gazette*," the words, "Published by authority," but did not in any other way purport to be printed and published by the Queen's authority.

It was objected on the part of the prisoner, that the said printed paper was not sufficient evidence of the said proclamation, or that the parish of Shankill was a district specified in any proclamation under the said Acts, or any of them.

I allowed the case to go to the jury, and the prisoner was convicted. I sentenced him to be imprisoned for three calendar months, and to be kept to hard labour; but I resipited the execution of the said judgment until the question in this case shall be decided, on the said prisoner's entering into recognizances of bail, himself in £20, and two sureties in £10 each, to render himself in execution on the first day of the next assizes for the county of Antrim, if the question shall be decided against him.

The single question for the decision of the Court is



"Whether the production of the said printed paper was sufficient evidence of the proclamation therein contained, and that the said parish of Shankhill was a district specified in the proclamation, under the said 'Peace Preservation Ireland Act, 1856.'" If so, the said conviction is to stand: if otherwise, to be reversed.—F. A. FITZGERALD.

*Joy* (with him *Norwood*) for the prisoner.—The statute is to be construed according to the ordinary and grammatical sense of the words. *Smith v. Bell* (10 M. & W. 389). The words of the statute best declare the intention of the Legislature. *The Sussex Peerage Case* (11 Cl. & Fin. 85); *Fordyce v. Bridges* (1 H. of L. 4). Penal statutes are to be construed strictly; this rule has been even more acted on in modern times than formerly. *Bradley v. Clarke* (5 T. R. 201). It is a well settled rule of the common law that to make the Gazette evidence it should purport to be the Gazette and to be printed by royal authority. *The King v. Holt* (5 T. R. 436). *Byrne v. Humphrys* (1 L. Rec. O.S. Q.B. 232). The words in s. 21 of the Peace Preservation Act, "purporting to be printed by the Queen's printer," will in their ordinary meaning bear only one meaning, and that is that the document purporting to be the Gazette must also purport to be printed by the Queen's printer, or should be proved so to be. The word "conclusive" is introduced into s. 21. The document here did not purport to be printed by the Queen's printer, but by Alexander Thom; he is not, and has not been the Queen's printer.

*Barry, Q.C.*, and *The Solicitor-General* for the Crown.—Though the word "conclusive" is used in the Act, it does not follow that the Gazette *per se* is not some evidence. The Gazette has been held to be sufficient evidence of a proclamation issued under an order in council. *The Ator.-Gen. v. Theakstone* (8 Pr. 89.); *The King v. Sutton* (4 M. & Selw. 532). Why was the order in council held to be proved in the case of the *Attorney-General v. Theakstone*? It was proved merely by the production of the Gazette. There was no Act of Parliament there. Here, if it was necessary for us to prove that the proclamation had been issued, the production of the Gazette would be sufficient. My argument is that in this case we lose the advantage of our proof being conclusive; and it might be shown on the other side that the proclamation had not issued, which would not be the case if the Gazette purported to be printed by the Queen's printer. In *The King v. Holt* the argument was that as the instrument purported to be printed by the Queen's printer it should be taken to be the London Gazette. First, we submit that this document purporting on the face of it to be the Dublin Gazette, that being the term used in the statutes, is *prima facie* evidence to be judicially noticed by the Court; that if we want to make it conclusive evidence we should comply with the statute and show it came from the Queen's printer. The law as to the Gazette being *prima facie* evidence remains the same as before the statute. Secondly, we submit that at all events within the last Act requiring the copy to be printed by the Queen's authority, this sufficiently purports to be so. The publication purporting to be authorised would be *prima facie* evidence on the

principle that it is a misdemeanor to publish an act of state without authority. *The King v. Holt*.

*Norwood* in reply referred to st. 11 Vict. c. 2; st. 19 & 20 Vict. c. 861; 23 & 24 Vict. c. 108; 28 & 29 Vict. c. 118; 8 & 9 Vict. c. 113. Taylor on Evidence, paragraphs 7, 8, 16. *Cur. adv. vult.*

February 12.—MONAHAN, C.J. stated the facts of the case, and referred to *The King v. Holt* which had been cited, and where the question was whether the production of the Gazette was *per se* evidence that certain addresses which were published in it had been presented. The Court ruled that the Gazette was evidence of all acts of state, and therefore evidence that those addresses had actually been presented. And there is no doubt but that, if this paper purported to be printed by the Queen's printer, it would be clearly evidence that the proclamation had issued, and on the mere production of a document purporting to come from the Queen's printer, the Court would take judicial notice of it. But the difficulty here is that this does not purport to be published by the Queen's printer, or by any royal authority. There is no evidence either on the face of the document itself or otherwise of what the authority was under which it was published; there was no evidence that it was the Dublin Gazette in which acts of state are published. The Act of Parliament seems to recognize the Queen's printers as being the proper persons to publish these proclamations. The reason why in *The King v. Holt* the production of the Gazette was evidence not only of its being the Gazette, but also of the acts of state published in it, was that it purported to come from royal authority, that Lord Holt had held it to be a high misdemeanor to publish anything as from royal authority which was not so, and that a misdemeanor would not be presumed. We are of opinion that no such inference can be drawn in the present case. The mere circumstance of the party publishing the document saying that it was published by authority, but not stating on its face that it was published by the Queen's authority, or by the Queen's printer, is not sufficient to bring this case within the authority of *Queen v. Holt*. We give no opinion as to whether it might have been shown by other evidence that this document had been published by the proper authority. No such evidence was in fact offered, and under those circumstances we must reverse the conviction in this case and in the four others which depend on the same point.

*Conviction quashed.*

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

ERRATUM.—In the head note to the case of *GRIFFIN, APPELLANT; MALCOLMSON, RESPONDENT*, ante page 28; for "the decision of the Commissioners was upheld," read "the decision of the Commissioners was reversed."

CORNWALL, v. DELANY: November 14.

Promissory note—Arrangement—St. 20 & 21 Vict. c. 60.

To an action on a promissory note by indorsee against

*indorser, defendant pleaded that one J. W. D. being a trader within the bankrupt laws, was indebted to plaintiff in £5,194 4s. 2d., and being unable to meet his engagements, presented a petition for arrangement, that his proposal was assented to by three-fifths of his creditors, and was confirmed and entered of record by the Court of Bankruptcy which afterwards gave the trader his statutory certificate: that by virtue of the certificate J. W. D. was discharged from the debt of £5,194 4s. 2d.: that after the time when the proposal was entered of record, and before the granting of the certificate the defendant at the request and for the accommodation of said J. W. D., and without consideration, indorsed the promissory note to the plaintiff as a security for £250 part of said debt of £5,194 4s. 2d.: and plaintiff always held said note without any consideration save said sum of £250 parcel of said debt of £5,194 4s. 2d. from which J. W. D. had been discharged as aforesaid. On demurrer this defence was held bad.*

**DEMURRER:** The first count of the summons and plaint complained that John Wm. Delany, on the 11th July, 1863, by his promissory note now overdue, promised to pay to one A. R. Levey and defendant, or order, £250 on the 27th day of March, 1864, and the said A. R. Levey and the defendant indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof the said A. R. Levey and the defendant had due notice, but did not, nor did either of them pay the same.

To this first count the defendant pleaded, secondly, that one John William Delany being a trader within the "Irish Bankrupt and Insolvent Act, 1857," was indebted to plaintiff in the sum of £5,194 4s. 2d., and was also indebted to divers other persons in divers other sums, and was unable to meet his engagements with them, and he thereupon being so indebted, and so unable to meet his engagements, after the passing of the said Act of Parliament, duly made an arrangement with his creditors under the superintendence and control of the Court of Bankruptcy in pursuance of said Act, and filed such petition, and did all such matters and things as were required by the said Act in that behalf: and defendant further said that three fifths in number and value of the creditors of the said John William Delany who had proved their debts to the amount of £10 and upwards, did at the second sitting agree to the modified proposal made by the said John William Delany at the first sitting, such sittings being duly held in pursuance of the said Act, and that such modified proposal was then reduced into writing, and duly assented to by the said creditors; and the defendant further said that afterwards the said Court of Bankruptcy did after hearing such parties as are in and by the said Act mentioned in that behalf, approve and confirm the same, and caused it to be filed and entered of record in pursuance of the said Act, and that afterwards, and before the commencement of this action, the said Court, to wit, on the 3rd day of November, 1863, did, in pursuance of the said Act of Parliament, grant to the said John William Delany such certificate as in the Act of Parliament in that behalf mentioned, set-

ting forth therein the petition of the said John William Delany, the agreement of the creditors, and that the same had been fully carried into effect; and all things had been done and had happened to make the said certificate valid and effectual to discharge the said John William Delany from his debts owing at the time of filing his said petition, and that by virtue of the said certificate, and by the force of the said statute, the said John William Delany became and was before the commencement of this suit, to wit, on the 3rd day of November, 1863, and before said promissory note became due, discharged from the said debt of £5,194 4s. 2d.; and the defendant further said that after the said proposal was filed and entered of record in pursuance of said Act as aforesaid, and before the granting of said certificate, the said A. R. Levey and the defendant, at the request and for the accommodation of the said John William Delany, and without any value or consideration whatever, indorsed the said promissory note to the plaintiff as in the first count mentioned, as a security for the payment by the said John William Delany to the plaintiff of the sum of £250, parcel of the said debt of £5,194 4s. 2d. from which the said John William Delany had been so discharged as aforesaid, and there never was any value or consideration for said indorsement or the payment of the said note by the said A. R. Levey and the defendant, and same was indorsed to the plaintiff, and he always held same without any value or consideration save said sum of £250, parcel of said debt of £5,194 4s. 2d. from which the said John William Delany had been so discharged as aforesaid.

To this second defence the plaintiff demurred, saying that it was bad in substance, because the said defence in itself showed a sufficient consideration for the indorsement by the defendant and A. R. Levey of the promissory note therein mentioned; and also because the said defence did not show that the plaintiff was a holder of the said promissory note without consideration; and also because the debt of £250 from which the said John William Delany was after the making of the said promissory note and the indorsing thereof by the defendant, discharged by the certificate of the Court of Bankruptcy under the arrangement clauses of the statute, was sufficient to support the said indorsement by the defendant; and also because the request of the said John William Delany made of the defendant, to secure by the making of the indorsement in the said defence mentioned, and the existence of the £250 then due to the plaintiff, was a sufficient consideration for the said indorsement; and also because the fact of the discharge of the said John William Delany by the certificate under the arrangement clauses of the Bankruptcy Act, from a debt for which he had previous to such discharge made his promissory note, indorsed by the defendant and A. R. Levey for his accommodation, and which at the time of such discharge was held by the plaintiff, and was not then due, was not sufficient to discharge the defendant from his liability thereon.

*Edward Gibson* (with him *Kernan Q.C.*) in support of the demurrer.—First, there is a palpable falsehood on the face of the defence in stating that it was passed without any consideration, when it had stated before that it was passed for a preceding debt.

The note is free from every taint of illegality. A debt due is a good consideration for a note payable at a future day. Byles on Bills, p. 105. The presumption of law as to bills and notes is that they were given for good and valuable consideration. Byles on Bills, 108, citing *Price v. Edmunds* (10 B. & Cr. 220), and *Mills v. Barber* (1 M. & W. 425). It required the express words of an Act of Parliament to free the debtor from his liability, and it lies on the other side to show that section 145 of statute 20 & 21 Victoria, chapter 60, displaces the defendant's liability. The sections as to arrangements to be considered are secs. 343 to 353. *Bernal v. Croker* (15 Ir. C. L. R. 194). The bill in that case was given after the certificate, and the Court held that there was a sufficient consideration to bind a third party, not the debtor. Section 145 provides that the certificate shall not discharge any person who was a partner with the bankrupt, or had made any joint contract with him.

*M'Mahon and Heron*, Q.C. to support the defence.—The plea is good in point of law, and is founded on the usual course of precedents. We wanted to show by it that there was no consideration, and that if there was the composition and payment under it was a discharge, and that this proceeding is a fraud on the bankrupt laws. By the statute 20th & 21st Victoria, chapter 60, section 342, the certificate of the Court in arrangement cases is to have all the effect of a certificate of conformity under a bankruptcy. The question is, can a party having a composition which includes this note now come into Court and get the amount of this very same note? In *Cockshott v. Bennett* (2 T. R. 766), the note was held to be annihilated by the composition as a fraud on the other creditors. The effect of compositions upon sureties is considered in *Lewis v. Jones* (4 B. & Cr. 506): the cases on the subject are collected in the note to that case at p. 515, where it is said that generally speaking a creditor discharges a surety by giving time to or compounding with the principal debtor. The agreement to accept a composition is binding on all who enter into the agreement, on the principle that it is a good consideration for one to give up part of his claim, that another should do the same. *Norman v. Thompson* (4 Exch. 755). In the absence of a clause in the deed reserving the remedies against the surety, they would be all gone. *Keyes v. Elkins* (13 W. R. 180). It appears on the record here that there was a composition for the debt, that for part of the debt the bill was given for the purpose of suretyship and for no other purpose. [*O'Brien J.*—Does it not make some difference that in the cases which you have cited the creditor was a voluntary party to the arrangement, but in this case the resolution of three-fifths of the creditors binds the others, and the arrangement thus becomes compulsory on them? *Fitzgerald J.*—Suppose the plaintiff had the defendant as security for the whole of the debt, as I understand you, if a composition at the rate of two-and-sixpence in the pound was forced on him, the result would be to discharge the surety from the whole.] There is nothing in the arrangement clauses preventing the creditor from reserving his remedies

against the sureties. [*Fitzgerald J.*—But he cannot do so unless the proposal does so. Has it ever been held that if the principal gets a certificate of bankruptcy that discharges the surety?] No, because that point is expressly settled by the Act of Parliament. Under section 147 no bankrupt after his certificate shall have been allowed shall be liable to pay any debt from which he has been discharged, by virtue of any contract made after the bankruptcy. Byles on Bills, p. 122. The arrangement is a complete bar to the debt from the moment it becomes binding, and from the moment s. 352 becomes operative, s. 147 becomes part of it. The Court will not allow anything in the nature of a new contract to stand; it is against the policy of the bankrupt law. *Rose v. Main* (1 Bingh. N. C. 357); *Ex parte Hall* (1 Deac. 171). The agreement unbroken even before performance is as much a discharge as after the performance. When the agreement is broken, the parties are remitted to their original rights and remedies. The plea here is good both because there was no consideration and because the agreement unbroken is a bar, and because the action is against the policy of the bankrupt law. The original debt was extinguished at the time of the indorsement.—s. 347. It is averred here that all things were done to make the certificate effectual. Forsyth on Composition, p. 28: Burge on Sureties, 422: *Good v. Chelmsman* (2 B. & Ad. 328); *Bradley v. Gregory* (2 Campb. 383); *Armstrong v. Turquand* (9 Ir. C. L. R. 32); *Ex parte Glendinning* (Buck Bankr. Cas. 517); *Ex parte Carstairs* (Buck Bankr. Cas. 560); the plea here exactly follows *Tindall v. Hibberd* (2 C. B. N. S. 199).

*Kernan*, Q.C., in reply.—On the face of the defence itself it is evident that there was consideration for this indorsement. If the plea is held good it would prevent a creditor from recovering in this event, viz: a proposal that the arranging debtor should pass notes in favour of the defendant to be indorsed to his creditors for the amount of five shillings in the pound, and that upon passing the said notes he should be released from the debt due by him, and should get a certificate under s. 352. The argument on sec. 352 is carried too far. Sections 146 and 147 are inapplicable to arrangements.

THE COURT said that there was consideration for the indorsement apparent on the face of the defence. Besides, there was nothing to prevent an arrangement being entered into by a composition to be secured by notes to be paid after the certificate. For aught that appeared in this case, the note here, as to which there was no allegation of fraud, might have been given to secure the composition itself, and it could not be held that the plaintiff was barred from recovering on such an instrument, the passing of it being the very ground of the arrangement. The demurrer should be allowed.

THE QUEEN AT THE PROSECUTION OF DALY v. THE NEWRY AND GREENORE RAILWAY COMPANY—Nov. 20, 21.

*Railway Company—Certificate—Mandamus—St. 14. § 15 Vict., c. 70, s. 21.*

*Order made absolute for a mandamus directing as*

*Railway Company to give a certificate of the amount awarded as compensation for lands of the prosecutor required by the Company, of which possession had not been taken.*

THIS was a motion to shew cause against a conditional order for a mandamus to issue directing the Company to deliver to the prosecutor a certificate under its seal, stating the amount of the compensation to which he was entitled under the award of the arbitrator for certain lands of the prosecutor required by the Company, for the purposes of its railway. It appeared from the prosecutor's affidavit, that the usual arbitration had taken place, and that the arbitrator had made his award. The Company had not gone into possession, and it did not appear whether it had approved of the prosecutor's title.

*Harrison, Q.C.*, and *M<sup>c</sup>Blane*, for the Company. The cause shewn ought to be allowed. In the first place it ought to have been shewn by the prosecutor's affidavit that the Company had approved of his title. Sections 9, 14, 15, and 21 of the st 14 & 15 Vict., c. 70, are important to be considered. Under section 21, a new remedy is given, for it is enacted by it that all rights and interests of parties arising under the provisions of the Act may be enforced against the Company by a summary petition in Chancery. There are authorities to shew that where a new right and a new mode of enforcing that right are given by the same statute, the new remedy is the only one which can be followed. *Stevens v. Evans* (2 Bur. 1157.) That case is adopted as authority in *The Queen v. Hull and Selby Railway Company* (6 Q. B. 70); *Murphy v. The Corporation of Belfast* (3 Ir. Jur. N.S. 439); *The King v. Barker* (3 Bur. 1265).

*Samuel Ferguson, Q.C.*, and *Hamill*, for the prosecutor. There is no doubt of the principle that if a party has another specific remedy at law, he is not entitled to the writ of mandamus; but the other remedy must be a remedy at law, and a specific remedy.—*Tapping on Mandamus*, p. 18. It is also laid down at p. 22 of the same book, that where a legal right exists, it is no answer to an application for a mandamus to say that there is a remedy in equity, *The King v. The Marquis of Stafford* (3 T. R. 646). There is this exception to that rule, that if the remedy in equity is more certain and efficacious, the Court will refuse the mandamus, and send the party to equity; but the mere existence of a remedy in equity will not prevent the Court exercising its discretion in giving the writ. Nothing of the kind exists here. Section 21 consists of two parts. One says that if for any reason the Company shall not deliver the certificate to any person claiming an interest in lands, "the possession whereof has been taken by the Company," then the right to have a certificate may be enforced by summary petition in Chancery. The second part says that all other rights and interests arising under the Act may be enforced in a like manner. Suppose that the first part of the section was not there, and that the whole effect of the section was to enact that all rights might be enforced by petition in Chancery, still there would be nothing in the permissive words of the Act to bind the party to take his remedy in equity. Unless the Court sees clearly that there is a specific remedy in the Court of

Chancery of a more beneficial nature than that which there is here, it will not allow its jurisdiction to be ousted by the other Court. It cannot be said that the remedy in Chancery is more efficacious than that here. Section 21 is entirely governed by the word "possession." If the Legislature intended to give power to the Court of Chancery in all cases, the greatest part of section 21 is useless. The words at the end of the section may be satisfied by giving jurisdiction to the Court of Chancery in cases such as those of disputes between tenant for life and remainderman, or disputes as to priorities. A prerogative writ is not taken away except by express words.—*Dwarris on the Statutes*, p. 603. *The Queen v. Fishbourne* (7 Ir. C. L. R. 6); *The Queen v. Irish South Eastern Railway Company* (1 Ir. C. L. R. 119); *Collinson v. Newcastle and Darlington Railway Company* (1 Car. & Kir. 546).

*M<sup>c</sup>Blane* in reply.—There is nothing to confine the words at the end of section 21 to the case provided for by the first part of it. The remedies given by the Act of 1845 have been held to be exclusive. *Little v. Dublin and Drogheda Railway Company* (7 Ir. C. L. R. 82); *Moore v. Great Southern and Western Railway Company* (10 Ir. C. L. R. 46); *Corporation of Belfast v. Murphy* (3 Ir. Jur. N. S. 439) follows the same principle. [*O'Brien, J.*—Is it not an ordinary rule of construction, that a contingency is put in the early part of a section, it is to govern the whole section? Assuming that the Court of Chancery has power to give relief, shew us what there is in this case to make it more expedient for the party to go to the Court of Chancery.] *The Queen v. The Hull and Selby Railway Company* (6 Q. B. 70). The cases cited on the other side are not analogous.

*Cur. adv. vult.*

Nov. 21.—*LEFROY, C. J.*, stated that the judgment of the Court was that the order should be made absolute. This was done in order to have the question more fully discussed on the return to the writ, as there was some difference of opinion among the members of the Court as to the effect of section 21 of St. 14 & 15 Vict., c. 70. His own opinion was that the party's remedy was in Chancery.

*O'BRIEN, J.*, inclined to the opinion that the legal right of the prosecutor to his writ was not taken away by the section is question.

*HAYES, J.*, concurred with *O'Brien, J.*

*FITZGERALD, J.*, concurred with *Lefroy, C. J.*

*Order absolute.*

[BEFORE LEFROY, C.J., AND O'BRIEN, J.]

THE QUEEN AT THE PROSECUTION OF M<sup>c</sup>KIM v. GILMOR.  
Jan 29—Feb. 17.

*Clerk of Petty Sessions. — Quo Warranto.*

*The office of Clerk of Petty Sessions is one for which the Court will grant a writ of quo warranto, calling upon the party holding the office to show by what right he holds it.*

This was a motion to make absolute a conditional order for leave to file an information in the nature of a *quo warranto*, calling upon the defendant James

Gilmor to show by what right he claimed to hold the office of Petty Sessions Clerk for the district of Sligo. The circumstances under which the case came before the Court were as follows:—On the 6th November last, a meeting of magistrates was held at Sligo for the purpose of electing a Clerk of Petty Sessions. At that meeting twenty-two magistrates attended, including the mayor of Sligo, who presided, Mr. Cogan, the sub-sheriff, and Mr. Howley, the resident magistrate. There were three candidates for the office, Mr. Gilmor the defendant, Mr. M'Kim the prosecutor, and a Mr. Wilson. On the second voting, Mr. Gilmor had eleven votes, including those of Mr. Cogan, the sub-sheriff, and of the mayor, and Mr. M'Kim, also had eleven votes. There being thus an equality of votes, the mayor as chairman, gave a casting vote in favor of Mr. M'Kim, and declared him duly elected. Thereupon Mr. Gilmor applied for and obtained a conditional order for an information in the nature of a *quo warranto*, upon the grounds that Mr. Cogan was, by his being sub-sheriff, disqualified from voting, and that the mayor had no right to give a casting vote, and that if those two votes were struck off, he, Mr. Gilmor, would have a majority of votes. It was now sought to make this conditional order absolute.

*Brereton Q.C.* (with him *Gerald Fitzgibbon*) for the prosecutor.—The first question is whether this office is one for which the Court will grant a writ of *quo warranto*. We submit that it is. The nature of the office depends on the st. 21 & 22 Vict. c. 100, s. 6, and s. 8, paragraphs 4 & 5. Sec. 11 is also important. So, too, the Petty Sessions Act, 14 & 15 Vict. c. 93, s. 5, par. 7. From all these it appears that the office is in truth one held by the clerk *dum se bene gesserit*. *The King v. Mein* (3 T. R. 596); *The King v. M'Kay* (4 B. & Cr. 351); *Darley v. The Queen* (12 Cl. & Fin. 541; judgment of Tindal, C.J.). The Petty Sessions Clerk cannot be dismissed by the justices without the consent of the Crown; he cannot be looked upon at all as the mere servant of the justices as in the case mentioned by Tindal, C.J. in *Darley v. The Queen*. Cole on Informations, p. 138. *The Queen v. the Guardians of St. Martin's* (17 Q. B. 149). Such being the nature of the office, the sub-sheriff was disqualified from voting by st. 7 Wm. 3 (Ir.) c. 13, s. 3. If the sub-sheriff was disqualified, there was no equality of votes, and the necessity for a casting vote did not arise, even if the mayor had a right to give one, which we are prepared to show he had not.

*Hemphill, Q.C.* and *Harkan*, for the defendant.—The Petty Sessions Clerk is nothing more than the servant of the magistrates; his appointment is to hold during the pleasure of the justices and of the Lord Lieutenant. The question is closed by authority. Originally, the writ of *quo warranto* issued only in cases of offices granted by the Crown, and of franchises. It was only the case of *Darley v. The Queen*, which extended it to offices like this, created by Act of Parliament. *The King v. Dawbeny* (2 Str. 1196); *The King v. Shepherd* (4 T. R. 381); *The King v. Ramsden* (3 Ad. & Ell. 456); *Re the Aston Union* (6 Ad. & Ell. 784); *The King v. The Justices of Hereford* (1 Chitty R. 700). *Darley v. The Queen*

decided that the office must be a public, substantive, permanent office, not held at the will of others. The view taken of that case is shown in that of *The Queen v. The Guardians of St. Martin's*. On that authority the Court ought not to grant the *quo warranto*. The right to the office should be tried by action for money had and received for the fees or salary appertaining to the office. *Chitty on Contracts*, p. 605; *Lauder v. Lauder* (5 Ir. C. L. R. 27). Thus the prosecutor will not be prejudiced by the writ being refused. This case is quite different from that of *Darley v. The Queen*, as here the officer is removable at the pleasure of others, under s. 8 of 21 & 22 Vict. c. 100. [*O'Brien, J.*, referred to the case of *The Queen v. The Guardians of the Galway Union* (not reported), where the Court had refused to grant this writ in the case of the chaplain of a workhouse, on the ground that the chaplain held his office entirely at the pleasure of others.] Then, on application for a *quo warranto*, the Court cannot go into the question of the right of a voter to vote; though the sub-sheriff may have rendered himself liable to a penalty for voting, under st. 7 Wm. 3 (Ir.) c. 13, there is nothing in the Act to make his vote void. As to the casting vote, there is nothing in the Act of Parliament regulating the procedure at these elections, and it is the ordinary course for the chairman of such a meeting as this to have a casting vote.

*Gerald Fitzgibbon* in reply.—This case proceeds upon grounds different from *The Queen v. Darley*. The office here is one connected with the administration of justice. The salary of this officer is an annual one; the clerk has a number of important duties to perform; he has to account for all moneys received, to make returns of proceedings at Petty Sessions; he has also under the Petty Sessions Act to obey orders of the Lord Lieutenant. How then can he be said to be the mere servant of the justices? If the justices are absent, the clerk adjourns the Court. *The Queen v. Booth* (12 Q. B. 884) is conclusive in our favour from the grounds on which the rule there was refused. There is a remarkable distinction between the nature of this office here and in the cases in England, as in England the appointment is made under s. 102 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, by which the justices of boroughs are to appoint a clerk removable at their pleasure.

*LEFROY, C.J.*—We are clearly of opinion to grant the writ of *quo warranto* in this case. It will still be competent for the party afterwards to raise the question either with respect to the election, or with respect to the remedy itself. With respect to the election there are two or three objections, one involving the right of the voter whose vote turned the election. With respect to the remedy it is only necessary to look at the common law to see how it is that this case is now taken out of the reach of a number of authorities which follow one after another upon the principle that this was a remedy to redress an injury only in the case of an office held immediately under the appointment of the Crown. Then came those Acts of Parliament which gave to appointments by force of an Act of Parliament the remedy which before was confined to offices held under the Crown.

This is an office held under an Act of Parliament, and if it is necessary to quote a precise authority upon the question, we have that of *Darley v. The Queen*. Under those circumstances I confess I could not find any ground for doubting on either point, except one that is raised on the ground of the want of permanency; but by permanency is clearly meant that the office should be a permanent one, and not merely one which it is beneath the dignity of the Court to take upon itself to redress an injury to, that is a mere temporary office, not a permanent one, but one, the holder of which is placed at the mere pleasure of another party. When a person holds an office from which he may be displaced as one displaces a servant, that is not an office in the case of which this Court will interpose by its writ of *quo warranto*. But the office in the present case is made a public one by Act of Parliament. Whatever difficulty might have arisen from former cases is removed by *Darley v. The Queen*; since it there is none, and we are both of opinion that the proper remedy here is by writ of *quo warranto*.

O'BRIEN, J.—I concur with my Lord Chief Justice in thinking that this is a proper case for issuing a writ of *quo warranto*. Several objections have been taken by the counsel for the defendant; one was that the ground on which the writ was sought was not one which we could discuss on *quo warranto* at all, namely, the disqualification of the voter; but as to that, I need only refer to the case of *The Queen v. Crosthwaite* in this Court and afterwards in the Court of Exchequer Chamber (*vid.* 9 Ir. Jur. n. s. 148 and 188), in which the question as to the validity of votes by females at elections of Town Commissioners was very fully discussed. So also in other cases. There is therefore nothing in that. Then comes the question as to the sub-sheriff being entitled to vote. Mr. Hemphill says the sheriff only incurred a penalty by voting, but the statute makes his acts as a magistrate void; and if it were necessary to express an opinion on the subject, I certainly should require some authority to show that where a man's acts as a magistrate are null and void, his vote, which is an act done by him as a magistrate, is good.

Then, is this case one in which the writ of *quo warranto* will lie? Mr. Hemphill has pressed some of the observations in *The Queen v. Darley* to an extent to which I think he was scarcely entitled. The office there was that of treasurer of the county of Dublin; that office was very distinct from the present one, and Mr. Fitzgibbon has well drawn a distinction between offices, like this, connected with the administration of justice, and those in which, before *Darley v. The Queen*, the writ had been refused. It was granted there because the office was a public and substantive one, and one the tenure of which was permanent; but I think that Mr. Fitzgibbon was right in saying that the observations of the judges in that case as to the permanent character of the office, and as to the holder of it not being removable at the will and pleasure of others might apply to a case like that, but would not apply to a case like this. The decision of that case shows that the office of treasurer is one in respect of which a *quo warranto* will lie. That is all that it decides; but it does not

decide at all that in a case like the present, where the office is one connected with the administration of justice, the writ may not be granted on other grounds. There is another distinction to be observed in cases of *quo warranto*, namely, that in those cases where the party who has himself the power of removing the holder of the office comes to the Court, there the application is useless, as there the party has in himself the power of removing by mere order. But here the case is different. The applicant here says that an election was held, that he was the person who ought to have been elected, and that the present defendant was wrongfully elected. That is a very different case. If the fact that this gentleman is removable at the pleasure of the Lord Lieutenant and of the justices, is a ground for distinguishing this case from that of *Darley v. The Queen*, that ground will be open to the party on the pleadings. Where there is a reasonable doubt on the matter it is established that that is a ground for granting an order for the writ to issue.

*Order absolute.*

## Court of Common Pleas.

Reported by H. W. B. Mackay, Esq. Barrister-at-Law.

WHALEY v. CARLISLE AND OTHERS—Jan. 25, 81.

*Evidence—Judicial notice—Entries in an account where balance struck—Form of exception—Affidavit in a cause evidence against a party.*

*The Court will judicially notice who was Minister for Foreign Affairs so long ago as 1803.*

*The entries on the credit side of an account being in the interest of the accountant, are, consequently, not admissible in evidence against third persons. But the entries on the debit side being against his interest are admissible after his death, and the fact of a balance having been struck is immaterial.*

*Where an exception to the admission of such entries is taken on the ground that the accountant does not charge himself with any sum of money, but that on the contrary, the balance on the whole account is struck in his favour—this is a bad reason, but does not vitiate the exception.*

*An attested and compared copy of an affidavit made in a Chancery suit by the since deceased solicitor of a party, and an order in the suit are admissible in evidence against that party and those claiming under him.*

QUARE IMPEDIT.—This action was brought by R. M. Whaley, against J. Carlisle, the Right Hon. Lord Massareene, and Rev. Roger Bickerstaff, Incumbent of the Advowson of Killead, to recover that advowson in fee-simple.

The case was tried at the last Spring Assizes for the county of Antrim, before the Lord Chief Justice of the Common Pleas, and at the trial, counsel on either side tendered a bill of exceptions, on the ground of the reception of illegal evidence.

By the bill of exceptions tendered on behalf of the defendant, which was the only one argued, it appeared that counsel for the plaintiff proposed to offer in evidence an attested copy and translation of a passport purporting to bear date 22nd April, 1803, and to have been granted by Robert Banks Jenkinson, Lord Hawkesbury, Privy Councillor of his Britannic Majesty, and his principal Secretary of State for Foreign Affairs, &c., &c., to enable William Whaley (who was the father of the plaintiff, and under whom plaintiff claimed) to travel to France, and purporting to have been *visé* by General Andreossi, Ambassador from the French Republic to his Britannic Majesty. It was proved that the translation and copy were correct, and was admitted that the original document had been found in the proper custody. However, the counsel for the defendants insisted that the said passport and *visé* were not, nor was either of them, admissible in evidence on the issue, and called upon the learned Chief Justice so to direct the jury. The Chief Justice, however, held that the passports and *visé* were admissible, and counsel for the plaintiff thereupon gave them in evidence, and read same, whereupon counsel for the defendants excepted.

It further appeared that counsel for the plaintiff produced two books, which were admitted to have been the books kept in the office of W. Furlong and J. F. Chambers, partners, as attorneys and solicitors. And it was further admitted that the said W. Furlong and J. F. Chambers were long since dead, as also all the clerks by whom the entries had been made in such books, and that the entries in said books were all in the handwriting of deceased clerks of the said firm, and that the said W. Furlong and J. F. Chambers has acted as attorneys for William Whaley in a *quære impedit* cause, and in other matters in 1803, and that such books were now produced from the proper custody, and counsel for the plaintiff then proposed to read entries from the said books, that is to say, a debtor and creditor account entered in one of the said books, at folio 39 of said book. This account—which it is unnecessary to set out at length—contained on the debtor side, amongst other items, the following:—“Costs respecting Advowson of Killead, B 2, 226, £46 14s. 9d.,” and “Costs—Lord Massareene a. Whaley, B2, 229—£19 8s. 0d.,” and the whole account showed a balance in favour of Mr. Furlong, of £42 16s. 7½d. And counsel for plaintiff, along with said debtor and creditor account, proposed to read in evidence an account in the other of said books, being the book marked B 2, referred to in said debtor and creditor account, opposite said sum of £46 14s. 9d., which account contained in the book marked B 2, shows the items of said sum of £46 14s. 9d.; whereupon counsel for defendant objected that said several last-mentioned entries respectively, were not admissible in evidence against defendant, on the ground that it did not appear by such entries that the said William Furlong charged himself with any sum of money, but that, on the contrary, the balance on the whole of said accounts was struck in favour of said William Furlong, and requested the Lord Chief Justice so to inform the jury, but the Lord Chief Justice held that each of the said last-mentioned entries was admissible, whereupon counsel for plaintiff gave the said last-mentioned en-

tries, respectively, in evidence, and read same, and thereupon counsel for defendants excepted, as a separate exception, to each of said last-mentioned entries.

It further appeared that counsel for defendants gave in evidence a certain indenture of grant bearing date 16th May, 1855, made between defendant, John Viscount Massareene, of the one part, and defendant, J. Carlisle, of the other part, whereby said defendant, John Viscount Massareene, in consideration of £1,400 granted to said J. Carlisle the next presentation of said rectory of Killead, and further gave in evidence as proof of the registration of said indenture an office copy of a memorial thereof, which memorial was registered 23rd June, 1855, in the Office for the Registration of Deeds in Dublin, and also another memorial of said indenture which was registered in said office 9th January, 1860, before the pleading of the plea, but after the issuing of the writ and filing of the declaration, in this cause. It further appeared that counsel for plaintiff had gone into a rebutting case, and had proposed to offer in evidence the debtor and creditor account already mentioned, and along with it the entries in the book marked B. 2, showing the items of which said sum of £19 8s. was composed; and the Lord Chief Justice having ruled that they were admissible, defendant's counsel took a several exception to each entry on the same ground as in the exception taken to the previous entries in the said books. It further appeared that counsel for plaintiff tendered in evidence a duly attested and compared copy of an affidavit made in said Chancery cause of *Masareene v. Whalley* by Richard Waring, the solicitor for said Lord Massareene in said suit, which affidavit purported to have been sworn 31st Jan. 1805, and filed 1st Feb. 1805, together with an order made in said cause, and bearing date 26th Feb. 1805, whereby the Hon. Chichester Skeffington, the high sheriff, was ordered to lodge in Court £315 14s. 5d. and £177 5s. 9d., unless cause shown, &c.; and the Lord Chief Justice having held that said affidavit and order were admissible, counsel for plaintiff gave said affidavit and order in evidence, and read same, and thereupon counsel for defendant excepted to said ruling and directions of the Lord Chief Justice. It further appears that the Lord Chief Justice in his charge directed the jury, upon the issue in fact joined on the eighth plea, to find that the memorial of the deed of the 16th of May, 1855, was not duly registered, and that the memorial thereof filed in the Office for Registering Deeds on 23rd June, 1855, was invalid and void at law, and that inasmuch as the memorial thereof registered in said office on 9th January, 1860, was admittedly registered after the commencement of the present action, though before the pleading of said plea the same ought not to be regarded by them upon said issue; and that to all these rulings the defendant's counsel excepted; and that the Lord Chief Justice repeated in his charge the rulings made already stated to have been by him in the course of the trial, and defendant's counsel excepted to them. The jury returned the following verdict:—1. That Clotworthy, Earl of Massareene, did by indenture of 12th June, 1793, convey said advowson in fee to said William Whaley. 2. That said Bernard Ward did, by indenture of 1st April, 1801, convey said advowson to said



William Whaley. 3. That William Whaley did not devise said advowson to plaintiff as in first and second counts mentioned. 4. That said William Whaley did devise said advowson to plaintiff as in third and fourth counts mentioned. 5. That the indenture of 16th May, 1855, from Viscount Massareene to defendant, John Carlisle, was not duly registered. 6. That the said William Whaley did not re-convey said advowson to said Clotworthy, Earl of Massareene, in manner and form as in ninth plea alleged; and that the living was worth £480 a year, and that the action was brought within six months from the time of the vacancy occurring, and that the said vicarage is full of the defendant, the Rev. Roger Bickerstaff, of the presentation of said defendants. They then, by direction of the Chief Justice, found a verdict for the plaintiff, and they assessed the damages at £243. The case now came on to be argued on the defendant's bill of exceptions.

*W. D. Andrews* for defendants, did not insist on the point as to the memorial, since it had been decided in *Whaley v. Lord Massareene*, (7 Ir. Jur. N. S. 278). On the admissibility of the passport he cited 1 Taylor on Evidence, s. 139. On the admissibility of the entries in the books of Messrs. Furlong & Chambers. *Doe v. Beviss* (7 C. B. 456). *Knight v. Marquess of Waterford* (4 Y. & C. Ex. 283). With respect to the affidavit purporting to have been sworn by Rich. Waring, he cited *Whyte v. Dowling*, (8 Ir. L. 128).

*Falkiner* (with him *Butt*, Q.C., and *Harrison*, Q.C.), *contra*, with regard to the account books, cited *Reg. v. O'Connell* (7 Ir. L. 261, 309). *Bain v. Whitehaven & Furness Jn. Ry. Co.* (3 H. of L. Ca. 1). 1 Taylor on Evidence (4th ed.) s. 608, p. 585. *Rowe v. Brenton* (3 M. & R. 268). *Higham v. Ridgeway* (2 Sm. L. C. 249). *Warren v. Greenville*, (2 Strange, 1129). *Doe v. Michael* (17 Q. B. 276).

*Butt*, Q.C., followed.—On the subject of the admissibility of the passport, he cited *Rex v. Jones* (2 Camp. 131). 1 Taylor on Evidence, s. 16, p. 27. *Id.* s. 14, p. 24. 2 *Id.* s. 1585, p. 1495. With respect to the account-book, he cited in addition to the books above, *Musgrave v. Emmerson* (16 L. J. N. s. Q. B. 174).

*May*, Q.C., in reply, cited 2 Taylor on Evidence, s. 1585, p. 1496. 2 Phillips on Evidence, 10 ed. 183. *Rhodes v. Hunter* (2 Huds. & Br. 589-90).

*Cur. adv. vult.*

*Jan. 31*—MONAHAN, C.J.—This case comes before us in a more formal manner than the last,—it comes before us on a bill of exceptions. The case is not very novel to us, for this is the third, or fourth, or fifth time that verdicts in it have been set aside, and the same rule, I regret to say, applies to this case, for we cannot allow the verdict to stand. But the question is, upon what grounds we have come to that conclusion. The matter objected to was the reception of certain documentary evidence. There was no question as to the weight of evidence. The question was whether a certain deed executed by Lord Massareene, was really his deed, and though the execution of the deed was admitted, there was supposed to be sufficient evidence for the jury to consider whether he was

net imposed upon. I need not go into that because of the former case. It appeared that notwithstanding this deed transferring the advowson to Mr. Whaley, the father of the plaintiff, Lord Massareene had twice presented to the advowson. It also appeared that a bill had been filed by Lord Massareene impeaching the deed on the ground that he had intended to execute it for one purpose, whereas he was induced to sign it in effect for another purpose. The question was, whether there was sufficient evidence to justify the jury in coming to the conclusion that this deed was not the deed of Lord Massareene. To show that there was no foundation for this defence, it became necessary for the plaintiff to show why he had allowed Lord Massareene to present on two occasions as if no such deed existed. And then, upon the other side, Lord Massareene had not proceeded to set aside the deed; and it was incumbent on the defendants to show why Lord Massareene did not go on with the suit to have the deed set aside. One of the cases made by the plaintiff to account for the non-prosecution of his rights by his father was, that at the time his father was a prisoner in France. It appeared that he had been detained a prisoner of war in France as a *détenu* by Napoleon Bonaparte during the war which commenced in 1803 between the United Kingdom and France. But the plaintiff thought it necessary to go further, and he tendered in evidence a passport purporting to be signed by Lord Hawkesbury, who appeared to have been Minister for Foreign Affairs to King George III. in 1803; and it appeared that it was *visé* by M. Andreossi, Ambassador of the French Republic at London, and that it was found in the archives at Paris, where it ought properly to have been; and it was said that the jury were justified in receiving it in evidence. I thought they were, during the argument, and upon consideration, we are all of that opinion, because the Court has a right to take judicial notice of the great officers of state. It was contended that this was not true to an unlimited extent, that we must stop somewhere, and that the Court cannot take judicial notice of an event which has happened so long ago. We have, however, come to the conclusion that as the Court ought to know that Lord Hawkesbury was foreign minister, the evidence was rightly received.

Then comes another exception, which we feel bound to allow. The question was the admissibility of a certain account. That account was given in for the purpose of furnishing particulars of certain *quare impedit* proceedings. The unfortunate state that the records were in was such that the pleadings could not be found, and therefore it was as a sort of secondary evidence of the proceedings in the *quare impedit* that the document was tendered in evidence. It appears to consist of entries in the books of Messrs. Furlong and Chambers, solicitors, in a debtor and creditor account. [His Lordship here read the debtor side referring particularly to the item of £46 14s. 9d. for costs respecting the advowson of Killead, and proceeded.] The credit side of the account is in this form: "Brought over from folio 36, £60 0s. 0d." Therefore this is a credit admitted by Mr. Furlong of £60. The next item is a balance due to Mr. Whaley of £144 4s. 8d. Therefore there is a clear



admission that Mr. Furlong had received on account of Mr. Whaley £144 4s. 8d. And the account is prepared on the supposition that they are setting the one side off against the other. On looking at the £42 16s. 7½d. it appears to be the sum that was required to make the debts equal to the credits, and it appears that the account leaves that sum due to Mr. Furlong. The counsel for the plaintiff along with the said debtor and creditor account proposed to offer in evidence another account showing the particulars of the item of £46 14s. 9d. mentioned in this debtor and creditor account, and that being so, an objection is taken on these records in the words, "Whereupon the counsel for the defendants interposed and insisted that the several last-mentioned entries respectively were not admissible in law as evidence against the defendants in this cause on the ground that it did not appear by said entries that the said Wm. Furlong charged himself with any sum of money, but that, on the contrary, the balance on the whole of said accounts was struck in favor of said Wm. Furlong, and the Lord Chief Justice overruled the objection."

I think it right to mention that though this objection is on the record and is the one we are bound to set upon, it differs from that taken at the trial. The entry in my note-book was this:—"Plaintiff tenders in evidence the late Mr. Furlong's cash-book in which he debits Mr. Whaley with costs of the advowson of Killead, and admits, &c., leaving a balance due to Mr. Furlong. Defendant's counsel objects on the ground that Mr. Furlong claimed a balance," and so I ruled that this being a debtor and creditor account, in which a sum of costs was admitted to have been paid, the fact that the balance of the account was in favor of the attorney, did not make the account inadmissible in point of law. The objection that has been placed on this record is that the account is inadmissible, not because it shows a balance claimed, but because the account does not say that the costs were in fact paid, and the substance of the account is that there was a set off against the costs, and that it is not an account of costs and payments, but of costs on the one side and credits not immediately connected with the costs on the other. The case has been argued at very considerable length, and the authorities have been referred to. The objection that I thought I was deciding at the trial has not been argued; it could not be, because all the cases prove that the fact of a payment being entered in an account entitles you to look at what the item is which has been so paid, so that if this were an item paid, you might look further to ascertain of what it was made up, and that the fact of a balance being struck in favor of Mr. Furlong, would not render the document inadmissible. But inasmuch as this account consists of items of this description, that they are in the nature of a debtor and creditor account, the consequence is that though you may enter the items of the credit side, and give them in evidence so that you may give in this item of £144 4s. 8d., yet you are not at liberty to give in evidence the items not immediately connected with it. The case of *Doe v. Bevis* (7 C. B. 456), is in point. That case was an action brought by the lord of a manor who claimed to be entitled to the possession of certain lands in the occu-

pation of the defendant. The defendant was a customary tenant of the manor, and the question was whether the land was his, or whether he had a right to the pasture only, the soil remaining in the lord. The language of the entries on the Court Rolls being "the pasture of the wood and under-wood of Haywood, one question was whether that was sufficient to pass the land itself, but evidence was given that the defendant and those under whom he claimed had for a long time enjoyed the soil as well as the pasture. The lord however, attempted to prove that the soil was his by showing that in early times the timber did not belong to the tenants of the land in dispute, although by the custom of that manor timber was the property of the customary tenants of the lands. For this purpose he gave in evidence certain ancient pipe-rolls containing the accounts of the reeves of six of the hundreds into which the manor was divided. The substance of them is this:—On one side of the account is set down the sum with which the party furnishing the account is debited, and the various items of the debit are entered. Amongst others were the items which he had received from the persons who had occupied the wood, and no doubt was felt but that all the items with which he had debited himself were properly received. But they wanted to give in evidence the items on the opposite side of the account which were certain disbursements for the benefit of the woods. There was no balance struck; and the question was, whether they were not also to admit in evidence the payments which he had made. The Court of Common Pleas in England ruled that notwithstanding the principle established by *Higham v. Ridgeway* (10 East, 109), an account which cannot be considered in the nature of payments, but is really set off, ought not to be receivable against third persons. We do not feel ourselves at liberty to review that decision here, and the only question, therefore, that we have really to consider is this,—within which case does the present case properly fall. If this case before us did not strike a balance in favor of Mr. Furlong, it would not be distinguishable from *Doe v. Bevis*, because it would be, as it were, two separate accounts of debts and credits. The only question, then, is this: whether the circumstance of Mr. Furlong having entered in this account, this item, "By balance due to William Furlong, £42 16s. 7½d.," alters the character of the account and renders it inadmissible in evidence. We have come to the conclusion that that is not so. We have come to the conclusion that the striking of the balance is the mere mechanical operation of subtracting the debtor from the creditor account, which anybody could do, and therefore we do not think that this alters the character of the account so as to distinguish this case from that of *Doe v. Bevis*. Another question was this: Whether having regard to the form of the exception, it is not open to the objection in *Bain v. Whitehaven and Furness Railway Co.* Of course, we are only at liberty to look at the records, and there the form of the objection is this: He objects that these latter entries, namely, the component parts of the item of £46 14s. 9d. are not admissible in law "on the ground that it did not appear that the said William Furlong charged himself with any sum of

money." It is true that he does not charge himself with any sum of money, but the contrary. I thought I could bring this case within the case in the House of Lords (*Bain v. Whitehaven and Furness Jn. Railway Co.*, 3 H. L. Ca. 1); but we have come to the conclusion, upon consideration, that we cannot do so. In that case an objection was taken, on the ground that the call letters were not signed in writing. Evidence was given that according to the law of England, upon the construction of the English Companies Clauses Consolidation Act, which was almost exactly in the same terms as the Scotch Act, such letters did not require to be signed in writing. The objection was, that the evidence of the English barrister should have been refused on the ground of surprise, and no objection was taken to the reception of evidence of the English law generally on the ground that it had nothing to do with the case. The parties were held to be tied down to the form of the objection, and the House allowed the evidence, which they could not have done if the evidence had been objected to at the trial. But this case does not come within that one; for here though they give a bad reason for their objection, yet they take a proper objection. The other objection was to the attested copy of the affidavit of Lord Massareene's solicitor, made in the Chancery cause of *Massareene v. Whaley*, and the order of the 26th February, 1805, were not admissible. We think, however, that there were sufficient grounds to justify us in receiving that evidence. With respect to objections on the registry question, the case has been already decided. We therefore overrule all the objections except that relating to the admissibility of those particular documents, and must direct a *venire de novo* on that ground.

CHRISTIAN, J.—I concur in the judgment of the Lord Chief Justice with great reluctance. I am not altogether satisfied that this case does fall within the principle on which *Doe v. Bevis* was decided, and that it does not rather fall within the old rule in *Higham v. Ridgeway*. But in deference to the opinions of my Lord Chief Justice and my brother O'Hagan, I withdraw my doubts. But I am certain that if the objection had been correctly taken at the trial, the evidence would have been overruled or withdrawn, and I do not think that its rejection would in the least have influenced the finding of the jury; as it is, we must set aside four verdicts.

O'HAGAN, J.—My doubt was not regarding the question of the admissibility of the evidence, but the form of the exception. I have my doubts as to whether the party should be let in to make the objection, having regard to the House of Lords case. As to the admissibility of the evidence, I am wholly unable to distinguish this case from the cases of *Doe v. Bevis* and *Knight v. Marquess of Waterford*. I have come to the conclusion that they are indistinguishable, and therefore there must be a *venire de novo*.

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-law

[BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.]

WHITNEY v. GLASS.—Jan. 22.

*Sale of a horse—Acceptance and receipt under Statute of Frauds.*

A. having examined a horse belonging to B., said he would buy him, and desired B. to bring him to a railway station in order that he might be conveyed with A. in the train to Dublin. On the arrival of B. with the horse at the station the traffic manager declined to take the horse for want of room, and thereupon A. said he would send for the horse in a couple of days, and B. kept the horse meanwhile. A. not having sent for the horse, B. brought an action for the price, £38 and obtained a verdict for that amount. Held, on a motion to enter a non-suit or a verdict for defendant or that there should be a new trial on the ground of misdirection of the judge on the above state of facts, that there was no evidence of acceptance to go to the jury, and that therefore the verdict should be entered for defendant.

THIS was an action brought by plaintiff to recover from defendant a horse-dealer the sum of £48, the first count in the summons and plaint being for £38, for a horse sold and delivered by plaintiff to defendant, and the second count for £10 for food and attendance supplied to and about the horse. Defendant traversed both counts. The evidence given at the trial at the last Summer Assizes in Wexford before O'Brien J., so far as is material for the present motion, was as follows:—

George Lett examined—"I was at Enniscorthy Fair 25th April last; had plaintiff's grey horse there for sale; met defendant there; told him of the horse; he looked at the horse and cantered him; offered me £35 for the horse; I had asked £50; we parted then. Met defendant again that day; defendant said he would give me £40 for the horse if I would give £2 out of it; I said I could not, that I would give him for £42; we parted. Met defendant again; he asked me would I give him the grey horse; I said I could for £40; he said he would give me no more than £38, I said he should have him at that price. He told me to go for the horse and bring him over to the railway, and that he would give me a cheque for the money. I went for the horse, and brought him to the railway station. I saw defendant there. I heard him tell the traffic manager that he ought to take one horse for him, (defendant) that there was time enough, nearly twenty minutes. The traffic manager said he was heavily laden and could not; defendant then told me he would send for the horse the day but one after that. He did not say anything to me about the keep of the horse. I said, I thought plaintiff, the owner of the horse, would meet him with the horse, in Enniscorthy. Defendant said that would be better."

John Whitney, plaintiff, examined—"I was standing at the door of Nuzum's hotel when defendant was

coming out on April 25th last, and he asked me if the horse had gone over to the railway; I said yes. He said that it was from Mr. Lett that he bought the horse, and that he would pay him."

The following letters were read.—

Defendant to plaintiff, April 26th, 1865.

Dear Sir.—I find it is not in my power to send for your grey horse, as one man has to start to England with three horses, and the other to come with me to Limerick, and I have ten horses still here, and I am rather short of men at present. If I had your proper address I could direct this to you, to save you the trouble of coming in to Enniscorthy; but you can have the horse shod when you are in, and take care of him till he is over his cold, and I think by that time there will be another horse to come from Tintern Abbey."

Plaintiff to Defendant, May 1st, 1865.

Dear Sir—"I would wish to know when you intend taking the horse, as I am about getting a small horse, but have no room for him until the grey horse is gone. I never saw him coughing since; I am riding him every day, and frequently in the stable with him. You will oblige by sending me an answer."

Defendant to Plaintiff, May 2nd.

"Sir.—I am in receipt of yours, and in reply my man is in England. When he returns I'll send for your horse."

Plaintiff to Defendant, May 3rd.

"Dear Sir—I would wish you to let me know a couple of days before you send for the horse, lest I should be from home, and I have the horse with me. If it would be any inconvenience to you, I could either send the horse or meet your man myself with him at Fitzpatrick's hotel."

Lett to Defendant, May 22nd.

"Dear Sir.—Mr. Whitney was here yesterday. He appears to think you are leaving the grey horse a long time. He has got a young one to put in his place. Until you send for him he cannot do so. The grey is greatly improved since you bought him. I know where there is a grand horse to be sold, belonging to an old gentleman, who is now in bad health, &c." The rest of the letter did not refer to the case.

Defendant to Lett, May 25th.

"Dear Sir.—I am this morning in receipt of yours of the 22nd inst. On my return from Kilkenny and Castledermot fair, I am leaving for Rugby fair in Staffordshire, and I won't be back till Saturday eight days. If there is anything of any use then in Wexford I'll come down for Whitney; and you may blame yourselves: if you had made up your mind, and given your horse in time, he could have been taken and paid for at once; and I don't think him worth bothering about."

Mr. Corcoran, Plaintiff's attorney, to Defendant, May 30th.

"Sir.—I am instructed by Mr. John Whitney of Moneytucker, to inform you that if you do not send for the horse purchased by you on the 25th April last, on or before Saturday next, he will put the horse to livery forthwith, and charge you with costs of same, and take such proceedings for the recovery of

the price agreed on, and for any loss he may sustain as he may be advised."

Defendant to Plaintiff's attorney, June 1st.

"Sir.—I am this day on my return home in receipt of yours, and in reply I bought no horse from Mr. John Whitney. A man of the name of Mr. George Lett took me to see a white horse, and I offered for him. He did not consent to take it till within 20 minutes of the train starting, when it could not be loaded; and I could have sent for the horse since, but I am told by a very good judge that Mr. Whitney was selling the horse, and that he is unsound. I am coming to the Co. Wexford next week, and will look at the horse. If I think he is sound I will take him if I get him."

Nathan Glass, the defendant examined—He deposed to the occurrence before and at the railway station as given in evidence by Lett, in fact there was no controversy as to the facts in any part of the case. On cross-examination he admitted—"When I wrote the letter of April 26th, I thought I had bought the horse. When I wrote the letter of May 2nd, I knew I had bought the horse."

The learned judge left to the jury the question as to whether there had been an acceptance of the horse to satisfy the Statute of Frauds by defendant, and they having found for plaintiff on the first count for £38, he reserved liberty for defendant to move the Court to change such verdict into a non-suit or a verdict for the defendant in case the Court were of opinion that the judge should have non-suited plaintiff or directed a verdict for defendant. His lordship stated that he was not satisfied with the finding of the jury on the first count, and that in his opinion they ought to have found for defendant.

*Hemphill, Q.C.*, (with him *Ryan*) for plaintiff, now showed cause against the conditional order granted in pursuance of the leave reserved.—There was ample evidence that defendant had plenty of time to examine his purchase, so that this case cannot come within those where it has been held that unless a purchaser has had an opportunity of examining his purchase, he should not be held to be bound by the contract. At the railway station, Lett became defendant's servant or agent to keep defendant's horse for him.—*Hodgison v. Le Bret* (1 Camp. 233); *Anderson v. Scott* (1 Camp. 235, n); *Elmore v. Stone* (1 Taunt. 458); *Chaplin v. Rogers* (1 East. 192); *Blenkinsop v. Clayton* (7 Taunt. 597); *Parker v. Wallis* (5 E. & B. 21); *Marvin v. Wallis* (6 E. & B. 726); *Morton v. Tibbett* (15 Q.B. n.s., 428); *Clark v. Wright* (11 Ir. C. L., 402); *Castle v. Swarder* (6 H. & N., 828); *Dodsley v. Varley* (12 A. & E. 632). Both *Carter v. Toussaint* (5 B. & Al. 855) and *Tempest v. Fitzgerald* (3 B. & Al. 680) will be relied on by defendant, but they cannot advance his case; the former was disapproved of by Cockburn, C.J., in these words—"Carter v. Townssaint always appeared to me to be a startling case." The acceptance required by the Statute may be either contemporaneously with the bargaining of the parties or subsequently.—*Cusack v. Robinson* (1 Best. & Smith, 299); *Jacobs v. Latour* (2 Moo. & Pay. 201); *Currie v. Anderson* (2 E. & E. 592); *Edan v. Duffield* (1 Q.B., 302); *Gibson v. Holland* (1 Law R., C.P. 1); *Bailey v.*

*Sweeting* (9 C.B., n.s., 843); *Valpy v. Gibson* (4 C.B. 837); *Bushel v. Wheeler* (15 Q.B., 442, n.); *Wright v. Percival* (8 Law J., n.s. Q.B., 258.)

*Walsh*, Q.C., (with him *Serjeant Armstrong*) contra for defendant in support of the conditional order.—Unless the vendor's lien is parted with there is no delivery under the Statute; and here it cannot be said that the vendor's right was gone.—*Kealy v. Tenant* (13 Ir. C. L. 394); *Tempest v. Fitzgerald* (3 B. & Al. 680); *Carter v. Toussaint* (5 B. & Al. 855); *Bill v. Bament* (9 M. & W. 36); *Holmes v. Hoskins* (9 Exch. 753); *Astey v. Emery* (4 M. & S. 262); *Cawthra v. Billiat* (3 F. & F. 850); *Barnett v. Farley* (11 Law T., n.s., 107); *Smith v. Hudson* (34 Law J. Q.B., 145).

*Ryan* in reply.—The direction by defendant to plaintiff to have the horse shod, shows that defendant exercised his power of ownership over the animal. The transaction was complete previous to the repudiation subsequently, and could not be affected by it.

*Cur. adv. vult.*

*Jan. 31st.*—The unanimous decision of the Court was given by

*Pigot, C.B.*—The law is quite clear in cases such as the present, the application somewhat difficult. [His lordship referred to the facts and decisions in the several cases cited in the argument, and proceeded as follows.] I have referred to these cases in some of which on very similar facts the decision was one way, and in others the contrary, to shew how difficult it is to decide a case like the present by the authorities. It was urged by defendant's counsel that where the right of lien continues there can have been no change in the possession. A better criterion is given in *Parker v. Wallis*, viz., that the purchaser (in order to accept under the Statute) must do something to indicate that he has taken possession of the article: he must do something which would be justifiable only on the ground that he was the possessor of the article and not otherwise. As to the transaction at the railway station, it is impossible to treat defendant as then accepting the horse. Lett, as plaintiff's agent, took the animal to the station, intending to keep possession of him until paid the purchase money, he then took him away as he was not paid, defendant being unable to take the horse as there was no room in the train. The next matter to be considered is the correspondence. The letter most relied on by plaintiff's counsel is that of April 26th. But I think there was no evidence that plaintiff ever acceded to the contents of that letter; there was even no evidence that the horse was shod. The plaintiff's whole conduct was consistent with his being an unpaid vendor. The subsequent letters amount to nothing more than a desire on plaintiff's part that defendant should take the horse, and excuses made by the defendant. Plaintiff speaks of his wishing to know what day defendant would send for the horse, lest he might be riding him and absent from home. That letter is equivocal, for plaintiff may have meant either that he was giving the horse moderate and beneficial exercise, or else that he was using him as his own property. But it is not necessary to refer to that letter. Now

comes the interview of June 10th; defendant came to plaintiff's house, and I asked to see the horse with an unjustifiable statement as to his being unsound, and saying that he would not take him unless he was sound. Plaintiff answers him, "I will not let you see the horse unless you tell me who told you he was unsound." That was an unequivocal act of ownership exercised by plaintiff. We think there was no evidence of acceptance to go to the jury, and that therefore the verdict must be entered for defendant with costs.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

*JOHNSON v. GRAY.*—June 9, 12, 13, 1865; Jan. 23, 1866.

*Bankers—Trust moneys—Breach of trust.*

*Where moneys clothed with trusts were lodged by a trustee in his banker's hands, and where such banker was fully aware that said moneys were trust moneys, and where trustee afterwards withdrew said moneys from said banker's hands for the purpose of applying same to purposes foreign from the trusts, and in breach thereof—Held, that the bankers, by paying out same, (they having knowledge of the breach), became participators in the breach of the trust, and were decreed in a suit against them by the cestui que trusts to replace the funds so paid away by them.*

THIS was a cause petition filed by George Joseph Johnson, the petitioner, against Robert Gray, John T. Gray, of College-green, in the city of Dublin, bankers, and Ellen Johnson, respondents. The petition prayed that a certain sum of £1196 14s. 6d. might be declared to be the assets of Thomas Johnson, deceased, and that the respondents, Robert Gray and John T. Gray, be ordered to replace and make good said sum to the estate of the said testator; and also that the trusts of the testator's will be carried into effect; and that said sum of £1196 14s. 6d. might be applied under said will in due course of administration.—The material facts of this case, as disclosed on the face of the petition, are as follows:—Thomas Johnson, of Upper Sackville-street, in the city of Dublin, was at the time of his death, which happened on the 29th of June, 1859, possessed of four policies of insurance effected by him upon his own life for a sum of £4000, subject to certain claims of the insurance company. That for several years previous to his death said Thomas Johnson carried on the business of a silk mercer in partnership with his son-in-law, Samuel Mayston, under the style of Johnson and Mayston. That from the commence-

ment of said partnership, and up to Thomas Johnson's death, the said firm of Johnson and Mayston dealt exclusively with the respondents as their bankers. That in the course of their dealings with Robert Gray and Co. the said firm became indebted to said bankers, the respondents, in considerable sums of money, to secure which sums so due, and also any further sums of money that might, thereafter should or might, accrue due, Thomas Johnson deposited with the said Grays the said four policies of insurance. The petition then stated that Thomas Johnson made his will on the 30th of April, 1859; that will is as follows:—"I give and bequeath to my dear wife, Ellen Johnson, otherwise Rees, all my right, title, and interest in and to my premises known as No. 14 Upper Sackville-street, in the city of Dublin, in which I now carry on business, in partnership with Mr. Samuel Mayston, with all my other property, of every nature and kind wheresoever which I now am, or may, or may hereafter become possessed of or entitled to, to be divided amongst my children or grandchildren at her death, or sooner if she think fit, as to her may seem most for their advantage; and I appoint my dear wife sole executor of this my will, in witness," &c. Said Thomas Johnson died on the 29th of June, 1859, and probate was granted on the 6th of August following to said Ellen Johnson. At his death Thomas Johnson left four children, namely—George Joseph (petitioner), Henry, Anne Mayston, otherwise Johnson, since deceased, wife of said Samuel Mayston, and Alice, wife of Richard Wilson. The petition then stated that immediately after the death of Thomas Johnson, Ellen, his widow, entered into partnership with said Samuel Mayston, and jointly with him continued to carry on said business of silk mercers under the former name, style, and firm of Johnson and Mayston; and said new firm continued from the time of its formation to deal with said respondents as their bankers. After proving said will, respondent, Ellen Johnson, at the request of the Grays, to enable them to obtain payment from the insurance company of the amount due on the policies, handed over the probate of the will, together with a receipt signed by her for the sum of £3683 6s. 8d., the amount so due upon foot of said four policies; and the said Ellen Johnson thereupon received from the said Grays the following letter:—"3, College-green, Sept. 9, 1859. Madam,—To enable me to receive the amount you have this day at my request signed as his executrix for the sum of £3683 6s. 8d. payable to you on the policies with the United Kingdom Assurance Co. on the life of your late husband, Mr. T. Johnson, out of which sum I am to retain the amount due to me at foot of my account with Johnson and Mayston on the 23rd October next, and I undertake to pay over to you the balance of said insurance money.—Yours, &c., ROBERT GRAY & Co." That said insurance company in due time paid said sum to Robert Gray & Co. who then retained thereout the sum due to them, viz. £2486 12s. 2d., leaving a balance of £1196 14s. 6d., which last mentioned sum petitioners now submitted was a part of the assets of Thomas Johnson, and as such were subject to the provisions and trusts of his will, and of all of which, petitioners charged that said Gray and Co. had full notice pre-

vious to receiving said sum from the insurance company. The petition then proceeded to state the breach of trust, for which the present petition was filed, was as follows:—On the 21st of October, the day upon which the Grays received the said monies from the insurance company, they made out their accounts with the new firm of Johnson and Mayston; and the sum of the debts of the old firm and the new equalled £229 9s. 3d. (which sum exceeded the amount due by Thomas Johnson and Co. to Gray and Co. at the date of Thomas Johnson's death), leaving a balance in Gray and Co's hands of £853 17s. 6d. On the 9th of November following a cheque was made out by the said Grays, the respondents, but in whose favor the petitioners were unable to state; but on the same day the said cheque was placed by said Grays to the credit of the new firm of Johnson and Mayston in their accounts as bankers of the said new firm. And petitioners charged that the said £853 17s. 6d. was afterwards applied in liquidation of debts contracted by the new firm with the said Robert and John Gray, and that such application was a breach of trust on the part of the respondent, Ellen Johnson; and that Robert Gray and John Gray had full notice of the breach of trust, and participated therein. That petitioner never received any assets of his said father; and that ever since his death until immediately before filing the cause petition, he had been absent from Ireland, being a sea-faring man; and that on the 5th of September, 1864, he applied to Messrs. Robert Gray and John Gray to reinstate and make good the sum of £1196 14s. 6d. This application was left unanswered by said Grays, and they had not reinstated the said monies. The case made by the respondent was first an absence of notice; secondly, even supposing they had notice that trusts were fastened on the said sum of £1196 14s. 6d., yet, even so, that according to the law and the recognised and established customs of bankers, the respondents (the Grays) were not under any obligation of taking any notice of trusts (if any) affecting sums of money lodged with them as bankers in the usual course of business.

*The Solicitor-General (Sullivan), with Purcell, Q.C., appeared for the petitioner.*—The respondents, the bankers are liable because they acquiesced in the breach of trust by Mrs. Johnson—*M'Leod v. Drummond* (17 Ves. 170). There is no primary liability in respect of breaches of trusts; all parties to a breach of trust are equally liable—*Wilson v. Moore* (1 Mylne & Keene, 127); *Keane v. Roberts* (4 Mad. 351). The next case bears especially on bankers—*Bodenham v. Hoskens* (21 L. J. N. s. 864; a. c. 2 De Gex, M.N. & G. 903); *In re Johnston's estate* (15 Ir. Ch. Rep. 261); *Pannell v. Hurley* (2 Coll. 241); *Walker v. Taylor* (8 Jur. N. S. 681).

*The Attorney-General (Lawson), Warren, Q.C., and Byrne, appeared for the respondents, the Grays.*—This is a highly important case to the public, affecting, as it does, the liability of bankers. The Messrs. Gray had no power on earth to do anything else in this matter than to pay across the counter the cheque that was presented to them. It would be unwarrantable for them to do anything else than to honour the cheque, the sum being lodged to the credit of the firm who presented the cheque. The

*Case of Wilson v. Moore* relied so strongly upon the other side did not bear upon bankers, but was entirely conversant with agents. The Bank of England would take no notice whatever of trusts; they never look beyond the legal title, and they cannot prevent an executor selling out or transferring stock into his own name.—*Bank of England v. Parsons* (5 Ves. 665). They are not chargeable if he transfers the stock to persons not entitled under the will.—*Lady Mayo's case* (Lofft. 85); *Hargis v. Bank of England* (8 Ves. 55). If the banks were to look to trusts, they might be saddled with resulting trusts, and would be charged with all the trusts in the kingdom. Clearly an action would lie against us if we did not honour this cheque for this £800 odd shillings.

*Marietti v. Williams* (1 Barn & Ad. 415) decides this last proposition.—Grant on Bankers, 377. We were bound then to pay this cheque, and by the custom of bankers we could not decline to do so.—*Foley v. Hill* (3 Cl. & Fin. H. L. Cas. 28) is cited to shew that "the relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the case of principal and factor or agent, who is *quasi* trustee for the principal in respect of the principal matter for which he is appointed factor or agent."

Jan. 23, 1866.—THE LORD CHANCELLOR. This case was argued before me in the month of June last, and I regret having been unable to give judgment until now. The petitioner here is George Johnson, who is a son and one of the children of Thomas Johnson, deceased, and he seeks to restore to the assets of said Thomas Johnson, deceased, certain sums of money which were in the hands of the respondents, the bankers. Well, the facts of this case are few and not very complicated. [His Lordship read the facts as given in the petition.] The question I am now considering has reference to the respondents the Grays, and not to the breach of trust committed by Mrs. Johnson, the widow of Thomas Johnson. It is not denied that Mrs. Johnson was guilty of a breach of trust. The question then is, what is the law with regard to bankers? Mrs. Johnson drew this cheque for £853 17s. 6d. in favour of the new firm of Johnson and Mayston, and that sum was afterwards applied in liquidation of debts contracted by the new firm. Now, this law is certain, that if an agent or a banker transfer money from one account to another, one being that of a trustee of the fund, and the banker that so transfers this trust money, if he have knowledge of the trust, this Court will hold that that transfer is concurred in by the banker. The case of *Keane v. Roberts* (4 Mad. 333) is very applicable. There it was held that "Bankers, the agents of executors, and authorised by them to receive certain assets remitting the amount to executors in the course of their duty as agents, and afterwards applying the assets, when received, in payment of the amount of such remittances, are not responsible in respect to a misapplication by the executors; they not being privy to any intention of such misapplication." I would have no hesitation in saying that Messrs. Gray could not be made to replace this money if they knew nothing of the prior transaction, if they were quite ignorant of the moneys being subject to trusts; but were they ignorant—decidedly, looking at

their own answering affidavit, they were cognizant of the trusts being in existence. *Wilson v. Moore* (1 Mylne & Keene, 126) was where the commercial correspondents of executors acting under a power of attorney were held to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them, and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge on part of the correspondents that the stock was part of the testator's assets. Well, in the case before us, no doubt Mrs. Johnson, that is, the firm of Johnson and Mayston, was the party, or rather the parties, who were to be benefited by this breach of trust in handling the sum which was so clothed with a trust; but there is no primary liability in respect of breaches of trust—any, whoever they may be, to a breach of trust, are equally liable. Well, that case was afterwards confirmed on appeal reported page 337 in the same volume of Mylne and Keene. This case, however, it is said, is not a case as regards bankers, but it makes, in the eye of a Court of Equity, no difference whether he be banker or agent, if a breach of trust be committed, and if he be a party thereto with knowledge of the breach of trust; and after all the arguments in this case it comes round to this—was there or was there not knowledge by Gray of the breach of trust by Mrs. Johnson, and was he aware that the money he so transferred was trust money. There is however a case directly to show that there is no exception to the case of bankers.—*Parnell v. Hurley* (2 Coll. 241). Bankers, under the circumstances of the case were decreed to refund moneys which had been drawn by a trustee from a trust account standing in their books, and placed to the credit of a trustee's private account at the bank, upon the balance of which latter account the bankers were creditors. THE VICE-CHANCELLOR, in this last-cited case, says: "Money is due from A. to B. in trust for C. B. is indebted to A. on his account. A. with full knowledge of the trust concurs with B. in setting out debt against the other which is done without C.'s consent. Can it be a question in equity whether such a transaction can stand?" Now I can conceive nothing more like the case before us than that put by the Vice-Chancellor. There is also a case decided by Lord Justice Knight Bruce—*Bodenham v. Hoskens* (2 De Gex M.N. & Gord. 903), which is a case entitled to very great respect. It was an appeal from the decision of Vice-Chancellor Kindersley. There an agent of an estate who had his own private account at his bankers, opened another account with his said bankers under the name of the estates over which he was appointed agent, and for the purpose of placing to the credit thereof such sums as he might receive in respect of the rents and profits of the estate, and the banker was informed that those rents would be paid in to that account, and that in fact they belonged to the owner of the estate. Well, the receiver then drew a cheque on that account, and he paid the money into his own private account; the agent was in insolvent circumstances, and upon the discovery of the transaction a bill was filed against the bank praying that the transfer might be declared fraudulent and void, and that

the bankers might be ordered to make good that amount, and it was held by the Vice-Chancellor, and afterwards affirmed on appeal by Lord Cranworth and Lord Justice Knight Bruce that the bankers were liable to repay the amount to the owner of the estate. Well, I then am of opinion that bankers stand in no higher position than any other person, and if they pay money with the knowledge that what they pay is trust money, they are responsible, and that being so, I shall decree that the respondents, the Grays, do replace those moneys which they have paid out with the full knowledge of the breach of trust by Mrs. Johnson. I shall, however, direct the interest of those moneys to be paid to the Messrs. Gray during the life of Mrs. Johnson, and I shall secure the moneys for the benefit of the children of the late Mr. Johnson, to be paid upon the death of Mrs. Johnson in the manner provided by Mr. Johnson's will. The respondents, the Grays, must pay the costs of this suit.

### Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE LEFROY, C. J., AND O'BRIEN, J.]

CHALONER v. BROUGHTON.—Jan. 20, 22, 26.

*Covenant to keep premises in repair—Obligation to rebuild.*

*To an action for breach of a covenant to repair and keep in repair certain premises, the defendant pleaded performance of the covenant. The jury on the trial found, first, that the premises were not in repair at the commencement of the action, and, secondly, that having regard to the state of the premises when demised to the defendant, they could not have been repaired and kept in repair without having been rebuilt. Held, that the covenant could not be held to impose an obligation to rebuild upon the defendant, and therefore, that on these findings he was entitled to have a verdict entered for him.*

THIS was a motion to show cause against a conditional order of the 4th November, 1865, whereby it was ordered that the verdict had for the plaintiff at the then last assizes for the County of Meath before the Right Honourable the Lord Chief Justice of the Common Pleas, should be turned into a verdict for the defendant pursuant to leave reserved. The action was brought by the plaintiff against the defendant for an alleged breach of a covenant contained in a demise of the lands of Lower Rathenree, bearing date the 9th December, 1853. The summons and plaint contained a count setting out the said indenture of lease, and the covenant, which was in the words following, that is to say, "that defendant, his executors, administrators, and licensed assigns, should from time to time, and at all times during the continuance of the said demise, well and sufficiently repair, uphold, preserve,

maintain, and keep the premises thereby demised and every part thereof, and all houses, buildings, orchards, gardens, inclosures, hedges, ditches, fences, and other improvements which then were or thereafter might be in or upon the said lands, &c. in good and sufficient tenantable order, repair, and condition." The defendant pleaded performance in the language of the covenant, and the issue to be tried by the jury was—"Did the defendant at all times during the said term, well and sufficiently repair, uphold, maintain, and keep the premises in plaint mentioned, and all houses, buildings, orchards, gardens, inclosures, hedges, ditches, fences, drains, and other improvements thereon, in good and sufficient tenantable order, repair, and condition, according to the form and tenor of the covenant in said plaint mentioned, as in said defence alleged?" At the trial the following facts appeared, as stated in the report of the learned Chief Justice. The lease which contained the covenant was still subsisting. The demised premises consisted of a dwelling-house, extensive out-offices, and a farm of considerable extent. The plaintiff originally complained of several breaches of the covenant in question, but at the trial relied altogether on some of the offices being out of repair. It appeared that the house and offices, when demised, were very old, the offices thatched: and what the plaintiff principally relied on was one large out-house called "the Bullock-house," being in a state of ruin, the roof fallen in. The defendant's case was, that the state of the premises at the time of the execution of the lease was such that it was impossible to keep them in repair without rebuilding them; that he had repaired them as far as practicable, and that ultimately they fell from decay which no repairing would have obviated. At the close of the case on both sides, two questions were discussed by the counsel; first, whether the impossibility to repair without rebuilding, was at all a defence, and, if it were, whether it should not have been specially pleaded: second, what was the proper criterion of damages, the lease not having expired, and the defendant being liable to a further action at the termination of the lease. The Chief Justice was of opinion that the proper estimate of damages was not what it would take to put the offices in repair, but the depreciation in the value of the landlord's reversionary interest if now to be sold. Both parties acquiesced in this, and with their assent the Chief Justice left the following three questions to the jury:—

1. Were the premises in repair according to the terms of the covenant at the commencement of the action?

The jury, under the Chief Justice's direction, found they were not.

2. Whether, having regard to the state of the premises when demised to the defendant, they could have been repaired, and kept in repair without having been rebuilt?

The jury found they could not.

3. To what amount was the value of the plaintiff's reversionary interest in the premises diminished by reason of the premises being out of repair?

The jury found that the value of the plaintiff's reversionary interest was not diminished, being of opinion that the offices were useless.



On these findings the defendant's counsel contended that he was entitled to have the verdict entered for him. The Chief Justice thought it right to direct a verdict for the plaintiff with nominal damages, sixpence, reserving liberty for the defendant to move to have the verdict entered for him, if, under the circumstances, the Chief Justice should have so directed. A conditional order having, as stated, been obtained in pursuance of the leave reserved, cause was now shown against it by

*Battersby, Q.C.*, (with him *Palles, Q.C.*, and *Dames*) for the plaintiff.—The party is bound to perform his covenant, and according to the authorities if he gets a house which is not in repair, he must put it into repair in order to keep his covenant.—*Woolcock v. Dew* (1 F. & F. 337). That has been upheld in this country.—*Maddock v. Mallett* (12 Ir. C. L. R. 173). Other important cases upon the same principle are, *Elliott v. Watkins* (1 Jo. 308); *Payne v. Haine* (16 M. & W. 341). The plaintiff has sustained some damage.—*Faze v. Thomson* (1 Taunt. 121) *Mazzetti v. Williams* (1 B. & Ald. 415). The fact of the premises being out of repair at the date of the demise is therefore no excuse for the defendant's non-performance of his covenant. The jury have found that the covenant was broken, and upon that finding the plaintiff is entitled to a verdict. At all events, upon the pleadings here the defence sought to be set up by the defendant is not open to him.

*Sidney, Q.C.*, and *Butt, Q.C.*, (with them *O'Driscoll*) for the defendant.—*Maddock v. Mallett*, cited on the other side, does not apply here at all. That was a case of voluntary waste, and the question turned chiefly on the Statute of Limitations. Neither, in *Payne v. Haine*, was the question the same as that in the present case. *Gutteridge v. Munyard* (1 M. & Rob. 334) is a direct authority for the defendant, and shews that the covenant did not bind him to the extent of forcing him to rebuild. So, *Harris v. Jones* (1 M. & Rob. 178); *Schroder v. Ward* (13 C. B., n. s. 410). The same principle, namely, that a covenant to keep in repair cannot have the effect of compelling the covenantor to rebuild premises which were ruinous at the date of the demise, and that the covenant is not broken by reason of the natural operation of the elements, appears in *Stanley v. Towgood* (3 Bingh. N. C. 4); *Mantz v. Goring* (4 Bingh. N. C. 452); Year Book, 10 Hen. VII.; Sheppard's Touchstone, p. 169; *Burdett v. Withers* (7 Ad. & Ell. 136); 1 Furlong's Landl. & Ten. 490; Gibbons on Dilapidations, p. 56. The question is properly raised on the pleadings. Any special plea to raise the issue must have been in the form of a plea in confession and avoidance, and would have been bad.

*Palles, Q.C.*, replied.

*Curr. adv. vult.*

Jan. 26.—LEFROY, C. J.—This is an action of covenant for not keeping in repair certain premises. The case was tried before the Lord Chief Justice of the Common Pleas, who left certain issues, by consent of the parties, to the jury, and on the finding of those issues the defendant insisted for a verdict in his favour, but the Chief Justice was of opinion that on the findings he should direct a verdict for the plaintiff,

with liberty for the defendant to come to the Court, and ask to have a verdict entered for him. We are of opinion that the verdict should be entered for the defendant, that the verdict for the plaintiff should be changed into a verdict generally for the defendant. The premises were of a very miscellaneous kind. There was a house, a dwelling-house, with a variety of offices. There were other premises that might come within the description as to which no question arises; but with respect to the subject-matter of this action, the part of the premises which constituted the material subject of inquiry with respect to the performance of the covenant to repair, was a large building called "the bullock-house." The fate of that house, the fact of that house having fallen in, that is what I may call having died a natural death, is what gave occasion to this action being brought. It is not a case of non-performance of a covenant to give up in repair at the expiration of a lease, but the action is brought pending the lease, for not having repaired or kept in repair that part of the premises specially. The parties contended upon the evidence that on both sides they were respectively entitled to a verdict on the evidence. Upon argument as to the claim to a verdict upon the evidence, it was agreed that four questions should be left to the jury with a view to bring the case within some limited bounds, and four issues were accordingly sent to the jury with the assent of the parties, so that on the result of the findings on those issues the determination of the Court should be grounded. The four issues were these—1. Were the premises in repair according to the terms of the covenant at the commencement of the action? 2. Whether, having regard to the state of the premises when demised to the defendant, they could have been repaired and kept in repair without having been rebuilt? 3. To what amount was the value of the plaintiff's reversionary interest in the premises diminished by reason of the premises being out of repair? Now, one thing is clear, that the parties having consented to have the case left to the jury on these issues, and to abide the result of them, the findings on those issues must be that which is to determine the right of one or the other to a verdict. With respect to the first issue, whether the premises were in repair at the commencement of the action, the jury found that they were not in repair pursuant to the terms of the covenant; but the jury have not found what in a point of that sort, especially in the earlier cases, was an adjunct to that finding; we do not find it here found that they were out of repair for want of due diligence in keeping them in repair. There is nothing, therefore, in this finding that of necessity would implicate the defendant in a liability, or if any such liability could be implied, it is repelled by the express finding upon one of the other issues in the cause, showing why they were not in repair at the time the action was brought, namely, that they could not be repaired without being rebuilt. Now, there was no covenant, express or implied, from which the duty of rebuilding could be cast on the defendant, and therefore I say that the finding on the first issue, though it might at first seem to implicate the defendant in the responsibility, negatives the liability to that responsibility by showing that it was not from the want of repair, but from the impossi-



lity of performing the covenant of reparation without doing that for which there was no covenant, and that was, rebuilding. The rebuilding of premises, and the repairing of premises, are totally distinct things, and, therefore, the ground on which the jury finds that they were out of repair, exempts the party from the liability which *prima facie* he would otherwise be subject to, for it amounts to this, that there was an incapacity in the premises as they stood, not only at that time, but in truth, as the evidence shows, and which is good and important evidence, that at the time of the demise they were in such a condition as accounted for the incapacity of their being kept in repair; and therefore, although the want of repair would bring it within one of the terms of the contract, there was no contract which would bring it within that which was essential in order to enable the party to perform the covenant; for there was no covenant for rebuilding; and, as Tindal, C. J., says, this species of contract does not at all bind the party to give his own new work to create a foundation for a liability which did not arise from the nature of the premises at the time they were let; and therefore, he says, it is all-important to inquire into the state of the premises when they were let; and in this case there is express evidence that they were old and ruinous at the time of the demise, and therefore if they were out of repair, they were not so from want of due diligence, but from an actual incapacity of being repaired or kept in repair. There was on the one hand the want of a breach, and on the other the want of a contract. Now, in every action of covenant the plaintiff is bound to establish two things, and although the language of the law may have been abolished in its use, the principles of the law are not in the least affected by the change which has been wrought in permitting parties to speak in their own language instead of the language of the law. It is *quodammodo* abolished as to the necessity for using it, and the abolition unhappily has led to a great deal of confusion and difficulty; but the principles are not changed, and the great difficulty in an action of covenant is this, that the plaintiff must show a covenant embracing the subject-matter, and a breach within the terms of the covenant. He must bring his case not only to show that there was a breach in the terms of the covenant, but that that breach in his case existed. Now, the principles upon which this case turns with respect to the two principal propositions which are involved in it will be found stated by Tindal, C. J., in the cases that have been cited. In the case of *Harris v. Jones* he says, "The defendant was only bound to keep up the house as an old house, not to give the plaintiff the benefit of new work, and upon the whole, the jury were to say whether the particulars of non-repair enumerated by the plaintiff's witnesses were dilapidations amounting to a substantial breach of the covenant." Well, in the other case of *Gutteridge v. Mynyard*, he says, "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it stood at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitutes a loss

which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by reasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised." If it appears that he has made these applications, and laid out money from time to time upon the premises, that will, he says, be a performance; but he is not bound to rebuild, as the Chief Justice stated, both here and in the former case, to put the thing into a state which rendered it susceptible of that of which it was not susceptible at the time of the demise, for he was not bound to rebuild, and in that way to guard against a loss accruing from the perishable nature of the materials and the efflux of time upon them. Upon the ground, therefore, that these premises here appear to be a particular building, the nature of which was shewn, and of its having fallen in of its own accord, and being in such a state when let that this was the natural consequence of that, and that no degree of reparation of which it was susceptible could have kept it up, I think there was no breach of the covenant here. The susceptibility of being kept up by repairs did not exist, and there was no contract to rebuild; and therefore both that which would appear to have been a breach of the covenant, and that which alone could have enabled the defendant to keep the covenant to repair, were not within the contract; so that an action could not be brought by any possibility—by no possibility could the party be made liable here. In an action of covenant you must not only bring the case within the contract, but you must bring your case as to the breach within the specific breach which is alleged. In this case, therefore, I can see no ground on which the defendant could be made liable here, and he is entitled to have the verdict entered for him.

O'BRIEN, J.—I am also of opinion that the verdict should be entered for the defendant pursuant to the leave reserved. The exact question involved in the case certainly in its terms presents some novelty, but it appears to me that the principle on which other cases were decided certainly apply to the present case. Now, I may notice one objection that has been made—namely, that this point was not open on the pleadings. I think that comes round to the same question. The defendant here does not rely on his not breaking the covenant, or say that there was an excuse for his doing so, but he says that the obligation which the plaintiff seeks to impose on him was not an obligation to which he was liable; so that the question as to its being open on the pleadings is substantially the same as the main question. The findings of the jury shew the state of facts, and is the plaintiff on that state of facts entitled to a verdict? The Chief Justice has not given us the evidence in the case, nor was it necessary for him to do so, because the findings of the jury are acquiesced in; and they appear to me to amount to this,—that the premises were not actually in a state of repair, but that they could not have been kept in repair in consequence of the state in which they were when demised without being rebuilt, so that the question comes to this—is the defendant bound to rebuild? It is also found that, &c.

cept for not rebuilding, the defendant was not guilty of any default. There was no covenant to rebuild, but it is said that the covenant is to repair and keep in repair; and that the bare fact of the premises being out of repair at the time of the lease would be no excuse for the defendant if the covenant was a general one. I must read the words of the covenant: they are these—"That the said lessee, his executors, administrators, and licensed assigns, shall from time to time, and at all times during the continuance of this demise, well and sufficiently repair, uphold, preserve, maintain, and keep the premises thereby demised and every part thereof, and all houses, buildings, orchards, gardens, enclosures, hedges, ditches, fences, and other improvements whatever which now are or hereafter may be upon the said demised lands and premises, in good and sufficient tenantable order, repair, and condition." Well, now, the terms of this covenant are relied on as involving the necessity of putting the premises in repair. There is this distinction upon the cases cited, that the bare fact of the premises being out of repair at the time of the lease is no answer to the defendant to make an excuse as non-performance of a covenant to repair, and I think the case of *Payne v. Haine* is an authority for that proposition. They lay down there that in an action upon a covenant to keep in repair it is no excuse to shew instances of non-repair at the time of the lease; but in that case *Alderson, B.* alluding to a case of *Stanley v. Towgood*, which had been cited—"The marginal note of *Burdett v. Wuthers* may be incorrect, but the judgment is quite right, and shews that a lessee who has contracted to keep demised premises in good repair is entitled to prove what their general state of repair was at the time of the demise, so as to measure the amount of damages for want of repairs by reference to that state. *Stanley v. Towgood* had seemed to shew that though the age of a house at the time of its demise must be considered in estimating the amount of repair on which the lessor can insist, yet any inquiry into its state of repair at the time of entry would be misplaced. However, as some want of repair then existed, and the case was left to the jury as to the amount of damages, which they found under £20, the Court would not interfere. It is, no doubt, in practice difficult to say what is a putting premises, so old as to be ready to perish, into good repair, or keeping them in it; but a contract to "put" premises in good repair cannot mean to furnish new ones where those demised were old, but to put and keep them in good tenantable repair, with reference to the purpose for which they are to be used." If a contract to put premises in good repair cannot mean to furnish new ones where those demised were old, it would seem to follow that there was still less obligation to rebuild the premises. *Parke, B.* in his judgment in the same case says—"This is a contract to keep the premises in repair as old premises, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all shew that the age and class of the premises set, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite

for repairing a mansion in Grovesnor-square." He then goes on to say that the defendant was to keep the premises in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term. That being so, the case before *Tindal, C. J.*, also furnishes arguments on which the defendant might rely. In *Harris v. Jones* *Tindal, C. J.*, says first that the covenant must be substantially complied with. Now, I may say as to all the cases on these covenants, and in estimating the amount of obligation and the liability to damages, that the condition and the age of the building at the time were to be taken into account, so that these covenants are not to be construed strictly; I mean without reference to the condition of the premises and to their age. Well, *Tindal, C. J.* then says—"The defendant was only bound to keep up the house as an old house, not to give the plaintiff the benefit of new work." Is he then bound to give the plaintiff not merely new work, but an entirely new set of premises? Again, in *Gutteridge v. Munyard* the same judge says:—and I may remark that though these are *Nisi Prius* decisions, yet none of them have ever been quarrelled with.—"Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value, than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications and laid out money from time to time upon the premises, it would not, perhaps, be fair to judge him rigorously by the reports of a surveyor, who is sent upon the premises for the very purpose of finding fault." Here the finding is, that the repairs could not be effected without rebuilding; and in the words of the judgment I have first quoted there is a loss which, so far as it results from time and nature, falls upon the landlord." Now, it is said that there is no finding here as to what the defendant had done. That is not necessary; the plaintiff is bound to shew a state of facts shewing a default in the tenant. I could well understand a finding that the premises were in that condition that by ordinary repair they could be kept up. There is no question but that if that was found by the jury the defendant would be answerable, as he would by his own default have created the state of things which made it necessary to rebuild; but the finding of the jury is on the issue whether, having regard to the state of the premises at the time of the demise they could have been repaired without rebuilding, and the jury found that they could not. We were pressed with the *dicta* in *Maddock v. Mallett*. The actual decision in that case is not applicable to the one now before us. The decision there was this: A man had committed a breach of covenant; he had done that twenty years before the action. Twenty

years had elapsed before the action was brought, and this Court held that the Statute of Limitations applied; the Court of Exchequer Chamber held that it did not, because where the defendant had done an act which was a breach of covenant, the keeping the premises in the state brought about by that breach of covenant was from day to day a continuing breach, and the Statute of Limitations could not apply. I think, fairly viewing the *dicta* in that case with reference to the case itself, you cannot draw from it the conclusion that the covenant in this case imposed an obligation to rebuild. It was sought to be argued in that case that the covenant to keep the premises in repair imposed an obligation to rebuild. What Christian, J. says in that case is this:—"If a man covenants absolutely to do something upon a particular thing, it is no excuse to him for not performing his covenant that that thing does not exist, if it is in his power to provide it; still less, if the reason why it does not exist is because he has himself destroyed it. Having covenanted to do the act, he is bound to provide whatever is necessary to enable him to do the act; having covenanted to keep a house in repair he is bound to build it in order that he may keep it in repair. If a man takes a lease of land on which there is no building, and covenants that he will at all times keep in repair a good and substantial dwelling-house upon the premises, it is clear that he must build one." Of course, if a man covenants to keep a house in repair where there is no house, that would imply that the defendant was to build a house; but does that apply here? The covenant spoken of by Christian, J. is a covenant to keep something which was not in existence and should be brought into existence. The effect of a covenant to keep all buildings in repair, there being none on the premises, is very different from the effect of such a covenant where there are buildings. The broad proposition that Christian, J. lays down therefore does not apply to the case before us. On these grounds I concur with my Lord Chief Justice that the defendant is entitled to have the verdict entered for him. The subject has something of novelty in it. I think that on the reasons on which the decisions are founded and the state of facts found by the jury, the defendant is entitled to the verdict. As to the facts of the case, it is all confined to this out-house called the "bullock-house," and one cannot much regret the conclusion at which the Court has arrived when it appears that the owner of the premises has suffered no loss from the falling down of that house. The cause shewn must therefore be disallowed, the defendant to have his costs of this argument as part of his costs in the cause.

## Court of Common Pleas.

Reported by H. W. B. Mackay, Esq. Barrister-at-Law.

ARCHBOLD v. THE EARL OF HOWTH.—Nov. 13, 15, 17, 20, 21, 1865; Jan. 29, 1866.

*Statute of Frauds—Pleading—Assessment of damages in the gross—Deceit—Part performance—Wilful and fraudulent concealment—Principal and agent.*

*Where a letter was written in the name of a firm of land-agents by the sub-agent to a tenant stating that a revision of the rents had been made, and that they were desired to make a general change in the rents by raising them 20 per cent., and that leases at the increased rents would be granted, and that a notice to that effect would be sent him; and a few days afterwards the sub-agent sent a bailiff to the tenant with a written agreement to pay the increased rent and to take out a lease, and the tenant signed the agreement, but it was not signed by or on behalf of the landlord. Held that there was no agreement binding on the landlord at law within the Statute of Frauds.*

*Where one count in the plaint sought to recover damages for breach of a contract which turned out to be void under the Statute of Frauds, and another count sought to recover damages for the loss of plaintiff's equitable remedy caused by defendant's wilful and fraudulent concealment of a contract which was by express reference the contract declared on in the former count: and but one traverse was pleaded to both counts: as the former count has failed so must the latter.*

*Where the damages are assessed in the gross upon two counts and one of them fails (there being no evidence to support it), the other must fail also.*

*Where under the above circumstances the tenant remained in possession and several times paid rent at the increased rate the Court were of opinion that this was no part performance sufficient to entitle plaintiff to an equitable remedy, his conduct not being incontrovertibly referrible to that object.*

*Where under the above circumstances the sub-agent laid by the agreement in the office and frequently received rent at the increased rate from the tenant without saying anything about the agreement: Held that this was no wilful or fraudulent concealment to ground an action for deceit.*

*Evidence of the above facts, and that plaintiff did not read the agreement he signed, nor was it read to him although he was informed of its contents, and that he forgot the particulars (although he admitted never having forgotten that he had signed a paper and been told at the time that it was an agreement for a lease) was held no evidence that plaintiff was ignorant of the existence in fact of the contract to defendant's knowledge.*

*Et per MORAHAN, C.J. (CHRISTIAN and O'HAGAN, JJ. dubitantibus).—That a principal, innocent at the*

*time, is not liable in damages for the fraud of his agent though he afterwards obtains the benefit of it; the judgment in Udell v. Atherton (7 H. & N. 172) being conclusive upon a court of concurrent jurisdiction.*

THE plaint in this case contained six counts, but the first and fourth alone were eventually important.

The first count set forth that on the 30th November, 1857, defendant agreed to demise and plaintiff agreed to take a certain farm and lands being part of the lands of Tyrrelstown then in the possession of plaintiff for the term of twenty-one years from the 29th September, 1857, at a yearly rent, to be ascertained by adding £20 *per cent.* to the then present rent of said farm, and that the said defendant agreed to grant and the plaintiff agreed to accept a lease in possession of said lands for the term and at the rent aforesaid, containing the clauses usual in defendant's leases, and to execute a lease accordingly. Averment of plaintiff's readiness and willingness, and of the performance of conditions, &c., necessary to entitle plaintiff to a performance of the said agreement by the defendant and to maintain this action for the breach thereof, yet that the defendant did not perform said agreement on his part, but on the contrary refused so to do, and during the continuance of the said term ejected and expelled the plaintiff from the possession of the said farm, and demised the said farm in possession to William Arthur for a term which is still subsisting, which said William Arthur has ever since kept the plaintiff out of the possession of the said farm by reason whereof the plaintiff has lost the benefit of the said contract and been deprived of the possession of the said farm. The count then alleged certain special damages which however it is unimportant to detail.

The fourth count was as follows. And the plaintiff further avers that before and at the time of the wilful and fraudulent concealment hereinafter mentioned, the plaintiff was tenant from year to year to the defendant at the yearly rent of £132 of the premises in the first count mentioned, and was entitled to the benefit of the executory contract for such lease thereof as in said first count alleged, of which benefit and contract the plaintiff at and during all the times in this count mentioned was wholly ignorant as the defendant at all times well knew, and the plaintiff avers that before the said wilful and fraudulent concealment, the defendant, to wit on the 3rd day of September, 1860, duly served the plaintiff with a notice to quit on the 25th day of March, 1861, or at the end of the current year of his tenancy. And the plaintiff avers that at the time of the said wilful and fraudulent concealment hereinafter mentioned the said executory contract was in full force and effect as the defendant well knew. And the plaintiff avers that after the service of the said notice to quit and before the making of the demise by the defendant as hereinafter mentioned, the plaintiff was in communication with the defendant on the subject of the said notice to quit and the right of the plaintiff whether at law or in equity to retain the possession of the said lands, and the plaintiff in the course of such communication stated to the defendant, as he then believed the fact

to be, that he the plaintiff had no greater estate or interest in said lands whether at law or in equity than a tenancy from year to year. And the plaintiff avers that at the time of such communication the defendant had knowledge of the existence of the said executory contract for a lease of the existence in fact of which the plaintiff was then and up to the time of the demise hereinafter mentioned wholly ignorant as the defendant during all the time aforesaid well knew. And the plaintiff avers that *the defendant, well knowing the plaintiff's ignorance of the existence of the said contract as aforesaid, and that the plaintiff was acting under such ignorance, did, in such communication, with intent to deceive and mislead the plaintiff, and in order that the plaintiff should not rely on the said contract or seek a special performance thereof and should not resist any proceedings for recovery of the possession of said lands consequent on the said notice to quit, and should permit and suffer himself to be dispossessed of the said lands, and allow the said lands to be demised in possession to a tenant other than the plaintiff at a higher rent than in said contract mentioned, wilfully and fraudulently conceal from the plaintiff the existence of the said contract: and well knowing the premises and the plaintiff's ignorance of the existence of the said contract, did, with the intent aforesaid wilfully and fraudulently permit and induce the plaintiff to act in ignorance of the said contract which then in fact existed between the plaintiff and the defendant: whereby the plaintiff was prevented from taking steps to restrain the defendant from proceeding upon the said notice to quit and to obtain specific performance of said agreement; and the defendant afterwards and while the plaintiff continued ignorant of the existence in fact of said executory contract evicted the plaintiff from the possession of the said premises, and demised the same in possession at an increased rent to one William Arthur who at the time of such demise had no notice of the executory contract, and who thereupon took and now holds the said lands discharged from the said executory contract: whereby the estate and interest of the plaintiff under the said contract was wholly lost, and the plaintiff sustained the special damage in the first count mentioned.*

The defendant filed twenty-seven defences. Of these the first went to both the above counts, and consisted of a traverse of the agreement to demise and take the farm. The other defences to the first count were in substance as follows:—(1.) That before any breach of the agreement it was mutually rescinded. (2.) A traverse of plaintiff's readiness and willingness. (3.) A traverse of the performance of conditions: and averment that it was a condition precedent to the right of the plaintiff to the performance of said contract, that the plaintiff should tender a lease for execution by the defendant; and averment that the plaintiff did not prior to the rescission in the above defence mentioned, tender a lease for execution by the defendant, nor did plaintiff ever require that a lease should be executed by defendant to him. (4.) Traverse of the defendant's refusal to perform the said agreement alleging that he was always ready and willing to perform it until the alleged rescission. (5.) That the plaintiff should not now be allowed to aver that the said agreement is binding on the defendant against:

the wilful acts and conduct of the plaintiff, and that the plaintiff is disentitled to maintain this action. This defence was grounded on the following allegations:—That after the making of the said agreement the plaintiff continued in possession of the farm. Averment that although the defendant requested the plaintiff to take out a lease in pursuance of the said agreement, the plaintiff did not do so but suffered the same to fall greatly in arrear, and that a large sum of money became and is still due and in arrear in respect thereof; that the defendant served a notice to quit on the plaintiff, and on the 26th Mar. 1861, and 10th Dec. 1861, demanded possession and afterwards brought an ejectment to recover the lands, the writ of summons and plaint in which was duly served on the plaintiff, but to which plaintiff took no defence. That defendant obtained judgment and executed the *habere* and remained in quiet and peaceable possession for a long space of time. And that plaintiff never at any of the times aforesaid, nor at any time, requested nor called on the defendant to perform said agreement, and never tendered to defendant any lease in pursuance thereof. And that plaintiff assented to and permitted such delivery of possession to defendant, and such remaining in possession by the defendant. Averment that by such acts and conduct of the plaintiff, plaintiff wilfully induced defendant to believe that plaintiff had wholly abandoned the agreement, and induced defendant wholly to discharge plaintiff therefrom and to demise the lands to the said William Arthur. (6.) That the plaintiff should not now be allowed to aver that he was ready and willing to perform said agreement against his wilful acts and conduct. The defence rested on the same grounds as the preceding one. (7.) The Statute of Limitations. The other defences to the fourth count were in substance as follows:—(1.) A traverse of the averment that the contract was in force at the time of the alleged concealment, defendant alleging that it had been long before mutually rescinded. (2.) A traverse of defendant's knowledge of the existence of the said contract, and of his knowledge that plaintiff was ignorant thereof. (3.) A traverse of the concealment of the contract by the defendant, and of his having permitted and induced the plaintiff to act in ignorance thereof. (6.) A traverse of the wilfulness and fraud of the said concealment. (5.) That at the time of said concealment plaintiff well knew of the existence of said contract, and that it was in full force and effect.

The case was tried at the sittings after last Hilary term before the Lord Chief Justice of the Common Pleas.

It appeared that in November, 1857, plaintiff who was then tenant from year to year to defendant received a letter written in the name of the defendant's land-agents, Messrs. Stewart and Kincaid, but in fact signed by Mr. Hamilton their sub-agent who managed the defendant's estates. The letter was as follows:

"6 Leinster-street, Dublin,  
"25 November, 1857.

"DEAR SIR,—We have recently made a division of the rents of Lord Howth's estate, and after full consideration and consultation with his Lordship, we are

desired to make a general change in the rents of the yearly tenants, and of those holdings the leases of which have recently expired by adding 20 per cent. to the present rents, and at these new rents his Lordship has consented to give the tenants leases for 21 years. A notice, therefore, to this effect will be sent to you from this office.

"We are, dear sir, yours faithfully,  
"STEWART & KINCAID,  
Per H. F. H."

On 30th November, 1857, a bailiff called on plaintiff, stating he had an agreement for him to sign, and informed him (which was the fact) that it was an agreement to pay the increased rent, and take out a lease for twenty-one years, but did not read it to plaintiff, nor did plaintiff read it. After some hesitation, however, plaintiff signed it, and the bailiff then took it back to the agent's office, where it remained until produced to plaintiff's attorney a short time before the commencement of this action. Plaintiff afterwards remained in possession, and paid rent at the increased rate until his eviction, as stated in the 4th count. During this time no mention was made of the agreement; and plaintiff's case was, that he had forgotten it, and that Mr. Hamilton had fraudulently concealed its existence from him. The facts are well stated in the judgment.

In the course of the trial defendant's counsel objection to the reception in evidence of a correspondence between Mr. Cantwell (plaintiff's attorney) and Messrs. Stewart and Kincaid relative to the production of the agreement of 30th November, 1857. The evidence was received, subject to the objection. The learned Chief Justice, in his charge, told the jury that, if pending the notice to quit and ejectment, Kincaid and Hamilton were aware of the existence of the agreement, and if plaintiff was not aware of its existence, and if Hamilton was aware of such ignorance on the part of the plaintiff, and concealed the existence of it from him with the object and for the purpose of preventing him using it as a defence to the proceedings, this might be a fraudulent concealment. He also thought that the Statute of Limitations did not run from the date of the agreement, but that the plaintiff had a reasonable time to require execution of the lease. Counsel for the defendant handed in the following objections:—On the first count—(1.) He called for a direction on the ground that there was no evidence of a contract binding under the Statute of Frauds. (2.) That if the jury believed the evidence that the plaintiff permitted possession of the lands to be taken and let to another without setting up the agreement for a lease, they ought to find for the defendant. (3.) That there was no evidence of a refusal by Lord Howth to grant the lease. (4.) That the evidence proved that plaintiff was not willing. (5.) He called for a verdict on the defences in the nature of estoppel, on the ground that the allegations in those defences were proved by evidence upon which there was no controversy except the allegation that defendants had requested plaintiff to execute a lease, which was not material. (6.) He called for a verdict on the defence of the Statute of Limitations, on the ground that the only contract proved being a con-

tract to execute a lease, the Statute ran from the date of the agreement. On the fourth count—(1.) He called for a direction on the ground that there was no evidence of concealment; and (2.) that there was no evidence of fraud. (3.) He insisted that there was no evidence of any obligation on the part either of Lord Howth or his agents to communicate to the plaintiff any information alleged to be withheld. (4.) He called for a direction on the ground that Lord Howth cannot be made responsible for any improper concealment on the part of his agent unless he sanctioned or authorized same, and that there is no evidence of such sanction or authority. (5.) Also on the ground that the evidence establishes that the plaintiff knew of the existence of the contract in point of fact. (6.) He called on the Chief Justice to tell the jury that they ought not to hold the defendant responsible for any fraud or concealment on the part of his agents or sub-agents, even if they believed any such to exist, unless they believed that the defendant sanctioned or authorized the acts constituting such fraud or concealment. The jury found a verdict for the plaintiff on the first and fourth counts, and assessed the damages on those counts at £1000, and returned a verdict for the defendant on the other counts.

**Nov. 2.**—*Macdonogh*. Q.C. obtained a conditional order for a new trial, on the grounds of the reception of illegal evidence and misdirection of the learned Chief Justice; that there was no evidence proper to be submitted to the jury in support of the plaintiff's case, and that the learned Chief Justice should have non-suited the plaintiff, or directed a verdict for the defendant; and that at all events there was no case to go to the jury on the 4th count, and that it was uncertain on which count—the 1st or 4th—the damages had been assessed; and on the further grounds that said verdict was against law and evidence and the weight of evidence, and that the damages were excessive. Counsel at the same time obtained a conditional order for arrest of judgment in case the verdict should be affirmed.

*Serjeant Armstrong* (with him *Jellet*, Q.C., and *Whiteside*, Q.C.) now showed cause.—On the second defence he contended that a party could not be taken to have rescinded a contract of which he was ignorant. On the measure of damages he cited *Chitty on Contracts*, 7th ed. 731 par. 2. On the question whether the concealment amounted to fraud, he cited *Addison on Wrongs*, 2nd ed. 755–6, and the cases there referred to; and *Udell v. Atherton* (7 H. & N. 172); and distinguished *Cornfoot v. Fowke* (6 M. & W. 358), as *Parke, B.*, concedes in that case that if one employ an agent who commits a fraud, the contract is void and the principal is liable to an action, although himself innocent. He contended that the result of the authorities was that if an agent is guilty of fraudulent concealment in the course of his employment and for the benefit of his principal, and if the principal reaps the benefit, the latter is liable. He also cited *Hern v. Nicholls* (1 Salk 289); *Crockford v. Winter* (1 Campb. 124–7); *Fuller v. Wilson* (3 Q. B. 58, 67). *S. C.* in *Ex. Ch.* 3 Q. B. 1010 distinguishable as *TINDAL, C.J.* there admits that if the agent were guilty of fraud the principal would be liable. *Rawlings v. Bell* (1 C. B. 951); *Flight v.*

*Barton* (3 M. & K. 282). *Addison on Wrongs*, 2nd ed. 761, and cases referred to. *Schneider v. Heath* (3 Campb. 506); *Limpus v. London Gen. Omnibus Co.* (1 H. & C. 526, 540); *Murray v. Mann* (2 Exch. 538, 540).

*Macdonagh Q.C.*, cited on the question on the Statute of Frauds, *Kennedy v. Lee* (3 Meriv. 454); *Routledge v. Grant* (4 Bing 653). 1 Jarman on Wills, 3rd ed. 81, 86–7, as elucidating the question how far the letter signed by Lord Howth's agent could be considered as incorporated into the agreement. On the question of the Statute of Limitations he cited *Waters v. Earl of Thanet* (2 Q. B. n. s. 757); *Norton v. Ellam* (2 M. & W. 461). *Selwyn's Nisi Prius*, 12th ed. 399, and that a fraudulent concealment does not prevent the statute running. *Bullen & Leake's Pr. Pl.* 2nd ed. 543. He contended that the averment of readiness and willingness in the first count was at variance with the averment of ignorance in the fourth, as a capacity as well as a disposition to perform the agreement was necessary to support the averment of readiness and willingness. On this question he cited *Archbold v. Earl of Howth* (10 Ir. Jur. 74); *De Medina v. Norman* (9 M. & W., 820); *Hibblewhite v. M'Morine* (7 M. & W. 201, 213). On the question of rescission he cited 2 Sm. L. C. 4th ed. 32, 5th ed. 35–6, and the cases referred to in the subsequent pages. On the question of Estoppel 2 Sm. L. C. 4th ed. 664, 5th ed. 722–3, and cases referred to. *Southern v. How* (Cro. Jac. 468 and *J. Bridgm.* 125); *Bullen & Leake Pr. Pl.* 2nd ed. 125 n. (a). *Co. Litt.* 304a. (Ed. Thomas III. 436 fin.) *Manby v. Cremonini* (6 Exch. 808). *London Dock Co. v. Sinnott* (8 El. & Bl. 347, 352). The case in 1 Salk. 289 was badly reported and was really a case of warranty as appeared by Bro. Abr. *Accion Case* pl. 8, and the remarks of *Cresswell, J.*, in *Coleman v. Riches* (16 C. B. 117), [and see 7 H. & N. 192 & 196.] With respect to defendant's liability for the acts of his agent counsel cited *Cornfoot v. Fowke* (6 M. & W. 358); *Pickering v. Dowson* (4 Taunt. 779); *Wilson v. Fuller* (8 Q. B. 68)). 2 Sm. L. C. 5th ed. 88–92. *Udell v. Atherton* (7 H. & N. 196); *Flight v. Barton* (3 M. & K. 282). Lord Brougham's remark on *Cornfoot v. Fowke* in *National Exch. Co. v. Drew* (2 Mc. Q. H. of L. 109); *et v. ib.* 123; *Molus v. Heyworth* (10 M. & W. 147, 157); *Rawlings v. Bell* (1 C. B. 951); *Horsfall v. Thomas* (1 H. & C. 100); *Grant v. Norwood* (10 C. B. 665); *Brady v. Todd* (9 C. B. n. s. 592); *Coleman v. Riches* (16 C. B. n. s. 104).

*Butt, Q.C.*, followed and cited on the question of the authority of the judge to withdraw the questions from the jury, *Piers v. Piers* (2 H. of L. Ca. 331, 360), and *Boyse v. Rossborough* (6 H. of L. Ca. 2). On the question on the Statute of Frauds he cited *Ridgway v. Wharton* (3 De G. M. & G. 677, and on appeal 6 H. of L. Ca. 238, and 27 L. J. n. s. Ch. 46); *Boydell v. Drummond* (11 Ea. 142).

*Whiteside, Q.C.*, replied.—He contended that damages might be recovered for depriving the plaintiff, by wilful and fraudulent concealment, of his equitable remedy, and to show that the agreement was binding in equity cited *Motteux v. London Assurance Co.*

(1 Atk. 545); *Collett v. Morrison* (9 Hare 162); *Fowle v. Freeman* (9 Ves. 354); *Field v. Boland* (1 Dr. & Walsh 37); *Clarke v. Moore* (1 Jo. & Lat. 723); *Kennedy v. Lee* (3 Meriv. 447, 451); *Fitzgerald v. Vicars* (2 Dr. & Walsh 298). On the question of the Statute of Frauds he cited *Saunderson v. Jackson* (2 Bos. & P. 238); *Hinde v. Whitehouse* (7 Ea. 558); *Allen v. Bennett* (3 Taunt 175); *Schneider v. Norris* (2 Maule & Sel. 286); *Johnson v. Dodgson* (2 M. & W. 653); *Dobell v. Hutchinson* (3 Ad. & El. 353, 371); *Norris v. Cooke* (7 Ir. C. L. 37); *Dowling v. Maguire* (LL & Goo., temp. Plunk. 19); *Thomas v. Dering* (1 Keane 729); *Fry on Sp. Perf.* 160, and as to the incorporation of the letter in the agreement, *Shippey v. Derrison* (5 Esp. 130). On the question of Readiness and Willingness he cited *Fry on Sp. Perf.* s. 738, p. 322; 2 Platt on Leases 539 (to show that it was the defendant's duty to have prepared the lease); *Price v. Williams* (1 M. & W. 6); *Cort v. Ambergate, &c. Ry. Co.* (17 Q. B. x. s. 127); *Levy v. Lord Herbert* (7 Taunt 314). On the question as to the Statute of Limitations that the breach does not occur until reasonable time for performance has elapsed, see *Peapoint v. Thimbleby* (Vin. Abr. "Condition" L. b. 2); *Addison on Contr.* 6th ed. 1002; *Blogg v. Kent* (4 Moore & P. 433); *Raunson v. Johnson* (1 Ea. 203). On the question of Rescission *Rockliffe v. Pearce* (1 Fost & Fin. 300); *Burke v. Smyth* (9 Ir. Eq. 135); *Sanson v. Rhodes* (8 Scott 556); *Horsfall v. Thomas* (*ubi supra*). With regard to the fraudulent concealment *Reynell v. Sprye* (1 De Gex. M. & G. 660). On the question of principal and agent *Peto v. Hague* (5 Esp. 133). Chitty on Contr. 7th ed. 612. Story on Agency, s. 451. Story on Eq. Jur. s. 192, s. 310 n. 4; *Neville v. Wilkinson* (1 Bro. C. O. 543; *Doe v. Martin* (4 T. R. 66 fin.); *Smith v. Bank of Scotland* (1 Dow. H. of L. 272); *Dresser v. Norwood* (14 C. B. x. s. 574); *Edwards v. M'Leay* (Coop. Ch. 308); *Pasley v. Freeman* (2 Sm. L. O. 68); *Re Burmaster* (Drury & Napier 577); *Stone v. Compton* (6 Scott 846; *Wilson v. Tumpion* (6 Scott N. R. 894); *Taylor v. Ashton* (11 M. & W. 401); *Smith v. Kay* (7 H. of L. Ca. 750 et. v. *ibid.* 759); *Skim v. Croucher* (1 De G. F. & J. 518, 527); *New Brunswick Ry. Co. v. Conyepare* (9 H. of L. Ca. 711); *Rex v. Gutch* (Moo. & Mal. 437); *Att.-Gen. v. Siddon* (1 Crompt. & Jer. 220, 227); *Att.-Gen. v. Riddle* (2 Crompt. & Jer. 493); *Pratt v. Humphreys* (L. Rec. O. S. 350, and on Error 2 Dow. & Cl. 288); *Railton v. Mathews* (10 Cl. & Fin. 934); *Foster v. Charles* (4 Moo. & P. 741). With respect to the fraud on plaintiff's alleged infirmities *Pratt v. Barker* (1 Sim. 1).

*Cur. adv. vult.*

Jan. 29.—CHRISTIAN, J., after recapitulating the pleadings, continued:—On the first count counsel for the defendant insisted that there was no evidence of a contract binding under the Statute of Frauds, and called for the direction of the judge on that ground. Whether he was entitled to that direction is the first question. The facts are few and simple. The plaintiff was tenant from year to year to the defendant, originally at a rent of £110 per annum. It appears

that in 1857 the defendant determined to raise the rents on his estate generally granting leases to his tenants. Accordingly a circular signed by Messrs. Stewart and Kincaid, his agents, was sent to the plaintiff, and was in the words following. [The learned judge here read the letter of the 25th November, 1857, which has been already given.] This letter was signed by Mr. Hamilton who had authority to bind Lord Howth in this respect, and, it was not disputed, to grant leases. A few days afterwards a bailiff, by direction of Mr. Hamilton or of Messrs. Stewart & Kincaid, brought to the plaintiff a written agreement purporting to be an agreement to pay an additional rent to Lord Howth and to execute a lease for the term of 21 years at that rent containing the clauses usual in the Earl of Howth's leases. This agreement was signed by Archbold. The circumstances are thus stated in his evidence:—"O'Brien, a bailiff, called on me at night. He told me he had a paper for me to sign. 'Oh!' said I 'it is to raise the rents 20 per cent.,' and I said I would not sign it. 'Oh!' said he, 'you will get a lease,' and therefore I signed it." Under the new agreement plaintiff remained in possession until March, 1862. His payments of the rent were made under the new agreement. Is there then an agreement binding within the Statute of Frauds? There was no writing signed by the defendant. I am of opinion that the letter of the 25th November was not an agreement at all because it does not make an offer of a lease, it merely informs the tenant that instructions have been given to the agent of what Lord Howth has determined upon, and is a notice to him that those intentions will be carried out in his particular case. It states that Lord Howth has consented to an arrangement made by Messrs. Stewart & Kincaid, and it proceeds then to inform him of their intention towards him individually. In my opinion the question whether an agreement was entered into must depend upon what was done afterwards in pursuance of the last clause of that letter. The test would be this. Suppose Lord Howth had revoked his instructions, and Messrs. Stewart & Kincaid had consequently taken no further steps, would the agreement in the letter have been binding? I think it would not, and if not binding at first it could not be made so by matter subsequent. The case is then reduced to the matter of the 30th November. The written agreement of that date was signed by the plaintiff, but not by or on behalf of the defendant. However Messrs. Stewart & Kincaid's letter of the 25th November contained a distinct representation of the terms on which the agreement was to be sent to the tenant for his signature. These terms must be taken to have been repeated at the time when the agreement was tendered for his signature. This agreement was void under the Statute of Frauds in its inception, but it was contended that it gives him under the doctrine of part performance a right to specific performance in equity, unless his right is lost by subsequent misconduct. This would depend on whether the acts insisted on as a part performance were solely referable to that object. The doctrine is laid down in *Dowell v. Dew* (1 Younge & Col. V. C. 357), and in the late case of *Nunn v. Fabian* (1 Law Rep. Ch. Ap. 35). It remains now



to consider his right to recover on this agreement here. I think with respect to the first count that the defendant was entitled to the direction which his counsel asked for. The doctrine of part performance cannot avail to render a promise void by the statute capable of being directly sued on in a court of law. I think that on that account there should have been a verdict for the defendant. On the first issue, so far as it respects the fourth count, the case is not so clear, for I do not see why the breach of an agreement valid in equity alone should not form the ground of an action of deceit. But there are two things which make it impossible for the plaintiff to rely on this difference in the present action. First, the form of the pleadings. The contract referred to in the fourth count is by express reference the same as that stated in the first, and the defendant has pleaded but one traverse to both counts. Secondly, the way in which the damages were assessed. They were assessed in the gross upon both counts, and as the one count must fail so must the other with it. I have now said enough to show that in my opinion the conditional order for a new trial must be made absolute, and if the decision of this Court were final it would not be necessary to go further. But this is an unsatisfactory mode of disposing of the case, for the decision on the fourth count would proceed on mere matter of form in which the plaintiff might of course hereafter mend his case. But our decision will not be final, for the plaintiff may ask leave to appeal, and if he should think fit to do so, we will not withhold that liberty;\* and we think it right that the defendant should be allowed to rely on any of the points of law argued in this Court, and that it should be open to the plaintiff also to consider these questions in the Exchequer Chamber. Hence, we will give our opinions on the merits.

The allegations in the fourth count are:—First, that Lord Howth in person knew of the contract. Secondly, that the plaintiff was ignorant of it, and that Lord Howth knew that he was ignorant, and so knowing took proceedings against him; and so (construing the matter with the plaintiff) Lord Howth wilfully and fraudulently concealed the contract, and thus succeeded in evicting the plaintiff, and then leased the lands to Arthur, who took without notice and therefore holds discharged of the plaintiff's claims. Now, by what evidence are these allegations supported. So far as regards the complicity of Lord Howth in person, there was no proof whatever. Lord Howth left the matter to his agents. As to direct personal fraud either by Lord Howth or his immediate agents the case of the plaintiff was a failure. It was rested on the conduct of the sub-agent Hamilton. Hamilton managed that part of the estate, to him the rents were paid, and it was he who superintended plaintiff's eviction. We must consider, then, first, was Hamilton guilty of fraud; and secondly, if so, was his fraud that of Lord Howth?

First, then, did the plaintiff at the trial make a proper case of fraudulent concealment by Hamilton? To decide this question the facts must be referred to. They are as follows:—Hamilton seems to have been

in charge of these tenants and the estates they farmed. The letter and the agreement are both in his handwriting. This agreement was signed by Archbold without (as he swears) its having been read to him or his knowing anything about it except what was told him by O'Brien. Afterwards Hamilton went down and met the tenants at Lusk in order to grant leases, but took none for the plaintiff because (he said) plaintiff owed an arrear of rent. It was proved by one of the tenants named Mathews, that some time after this meeting of tenants plaintiff asked him (Mathews) whether he had signed his lease. Mathews told him he had, and asked him in return why he did not go to the meeting, on which the plaintiff said that they had written to him from the office, but he did not go as yet, and he did not know whether he would or not.

This conversation shows that then at least his own agreement was present to his mind. Afterwards he was served with a notice to quit. This showed that in the opinion of Lord Howth and his agents they were at liberty to treat him as tenant from year to year; now at least it was brought home to him to determine whether he would be treated as tenant from year to year or take out his lease. He did not take out his lease. Decidedly he accepted the position of tenant from year to year. The reason of this is not for to seek; it was because he was not able to pay up the arrears. The notice to quit was not acted on, and the plaintiff remained in possession. Afterwards he was distrained, there being two years' rent due. His argument is that by this time all memory of the agreement had left his mind. Certainly his conduct was that of a man who had no right. He appealed to the indulgence of Lord Howth why he should not get a lease. None of these appeals seem to have been made to Hamilton, but it must be fairly assumed that Hamilton was cognizant of the letters and of the suppliant attitude which Archbold had assumed. After this Archbold paid rent several times, but notwithstanding this, on the 20th March, 1861, possession was demanded in pursuance of the notice to quit. He was however allowed to remain in possession until the September following. He seems to have made the utmost efforts to avoid eviction, for afterwards he paid a full year's rent leaving due up to March, 1861, only the small sum of £33. These sums must have been paid to avert proceedings against him. Of course Lord Howth got no more than his right; he was entitled to be paid his full rent; but that his tenant acted in the expectation that by paying the arrears he would avoid eviction no one can doubt. These payments were made to Hamilton who knew of the existence of the agreement, and who knew, if anyone did, of plaintiff's ignorance of it. Supposing the agreement not to have been forfeited by plaintiff's *laches* he would have been entitled to demand as a right what he was now asking for as a suppliant. But Hamilton remained silent. The large payments made did not stay the landlord's proceedings. In January, 1862, an ejectment was brought. No defence was taken to it, and in March, 1862, the *habere* was executed. Archbold sent in a claim for compensation which was rejected. Some of the rent however still remained unpaid.



However he was allowed to take the crops for that year. Afterwards the letter of the 25th November, 1857, was found, and having been shown to the plaintiff's attorney, he brought a pressure to bear upon the agent which resulted in the production of the agreement. In the meantime Lord Howth had demised to a new tenant at an advanced rent, who took without notice so that there could be no specific performance, and the present action was then brought. The question is, therefore, whether under these circumstances Hamilton's conduct was fraudulent. Let us consider what is the thing with the concealment of which he is charged. It was not anything of which the person with whom he was dealing must have remained in ignorance unless informed of it by him. The writing was signed by the plaintiff himself. The facts which are supposed to constitute the obligation on the landlord were the tenant's having continued in possession and paid the increased rent which it was insisted was a part performance of the contract. But these acts of part performance which in my view never would have had any effect either at law or in equity were all done by himself. To be valid in equity it would have been necessary that every time he made a payment of the increased rent, he should have done it distinctly under the agreement. If the agreement was not then present to his mind there would have been no part performance and no binding agreement at all. The acts done under an agreement are not part performance unless done with an express intention to perform. The thing said to have been concealed was one which lay as much within the plaintiff's knowledge as Hamilton's. Hamilton simply held his tongue and let Archbold take care of himself. Before it is said that that silence was wrong, let us see whether he was under an obligation to speak. I rely on the remarks of Bramwell, B. in *1 H. & C. 100*. "To constitute fraud there must be an assertion of something false within the knowledge of the party asserting it or the suppression of that which is true, and *which it were his duty to communicate*."

Was there then a duty of legal obligation on Hamilton to break the silence of which Archbold himself had set the example. Of course where an agent is employed to make a contract for his principal, he owes a duty to the party with whom he is contracting not to use crafty deceit to prevent him from discovering anything relating to the matter in question. But this does not apply to a thing that lies as much within his opponent's knowledge as his own. Is he under a duty to become the counsel of his principal adversary? Take the case of an attorney employed to defend an action who finds out a flaw in his client's title. Is it his duty to go to the opposite attorney and say, "I have discovered such and such a flaw in my client's title. I think it may benefit you to know, and it is scarcely fair to conceal it from you." Would we call this honourable and upright professional conduct? But to put Hamilton out of the case and go the length which Mr. Butt, with his usual intrepid logic, has suggested, would there have been a duty cognizable at law upon Lord Howth himself to have told it. I can imagine that a person of fastidious mind might do so, but such candour does not fall within the defi-

nition of a legal duty. Take the case where the cannon was sold and afterwards exploded in consequence of a flaw having been discovered in it (*1 Hurlst & C. 90*). There it was held that there was no fraud because there was no duty on the part of the seller to do anything but leave the buyer to take care of himself. How much more strongly does that apply to a contract like this where the dealings were at arms length, and where the thing concealed must have been at least as well known to the party alleged to have been deceived as to the deceiver. Not to have told him would have violated no legal duty, and so I think the *defendant* was entitled to a direction as to the issue taken on the 23rd and 24th defences [the 3rd and 4th defences to the fourth count] being those which traversed concealment and fraud. So the defendant was entitled to a direction on the defence which traversed the plaintiff's ignorance and the defendant's knowledge of that ignorance. The time to which the averments have reference is the period during which the plaintiff was writing letters to the defendant asking to be allowed to remain on the land, and subsequently until the demise to Arthur. The first proposition is that the plaintiff was ignorant of the contract, but it was in writing and signed by himself and periodically called before his memory by the increased rent reserved. The question was not whether he knew of his rights under the agreement, but what he has declared is that he was ignorant of its existence, but he has himself sworn that he knew he had signed it, and that he always recollected that O'Brien told him it was an agreement for a lease. It was contended that Hamilton must have known that Archbold was ignorant, because otherwise Archbold's conduct was incapable of explanation. But is not this conduct capable of a better explanation by supposing that Archbold was desirous of remaining in possession as tenant from year to year, but did not wish to bind himself to a lease. When his sister urged him to sign the agreement, he said, "Oh! it is to raise the rents;" and is it in the nature of things that Hamilton should tell him of it? He might say, "Both Archbold and I know the agreement has become a dead letter; it has never been acted on, and never will be." We all know what a Court of Equity requires of the plaintiff in a suit for specific performance. He must show himself in the language of that Court, "Ready, desirous, prompt, eager." But is this a description of the conduct of Archbold. [The learned judge here reviewed the conduct of the plaintiff and proceeded.] In my opinion there was no case for the jury and their findings both on the question of concealment and on that of the plaintiff's ignorance were not only against but without evidence. However I think the course pursued by the Chief Justice at the trial was the proper one, viz., taking the opinion of the jury on these questions as well as the others, because otherwise many of the questions in this case would not be in the satisfactory position for determination in which they now are. I said the defence raised two questions, first, whether Hamilton was guilty of fraud; secondly, whether if he were, his fraud would be that of Lord Howth. I have said enough to show that the first must be answered in the negative, and

so the second does not arise at all. I will give no opinion on the question on which the Exchequer in England was equally divided in the case in 7 H. & N. 172, 179. The question there was whether a principal is liable in an action which charges him personally with fraudulent misrepresentation. The fraud here consisted merely in the non-disclosure of a thing which lay in the knowledge of the opposite party himself. But if the jury was justified in finding that Hamilton's conduct was fraudulent, and that the cause as well as the consequence of it was that stated in the fourth count, viz., the enabling Lord Howth to dispossess the plaintiff and demise the land to a third person; then, speaking for myself, I am glad to be excused from saying that a man thus wronged must have no remedy except against the agent; that he must have none against the principal who is enjoying the fruits of the fraud. To enable me to hold thus, I should either have to deny the views of the Chief Baron in the case I have cited, or to say that that judgment does not apply to this case. I prefer resting my opinion exclusively on the grounds I have stated, namely, *first*, that there was no contract signed by or on behalf of Lord Howth, and so the first count must fail; *secondly*, taking the fourth count it has not been sustained, no case having been made either that the defendant personally, or his agent, committed a fraud, or that the plaintiff was ignorant of the agreement, or that the defendant knew of such ignorance.

O'HAGAN, J.—I feel myself constrained to concur with the judgment of my brother Christian. However we must take the law as we find it. After the judgment which has been delivered, a judgment so luminous and so exhaustive alike of fact and principles, it would be worse than useless for me again to traverse the same ground, and I shall only add that whilst I do not dissent from the reasoning and conclusions on the Statute of Frauds, I desire mainly to rest my judgment on the considerations which affect the fourth count, as to which the controversy chiefly arises. Putting aside the question as to whether either Mr. Hamilton or the plaintiff recollected the agreement, I adopt the opinion that no duty was cast on Mr. Hamilton under the circumstances to make any communication to the plaintiff. It would have been his duty to make such a communication to his employer but not to his opponent. The fourth count ceases to be sustained, but having looked through the cases as carefully as I could with reference to the effect of the fraud of Hamilton on his employer as regards this action, I would be disposed to say that even if such a duty did devolve upon Hamilton, his personal fraud could not be imputed to Lord Howth so as to ground an action for damages. This is not a case of master and servant but of principal and agent. I have found no authorities that the act of an agent not done with the knowledge of his principal, though he may have reaped the benefit of it, would make the latter responsible.

MCMAHAN, C. J.—I, too, concur in the opinion that has been so ably expressed by my brother Christian, but as it was a review of my own opinions at the trial, I was anxious that the judgment should have been delivered by him. With respect to the first point, that on the Statute of Frauds I have considered

it carefully, and I am free to admit that the opinion I had formed at the trial has been since altered; and I have come to that conclusion for precisely the reasons stated by my brother Christian. That being the case, it is clear that the first issue on the first count should at the trial have been found in favour of Lord Howth. With respect to its relation to the fourth count, I only mean to add to the remarks of my brother Christian that I entertain a strong opinion that whatever may be done in a Court of Error, here, at least it is utterly impossible to hold, even assuming that an action could be maintained against Hamilton, his principal is responsible. To render my views intelligible, I must state the facts. Messrs. Stewart & Kincaid are the agents of my Lord Howth. They get instructions to give Archbold notice to quit, treating him as a tenant from year to year. At the trial the case of personal fraud could be made. The question then was, whether there was any case against Mr. Hamilton. He was a clerk in the office of Messrs. Stewart & Kincaid, and the directions given were to proceed by notice to quit. That was not a direction to enter into any contract, nor to hold any communication whatever. *Brady v. Todd* (9 C. B. N. S. 592) is a settled authority, and decides that if a man is employed to sell a commodity—in that case it was a horse—his misrepresentation will not enable the buyer to bring an action against the principal for breach of warranty, although he may treat the contract as void. The cases in 16 C. B. 104, and 10 C. B. 685, proceed on the same principle. They are not strong as the first cited, as they were cases in which the principal received no benefit from the fraud. The only difference between my brother Christian's opinion and mine is, that I think the decision in *Udell v. Atherton* (7 Hurl. & Nor., 172) cannot be reviewed in a court of concurrent jurisdiction. In that case the defendants had authorized a person called Youngman to sell a log of mahogany. Youngman fraudulently concealed a defect in the log from the plaintiff, who, upon the assurance that it was sound, bought it at 3s. per foot. The evidence was that it was not worth 1s. 3d. The price was paid, and the log delivered. It was admitted that the defendants were not personally guilty, nor had they any knowledge of the fraud. The question was, whether an action could be maintained against the principal for the fraudulent misconduct of his agent. It is true that in that case the Court was equally divided, but the decision was in favour of Baron Martin's opinion at the trial, and from that decision no appeal was taken. But supposing that decision were to be reviewed, and that the House of Lords were to come to a different conclusion, it seems to me that it would not militate against our decision in this case. For the judgment of Baron Wilde himself seems to me conclusive against the plaintiff in this case. What he held was that where you employ a man to enter into a contract, and afterwards avail yourself of the contract, everything done in the contract is as it were, the doing of the principal. But even he admits that, unless the fraud itself falls within the authority of the agent, the principal is not liable. Baron Martin could not distinguish the case from those of a warranty given by an agent whose authority is merely to contract. But it was said that an

action for the breach of a warranty given by the agent cannot be brought against the principal who has not authorised it; and if *Brady v. Todd* (9 C. B., N. S., 592) be well decided that the principal is not responsible for a breach of warranty, on what principle will he be responsible because the agent has simply said nothing. In 7 H. & N. 780, Baron Wilde says—“All deceits and frauds practised by persons who stand in the relation of agents general or particular, do not fall upon their principals; for unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fault of the principal. Now, assuming Hamilton acted fraudulently, what evidence is there that he had the orders of Lord Howth? There is no difference between him and an attorney employed in a similar case. I have come to the conclusion that the action is utterly unsustainable. Set aside the verdict on the ground of misdirection. Our opinion is that there was no evidence to support the findings of the jury on the first and fourth counts—each party to abide their own costs of the former trial, and of the argument in this motion; and let the plaintiff have leave to appeal against this order (if so advised) within the usual time.

On *Butt, Q.C.*, asking that a new trial might be ordered on the ground that the verdict was against the weight of evidence, the Court refused, remarking that in that case the decision of this Court would be final; (and see Common Law Procedure Act, 1856, section 41).

BRINCKLEY AND OTHERS v. JOHN, ROBERT, AND PATRICK DONOGHUE.—*Jan. 18, 19, 31.*

*Landlord and tenant—Costs—Redemption after ejectment for non-payment of rent—23 & 24 Vict. c. 154, s. 70—Principle on which landlord in possession is to be charged.*

*Where a landlord ejects his tenant for non-payment of rent, and the tenant redeems under the 23 & 24 Vict. c. 154, s. 70, the landlord, not being guilty of fraud in the progress of the cause through the Master's office, is entitled to the costs of taking the account, not including the costs of such portions of his affidavit as relate exclusively to the subject-matter of the objections taken by him to the report, and commented on in Court.*

*Where there is evidence of what the landlord has actually received, he may be charged with it.*

*Where there is no such evidence, the amount he ought to be charged with is a fair occupation rent having regard to the circumstances, especially to the fact that he may be turned out at any moment.*

THIS case was an ejectment for non-payment of rent, brought to recover part of the lands of Cambs in the County of Sligo, which were held under lease subject to the yearly rent of £130. No defence was taken to the action, and judgment for the plaintiff was entered on 11th October, 1864. The *habere* was executed on the 24th October, 1864, but of part of the

premises possession was not taken till 2nd November, 1864. By indenture of 7th Mar. 1865, two of the defendants, Pat and Robert Donoghoe, who were in possession, and to whom it was alleged John Donoghoe (who had emigrated) had conveyed his interest, assigned all their interest to Mrs. Elizabeth Wills.

On 21st April, 1864, counsel moved on behalf of Mrs. Wills, who had previously lodged £191 in Court, that a writ of restitution might issue, and that she might have such further relief, and such accounts might be taken of the profit since possession had been obtained, as the Court might think fit, and as a Court of Equity would have ordered. In an affidavit made at the same time, Mrs. Wills stated that £191 was the sum ascertained by the *habere*\* as due for rent and arrears up to the period to which the rent was sought by the ejectment and for costs, and that on the 20th March, 1865, she had tendered that sum to Mr. Brinckley (plaintiff), at the same time showing him the assignment to her of the defendants' interest, but that he had refused to accept it. Mr. Brinckley in his affidavit stated that she had tendered only £161, and that the defendant, John Donoghoe, had never departed with his interest in the lease.

An order was, however, obtained on the 11th of May, 1865, referring it to the Master to ascertain what rent had accrued due to plaintiffs since the accrual of that marked on the *habere*, and whether the plaintiffs, or either of them, had received, or without wilful default might have received any and what sums of money since the execution of the *habere*, and to strike a balance, and certify what sum, if any, was due to the plaintiffs on foot of the rent. It appeared from the discharge of plaintiff that the farm in question adjoined another farm which had also been leased to the defendants, and recovered by plaintiff in ejectment for non-payment of rent, and that the fences between the two had been broken down so that it would have involved great expense to repair them, and plaintiff had consequently let the grazing of both farms together, subject to the tenant's right of redemption—the cattle straying over both farms indiscriminately. Some of the cattle had broken into and eaten two acres of hay. Nine acres more of hay had been mown, and saved by plaintiff, and was still on the land. The other statements in the charges and discharges referred chiefly to the sums received, and are immaterial.

Master Burke reported £67 12s. 10d. as a balance due to the defendants, and on his report coming in, the following motions were made:—

On behalf of the plaintiffs—That the report should be referred for re-consideration, or that it should be varied by charging the plaintiffs with such sums only as they had actually received, or by charging them with a fair occupation rent only during the time they were in possession on the ground that the report was framed on an erroneous principle in charging plaintiffs with the highest farming profits which could be made of the lands during the summer of 1865, whereas in fact Mrs. Wills, but for her own default, might have been in possession during that summer, and inasmuch as the proper mode of taking an account of what might have been received without wilful default, is to

charge the person in possession with a fair occupation rent.

On behalf of Mr. Reddington (with whom Mrs. Wills had intermarried pending the suit) and his wife—That the report should be confirmed, and that a writ of restitution should issue, and for the costs of the original motion, and of the reference and report thereunder, and of the present motion.

On the case being opened, the Court adjourned it till the next day in order to ascertain from the Master on what principle he had proceeded, and what evidence he had before him.

Jan. 19, Master Burke was sent for into Court, and said he had no evidence before him except the charges and discharges, and some parol evidence of which he had taken only a very slight note, and that he had not got on the principle of an occupation rent but on that of charging the landlord, not with the uttermost farthing he might have made, but with what he could reasonably have made. The case then proceeded.

*M. Morris, Q.C.*, for the plaintiffs, cited *Trant v. Irwin* (8 Ir. Jur. N. S. 309).

*W. Bourke, Q.C.*, contra, observed that the stat. 11 Anne, c. 2, s. 4, contained nothing in favor of the principle of an occupation rent, and that Sir A. Hart, in *Swanton v. Biggs* (2 Molloy, 20), was careful to follow strictly the wording of the statute.

*Beytagh* followed and contended that the landlord should be charged with all he had actually received, or without wilful default might have received. Counsel relied on the wording of the reference to the Master. He argued that under the circumstances plaintiff should not be required to pay the cost and referred to *Fitzgerald v. Hussey* (3 Ir. Eq. 319); *Newenham v. Mahon* (id. 804).

*Monahan* replied, and referred to Furlong on Landlord and Tenant, 1115. With regard to costs, he relied on the general rule.

*MONAHAN, C. J.*—We are satisfied that the tenant must pay the costs. A mortgagee in possession, and *a fortiori* a landlord, if he had recourse to the ejectment for non-payment of rent is entitled to the costs of taking an account, unless in the progress of the cause in the Master's office he has been guilty of fraud. There does not appear to have been anything of that kind. Certainly I thought at first that he had not allowed a fair balance to the opposite party, but that has been explained, with respect to the greater part of the land in question. As to the rest Master Burke has stated the ground on which he proceeded, but we are of opinion that he made a mistake as to the principle on which that account ought to be taken. The proper account was directed by the Court—namely, what plaintiffs had received, or without wilful default might have received. But then the question arose, on what principle that amount should be calculated. The landlord is only bound to get the best rent he can. In this particular case he took the possession upon himself, and we have no doubt that where there is evidence of what he has received, it is fair to charge him with it. As to the meadow-land the utmost that the Master could have charged him with was the actual value of the hay *minus* the expense of saving it. As to the other lands there were

two adjoining farms. He took in graziers; he says only as many as would do for the larger farm: but in consequence of the fences being broken down by the neglect of the tenant who was before in occupation, these cattle grazed upon both farms, and the utmost the Master could have charged him with was what would have been a fair occupation rent having regard to all the circumstances, and to the circumstance that he might have been turned out at any moment. No evidence was given by either party as to what such a rent would amount to because the Master decided that he would not proceed on that principle which we consider the right one. We do not think it right to preclude the parties from going into evidence on that point, but in mercy to them we would rather not send the case back again into the Master's office. They must ascertain what was the market value of the hay, and the expense of sowing it, and what would have been a fair occupation rent for the 55 acres subject to being turned out whenever the other party liked to redeem. We will not make an order for a day or two in hopes that the parties may come to an understanding, and enable us at once to issue the writ of restitution, and to put these people into possession. If there is no agreement come to, we must send back the case to the Master's Office.

Jan. 30—On the case being called on, it was agreed that the tenant should have the hay at £5, and the case with regard to the other land was referred back to the Master to ascertain the amount of an occupation rent as stated in the judgment. The writ of restitution to go immediately, the tenant and his wife undertaking to pay such balance, if any, as should be found due on the report.

The rule as to costs was as follows in the O. B. Rule Book:—That the said John Reddington do pay to said plaintiff the costs of the motion of the 11th of May last, and the reference and report thereunder, as also the costs of this motion. When said costs shall have been taxed and ascertained, the taxing officer in taxing the costs of this motion to exclude therefrom the costs of such portion of the affidavits and briefs used thereon as relate to the objection to the Master's report, save as to the meadow and pasture land hereinbefore mentioned, and in relation to which said plaintiffs have succeeded on this motion.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

*M'CARTHY v. MATHEWS.*—Mar. 15.

*Receiver—Attachment for rent.*

*An attachment will not be granted against tenants for non-payment of rent to a receiver, where only a half year's rent is in arrear, nor any order made for proceeding by civil bill process or otherwise.*

*Price*, for the receiver, who had been, by an order of the 10th day of July, 1865, appointed over the real estate

of the deceased; Thomas McManus, applied for attachments against several of the tenants on the lands for non-payment of their rents. Notices to pay their rents had been given on the 2nd March to the tenants by the receiver; and on the 13th of March a personal demand had been made on the tenants, with an intimation that, in default, an application would be made to the Court for an attachment, or for liberty to proceed, as might be directed. The rent in arrear in the several cases, was a half year, due the 1st November, 1865.

KEATINGE, J.:—The rule in Chancery is, that no proceedings can be taken against defaulting tenants, until after the expiration of five months from the time the rent is due; when the rents are reserved half-yearly; so that, in fact, the tenant may be said to have six months from that time to pay (146th General Order, 1843; and 32nd Order, May, 1857, substituting civil bill remedy for distress). In this case the rents are only due for one half year at 1st November, 1865; so that only three months have elapsed since that time. I will, therefore, make no order either for an attachment, or for any other remedy. The receiver must exert himself amongst the tenants, and get in the rents as best he can; or renew the application.

*No rule.*

(See Black. Ch. Pr. 428.)

## Court of Bankruptcy & Insolvency.

(Reported by John Larr, Esq., Barrister at Law.)

[BEFORE LYNCH, J.]

Re PATRICK GREHAN.—Feb. 1866.—(See p. 40.)

*Manager of bankrupt estate.—Claim made to repay advances made to manager who acts in violation of duties undertaken by him under special circumstances.*

Where, in a composition after bankruptcy, the manager of the bankrupt's estate was appointed, on his undertaking to provide a sum of £8,000, for the necessary outgoings of the estate, and likewise undertaking to have at all times forthcoming a sum of £5,000 for the benefit of unsecured creditors of the bankrupt, and the manager was to be considered a salvage creditor for all the necessary advances—Held, that such manager could not insist on the benefit of his salvage claim in priority to the creditors, or without providing in the first instance for the sum of £5,000 originally agreed to have on hand for their benefit.

This case came before the Court upon charge and discharge, and may be said to be a portion of the case of Grehan reported at page 40, where Gately, the auctioneer, made a claim for advances made by him to the manager.

Heron, Q.C., and Foley, were in support of the charge filed by the manager.

Kenneth, Q.C., was for the assignees in opposition to the charge.

The facts fully appear in the judgment.

LYNCH J., in giving judgment, said—The charge of Mr. Walsh submits that in the events stated in the charge he should not be held to a high and strict performance of the terms contained in the resolution of the 13th of January, 1863; inasmuch as "chargeant's assent thereto was obtained by erroneous statements of the true and actual condition of the bankrupt's estates and effects," and that therefore the claim of the chargeant to be paid the balance due to him as set forth in fourth schedule ought to be preferred to all other claims whatsoever; and he claims that the sum of £4,225 15s. 10d. now should be paid to him in priority to the creditors of the bankrupt, and prays that sum may now be ordered to be paid to him. This charge appears to have been framed in a very strange shape, viz., that of one accounting in a capacity designated by the resolution of January, 1863, and yet not bound by the terms of his appointment; and this, founded on the allegation that he was misled by the valuation of the property committed to his charge. Who misled him, or in what manner he was kept in ignorance of the truth does not appear; and, when he came to the knowledge of the fraud practised on him is not even distinctly stated. But the resolution confirmed by the Court contained an express provision that Mr. Walsh "might at any time apply to the Court to discontinue the present arrangement and wind up the estate," under which he could have come to this Court at any time upon discovery of the alleged mistakes, and have asked for his release; he never took any such course however, but the course he took was a very different one indeed, and which I shall remark on subsequently. At present I am only dealing with the charges. There seems to me no pretext for the claim put forward to account without being bound by the duties of the character in which he is accounting—a sort of accounting unheard of before. But counsel in argument properly took other ground than this, and sought within the terms of the resolution to show that he had this claim of priority. This is not the ground put forward in the charge, but it is a fair ground if sustainable; and I never wish to raise special objections, in the shape of pleading objections, unless in aid of what is justice. Again, Mr. Walsh is still an accounting party with no balance ascertained, and the claim in this view is by way of anticipation of an event which may never happen. But notwithstanding all these plain objections to the present charge, I have heard it argued on the construction of the resolution of January. On this point I am of opinion that the charge has no foundation. I think the resolution very plain in its terms. Mr. Walsh was bound to advance a sum not exceeding £8,000 in addition to the assets then in hand, for properly working the estate. For this sum advanced, ultra the assets, he was to have a lien as a first creditor; but in order to secure the rights of general creditors, he was bound always to have in hand the amount of the existing assets valued then at

£5,000 to be available for them; this latter provision is incorporated with the first provision, and makes it to my mind quite clear, that to give him now such a right would be totally to defeat the whole intention of these provisions, and indeed the exception made in his favour in the provision as to the £5,000, namely, "less by payments of the dividends thereout and loss (if any) by extraordinary casualty to cattle," seems to me conclusively to show what was intended. Therefore I hold that this charge is totally unsustainable; and I declare that Mr. Walsh is not entitled to be paid now the sum claimed by him; without prejudice, however, to any claim by him as a salvage creditor on the assets of the bankrupt, in respect of any payments made by him after the unsecured creditors have been secured to the amount of the existing assets valued at £5,000 at the time of this appointment, and I direct Mr. Walsh to pay to the assignee the costs of the proceedings on his charge. Having thus disposed of the case on this charge, I feel bound to remark upon some matter brought before me in the course of the proceedings here. Mr. Walsh has presented himself before this Court as a person injured, and who has a right to make complaints about the proceedings in this matter, and he continually reverts to some misstatements made to him, some matters suppressed from him, and some injustice done to him by the liabilities incurred. I hope I will never be led to fix liability unfairly on anyone, or to force to extreme rigour the consequences of acts fairly done in discharge of duty which by inevitable accident have turned out to be disastrous. If Mr. Walsh was misled in the hopes he entertained when entering into this arrangement, if while acting he discovered the unsound nature of this arrangement, I would most readily have heard him, considered the whole case, and most certainly would not have held him to the strict letter of an agreement which he showed me was incapable of performance. If acting honestly and fairly in the duties of his office, as long as he held it, he came before the Court seeking relief from its onerous provision incapable of being discharged, then he would have a fair claim to ask not to be visited with results that inevitably arose out of the very nature of the property committed to him; all this would have been honest and according to duty, and so acting, Mr. Walsh would have been secured from loss, and only disappointed in the hopes of benefit to himself from the arrangement. But I regret to say that in my opinion Mr. Walsh's conduct was totally the opposite to all this, and distinctly, knowingly, and willingly, in contravention of the duties of his office. Mr. Walsh had full notice of his intended appointment certainly before the 16th December, and that appointment was not confirmed by the resolution of the creditors until the 13th January, the duties pointed out were plainly stated, and he had full opportunity to consider the nature of the office he undertook, and to examine all matters connected with it. And on the 23rd December Mr. Walsh has recorded in this Court the following:—"I, the undersigned Walter Henry Walsh, hereby undertake to carry out the within proposal so far as it relates to me, and I undertake to be accountable to the Court and creditors in this undertaking." After that solemn and precise undertaking, and

on the faith of it, the creditors ratified the arrangement on the 13th January, and Mr. Walsh then entered on the discharge of his duties. By the resolution of the 13th January, 1865, the property was to be managed by Mr. Walsh, under the superintendence of the trade assignee; here again a duty is imposed, and required performance, for I cannot allow this Court to be trifled with, and specific duties to be undertaken by persons who have no intention to mind them. Every office undertaken brings its responsibility for the neglect of the duties imposed, and this Court is bound to see that the estates are protected from injury arising through means of the duties being neglected. It is certainly clear that the trade assignee took no part whatever in discharge of this duty of superintendence, and left the matter in the hands of Mr. Walsh, altogether uncontrolled by him. But let me see how Mr. Walsh discharged his duty of management on his own shewing. Of course, I will not anticipate the accounting in this case in any respect, or give any opinion as to specific items, that may be contained in the accounts—very particular accounts, and very troublesome investigations may become necessary in a case situated as this is—but justice must be done to the creditors, and I cannot allow disclosures such as those made here to pass unnoticed, and I must direct the whole case to be closely and fully worked out. I will not go into investigations now of the ordinary management of Mr. Walsh, pending the accounts; that may be for another day. One question I ask, is there now £5,000—the value of the stock—for the unsecured creditors? If the undertakings were observed, and the duties of the several parties discharged, there should be now that sum. If this Court has power for the purpose, it is the duty of those having the carriage of these proceedings, to secure this sum for the creditors. In what position stands Mr. Walsh now, on his own shewing. I only refer to acts of misconduct admitted by himself. In August last the whole property was swept away from the lands, with the express sanction of Mr. Walsh; this was not in management of the estate, but in violation of his duty. Mr. Walsh was bound to advance £8,000 to clear off liabilities, and to leave the property free to be worked. He raised money, it appears, from his brother, by his bill. Seeing how things were going on under his management, he was bound to advance £8,000—resolved to protect his brother, and so dealt with Ganly to raise the sum for discharge of his brother's liability, and intended to pay Ganly out of the stock on the lands, in direct violation of the trust of his office. If the act done—giving Ganly the security—prevails, he has saved his brother at the expense of the creditors, and taken their money to pay his brother for his advances. I have decided that Ganly has not this claim on the assets, but my decision is subject to be reviewed in the Court of Appeal, and at the opening it was intimated the appeal was intended. Again, I refer to another act. On 21st July last, for obvious reasons, the Court made an order on Mr. Walsh to furnish a list of the cattle on the lands. This order was acted on, and a list furnished the 8th of August, and that list contained cattle which he now states he sold to his brother on the 1st of August, but which were not selected till after the 8th of August. This

sale to his brother was to indemnify him in respect of sums raised, and in my mind, it was as plain and distinct a fraud on the trusts as could be committed. That case must be inquired into, it must be sifted, and the liabilities as to it ascertained; it cannot be sanctioned by this Court, or loss allowed to happen through it, without full inquiry. This Court in August, found the land deserted of stock, the plate secreted and sent away, and the whole assets gone, most of them confessedly to save favoured creditors in breach of his duty. The case seems clear, as far as Mr. Walsh is concerned, if the £5,000 is not secured for the creditors; as to who else may have liabilities, it is not for me now to declare. But I advise the creditors to attend particularly to this case, and I promise them the fullest assistance the due action of this Court can give, to secure for them an honest performance, by all parties, of the duties undertaken by them. It is a painful and unpleasant case to me, but I cannot allow any private feeling of my own to influence me, or even to be present to my mind, when I am judicially discharging the duty committed to me in this Court. No labour of mine will be spared, no length of sittings regarded as far as may be useful towards setting aright the affairs of the estate, so grievously mismanaged. The case requires active and careful proceedings, and in it it must be shewn that this Court is resolute in enforcing the honest and careful discharge of all duties undertaken with its sanction, and under its control. And with this intimation to the creditors, I now leave the matter for consideration.

#### RE THOMAS TRACEY.

*Mortgages—Reputed ownership—Goods and chattels—Fixtures and machinery attached to the freehold—What passes to assignees as goods and chattels within the meaning of the 313th section.*

*Where trade fixtures are seizable under a fi. fa. they will pass to the assignee under the reputed ownership clause in case of bankruptcy.*

*Where there is a permanent annexation of machinery to the freehold, it will not be regarded as goods and chattels that will pass under the reputed ownership clause; but moveable fixtures that are changeable into the condition of chattels by the severance of a tenant, will be held to be chattels for the benefit of his creditors generally, as well as for the benefit of a particular creditor who seized under a fi. fa.*

*Fixtures that are totally unannexed to the freehold, and are made steady by their own weight, but are worked by moveable belts put on to communicate motive power, will pass to the assignees as goods and chattels; and where machinery is fixed or attached for the purpose of making it steady in working, it will not be held to be so attached to the freehold as to prevent it becoming goods and chattels under the reputed ownership clause.*

THIS case came before the Court upon the charge of a mortgagee of certain mill premises and machinery of the bankrupt in the county of Dublin, and dis-

charge filed by the assignees, who claimed a large portion of the mortgaged property as goods and chattels passing under the reputed ownership clause as being in possession of the bankrupt with the consent of the mortgagee at the time of his bankruptcy; it was an admitted fact that they were in his possession at the time of the bankruptcy, and the question was, what portion of them should be deemed goods and chattels as coming under the reputed ownership clause.

Kernan, Q.C., appeared for the assignees, and Heron, Q.C., and Hamill, were for the mortgagees.

They cited *Hallawell v. Eastwood* (6 Exch. 295); *Hutcheson v. Kay* (23 Beav. 416); *Muirhall v. Lloyd* (2 M. & W. 452); *Boydell v. M'Michael* (1 Cr. M. & R. 179); *Combs v. Beaumont* (5 B. & Ad. 72); *Dill's case* (14 Ir. Jur. 123); *M'Kibbin's case* (7 Ir. Jur. 342); *Walmsley v. Milne* (7 C. B. N. S., 132); *Waterfall v. Penniston* (6 El. & Bl. 176).

The facts appear in the judgment.

LYNCH, J.—In this case the mortgagee claims, as against the assignee, certain articles specified in a schedule annexed as being conveyed to him by his mortgage. The assignees, on the other hand, claim these articles as belonging to them by virtue of sec. 313 of the Statute, as being "goods or chattels in the possession of the bankrupt at the time he became bankrupt." No question now arises as to the property in question, having been in the bankrupt's possession at the time he became bankrupt, and with the consent of the true owner; and the only question is—are they to be regarded as "goods or chattels" within the meaning of this section. I have already decided as to several of the articles originally enumerated, and the case remains now before me only as to the articles in the schedule to Mr. Lynam's affidavit of the 22nd February. Perhaps there are no subjects in law more difficult to deal with than the question raised as to fixtures and the several relationships of property that are allowed to influence decisions as to them. The cases are legion; and each new case seems only the more to disturb any fixed or certain rule that seemed deducible from former cases, and, indeed, on most questions on this subject, a court can easily give precedents that seem to uphold the doctrine it arrives at, or is anxious to arrive at. However, it is my duty now to consider the decisions applicable to the case before me, and only as to it, and see whether, on rightly estimating them, these articles are to be treated as fixtures and not within the class of "goods and chattels" within the provision of the 313th section. In looking to the authorities, I am bound to regard the question in a fourfold aspect. 1. As respects the mortgagee, how he acquired title to these articles; whether as fixtures passing by the grant of the mill, or whether only by express contract. 2. I have to regard the law in the relationship which may make these things although fixtures seizable under a *fi. fa.* 3. I have to construe the 313th section to see can they, if fixtures, by any relationship pass under its language. 4. Whether by the mode of annexation here these things were ever converted from the original condition of being goods or chattels. On the first point, as to the mode by which the mortgagee acquired title to them, was it by means of the convey-



ance of the realty or by contract only? In *Hutchinson v. Kay* (23 Beav. 416) the question arose as to mortgagee's claim to articles more fixed than these articles can be argued to be, and the Master of the Rolls held they did not pass under the general words "mill or factory," and the general words "of fixtures, machinery, &c. attached and belonging to said mill." The Master of the Rolls says—"I do not doubt that looms are machinery in one sense, but the question is are they, properly speaking, machinery belonging to the mill. . . . To whatever purpose the mill may be applied the steam-power, the gas-lighting, and the like do form a part of it, the others do not; the others are merely accidental, and no more form a part of the mill than a carpet forms part of a house." That case is quite sustained by the ruling in *Hellawell v. Eastwood* (6 Ex. 295), at page 313, Park B. says, "They would not have passed by a demise of the mill; they never ceased to be goods and chattels." Other authorities in great number expound the same doctrine; and I think in this case, therefore, that the only title that the mortgagee has is a title by contract to these articles. The next proposition I have to regard in this decision is—were they liable to seizure under a *fi. fa.* Now, *Hellawell v. Eastwood* is distinct on this point, except that it was not as against a mortgagee's title and was as to a distress. Parke, B. says—"they never ceased to have the character of moveable chattels, and were therefore liable to defendant's distress"—that is, as existing chattels. There seems to me no doubt that these could be taken under a *fi. fa.*, and taken as chattels. The next proposition is—whether they are within the purview of this section 313. Now, I think it is greatly to be regretted that such a question should be open for argument. A *fi. fa.* is the writ for a creditor enabling him to seize the goods and chattels of the debtor. This section gives a general right on behalf of all creditors to sell any goods or chattels, &c.; and thus in language as in object the two powers should be co-extensive. In *Muirhall v. Lloyd* (2 M. & W. 459), Parke, B. says—"I assent to the doctrine laid down in *Coombe v. Beaumont*, and *Boydell v. M'Michael*, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors." There are several other cases on this subject; and in *M'Kebbin's case* the Chancellor seems to speak of this distinction at least without disapprobation. But I am of opinion that this distinction is not to be accepted as settled on a due consideration of the cases, and that the exception made for the benefit of trade and for the benefit of creditors whereby removeable fixtures, because changeable into the condition of chattels by the tenant himself, are held to be chattels for his creditors, will be held to apply for the benefit of his general creditors, as well as for the benefit of a particular creditor who has sued him to execution. If for the benefit of creditors they are chattels, surely they ought then be held to be so within this section; and on this point I cite a passage from the case of *Walmsley v. Milne* (7 C. B. n. s. 132). That was a case in which the articles were treated by the Court as fixtures by permanent annexation, but I only now cite it for this passage in the

judgment: "The whole of the plaintiff's argument upon this head was founded upon the well established exception to the general rule, that where a tenant puts up fixtures for the purpose of trade during his term, he may, before its expiration, without the consent of his landlord, disannet them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiff that if the bankrupt had been tenant to the mortgagee for a term and the bankruptcy had happened before its expiration, the fixtures in question were such as would have passed to the assignees." I therefore think that before we establish a proposition distinguishing between goods seizable under a *fi. fa.* as trade fixtures; and those passing under this section as goods or chattels the authorities require to be carefully and fully considered, and that we should not lightly establish any such distinction. But the question remains—are these things, or any of them, fixtures; that is, are they fixtures though capable of removal by a tenant; or have they ever lost their quality of chattels. Now, this is a matter of fact principally, and turns upon the evidence. My former decision in *Dill's case* (14 Ir. Jur. 123) has been cited, but its facts were not accurately referred to. Perhaps in some parts of my judgment I might be understood as laying down too largely as propositions what I only meant as inferences. In that case I had evidence of permanent annexation. The engine formed the very props that upheld the lofts; and therefore in that case I got what I supposed to be certainly a fixture, though it might be removable for the benefit of trade or on other grounds of exception, if indeed it fell even in this class. Then, taking the articles now claimed by the mortgagee—they are three classes:—1. Those that are totally unannexed and stand by their own weight, but are worked by moveable belts, put on to communicate motive power to them when worked. These are—4, 5, 6, 10, 11, 12, & 13, though a peculiarity as to 13 I will notice hereafter. These are, in my mind, chattels, and never ceased to be such. The belt is put on merely to communicate motion to the machine when required for working, but the machine remains unaltered. No case is cited going near to this, and all the cases seem to me to treat much an *a fortiori* state of facts as not amounting to annexation, and therefore leaving the original chattel quality of the article unchanged. *Davis v. Jones* (2 B. & Ald. 165) was a case between outgoing and incoming tenant, and therefore the question was merely whether the articles were chattels; and there the "jibs," the articles in dispute, were more attached than these articles. In *Hellawell v. Eastwood* the mules and other machinery used—though much stronger in its facts—were held there not to have ceased being moveable chattels; and *Waterfall v. Penniston* (6 El. & Bl. 876) seems to me an *a fortiori* case on this point; and in *Walmsley v. Milne* Mr. Justice Willis thought the articles there remained as chattels. The second class are those only differing by an iron being put on to allow the belt to be moved—the 2, 7, 8, 10, the irons being placed as to prevent the belt from being totally removed. This is a device with no view to permanently fixing the machine, but merely for ease in adjusting the belt;



and, in my mind, does not alter the character of the machine from being a chattel. The article No. 1, taking Mr. Haig's evidence in conjunction with Mr. Lynam's, has no annexation, but is only secured for steadiness to work and not to fix it. Article No. 3 is wholly detached, but a projecting portion is put under the covering of the wheel to place it for work; it had no annexation thereby. Article No. 13 has this peculiarity, that steam is introduced into it by a pipe that comes down inside the machine, and a cross-pipe exists screwed on at end. This pipe is totally unconnected with the machine, and is no more than if a tub was put in under a cock placed in the piping. The lid and the mode by which the pipe passes through it seems to me not at all to alter the character of the article. As to article 12—the vices—having regard to their small value and the mode of annexation, I give them to the mortgagees. But as to all the rest I rule that they passed to the assignees under this section of the statute. I do not give costs against the mortgagees. The assignees to have the costs out of estate.



## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.

LYNCH'S ESTATE.

LYNCH, APPELLANT; COOKE, RESPONDENT.

*Judgment mortgagee—Marshalling securities.*

*By indenture of mortgage of the 23rd September, 1853, P. C. L. conveyed all his life estate in certain townlands, 18 in number, to the trustees of the Palladium Life Assurance Society. On the 19th December, 1856, J. Q. caused a certain judgment which he had obtained on the 16th of said December, for a sum of £1,600, to be duly registered as a mortgage against 13 out of the said 18 townlands. On the 21st January, 1857, the said P. C. L. conveyed his life estate in all his lands to trustees upon certain trusts, among which was to pay an annuity of £300 to Marcella, the wife of P. C. L. The said 18 denominations were set up and sold in the Landed Estates Court, and the said Palladium Society was fully paid out of the produce of the 13 denominations, over which J. Q. had his statutable mortgage, and which payment, while it exhausted the produce of said 13 denominations, left the produce of the remaining five in the Landed Estates Court to be otherwise disposed of. Thereupon the assignee of J. Q. insisted that he was entitled to marshal the securities so as to stand on the remaining denominations in the same priority he did upon the 13 so exhausted as aforesaid. Held, reversing the order of Judge Hargreave, that J. Q., being a judgment mortgagee, merely took such beneficial interest as P. C. L. could convey at the time of registering said mortgage, and that J. Q. was not*

*entitled as such judgment mortgagee to marshal said securities, and could not, therefore, have his judgment mortgage declared to be a charge on the said remaining five denominations.*

THIS was an appeal by Marcella, the wife of Patrick Crean Lynch, from an order of Judge Hargreave dated July the 22nd, 1865. The following are the facts of the case in the order followed by Mr. Blake, Q.C., in his opening statement—That by indenture of marriage settlement dated 14th Oct., 1845, executed in contemplation of the marriage of the said Patrick Crean Lynch and Marcella Mary Bellew, his then intended wife, certain townlands, 18 in number, were granted and conveyed to the use of or in trust for Patrick Crean Lynch during his life, with remainder (subject to a jointure of £600 per annum for the said Marcella Mary Lynch otherwise Bellew during her life, in case she should survive him, and to portions for the younger children, if any, of the said marriage) to the use or in trust for the first and other sons of the said marriage successively in tail male, with an ultimate remainder to the said Patrick Crean Lynch, his heirs and assigns, for ever; and by said indenture the trustees thereof were authorized and empowered at the request and by the direction of the said Patrick Crean Lynch, and of Andrew Crean Lynch, his father, during their joint lives, or of the survivor of them during his life, testified in writing, to raise and borrow upon mortgage of the said lands any sum not exceeding £5000, to be laid out and expended in the purchase of other lands, freehold or leasehold, to be settled in the same manner, and subject to the like uses and limitations as were thereafter declared, of the lands comprised in the said settlement. That by indenture of 31st March, 1850, said Patrick Crean Lynch conveyed his life estate in tail of the said townlands to George Ouseley Higgins, by way of mortgage, to secure a sum of £1000 and interest thereon. That in the year 1850 the said Patrick Crean Lynch borrowed a sum of £1600 from one Henry French, and by way of security therefor the said Patrick Crean Lynch, by indenture of the 26th September, 1850, granted to the said Henry French an annuity or rent-charge of £208 17s., charged upon the life estate of him, the said Patrick Crean Lynch, in all the said 18 denominations of lands put in settlement by the indenture of the 14th of October, 1845 (except one townland called Ballynew); and by way of further security for the said loan of £1600, the said mortgage debt of £1000 created by the said indenture of 31st March, 1850, and the securities for the same, were assigned to the said Henry French. That by indenture, dated 23rd September, 1853, the said Patrick Crean Lynch mortgaged his life estate in all the lands (18 in number) comprised in the said marriage settlement of the 14th October, 1845 (including the said townland of Ballynew), to the trustees of the Palladium Life Assurance Society to secure a sum of £3900 and interest thereon; and thereby covenanted with the said trustees that if the power contained in the said settlement of the 14th of October, 1845, of charging the said lands with the sum of £5000 should be exercised by the trustees thereof, he, the said Patrick Crean Lynch, would subject and charge the

lands which should be purchased for the said sum of £5000 with the said sum of £3900 and £1600, and would for that purpose effectually dispose of the said lands in such manner as the said trustees of the Palladium Company should direct. And the said Patrick Crean Lynch afterwards, in pursuance of such covenant, procured the said Henry Trench, by deed of the 27th September, 1855, to assign the said rent-charge of £208 17s. and the money thereby granted, and the said mortgage debt of £1000 and all the securities for same, unto the trustees of the Palladium Life Assurance Society, the said society having at the request of the said Patrick Crean Lynch advanced to him all moneys due on foot thereof. Afterwards, on the 16th Dec. 1856, John Queely obtained a judgment in the Court of Common Pleas in Ireland against the said Patrick Crean Lynch for the sum of £1600 debt, besides costs; and such judgment was obtained on the bond of Patrick Crean Lynch, conditioned to secure the principal sum of £800; and on the 19th December, 1856, the said John Queely caused the said judgment to be duly registered as a mortgage in the Office for the Registry of Deeds in Dublin, against 13 of the said 18 townlands in the county of Mayo, which 18 were as aforesaid put in settlement by the said indenture of the 14th October, 1845. The said judgment mortgage and all moneys due on foot thereof, and all securities for the same, were afterwards duly assigned to, and were now vested in Robert Cooke, the respondent. Many years after his marriage, and before the 19th January, 1857, Patrick Crean Lynch, on the death of his said father, became seised in fee of four other townlands in the county of Mayo, and also became as next of kin of his said father, Andrew Crean Lynch, who died in the year 1853, entitled to the absolute interest of one undivided third part of certain other townlands which were held under lease for 999 years; and being so entitled, the trustees of the said settlement of 1845 did, at his request testified in writing, exercise the aforesaid power of raising the said sum of £5000 by mortgage of the lands comprised in the said marriage settlement, and invested the said sum in the purchase from the said Patrick Crean Lynch of the said fee-simple lands, and the undivided one-third part of the said leasehold lands, to which he had thus subsequently become entitled as aforesaid; and the same lands were accordingly, by deed of the 19th January, 1857, conveyed to said trustees upon the trusts of the said settlement of the 14th October, 1845.

By indenture of the 21st January, 1857, after reciting the said marriage settlement of 14th October, 1845, and the powers therein contained, of raising the said sum of £5000, and the death of the said Andrew Crean Lynch, and the said last-mentioned indenture of the 19th of January, 1857, and also reciting the said indenture of mortgage of 23rd September, 1853, to the Palladium Life Assurance Society; and the said indenture of assignment by Henry Trench to said Palladium Company of the 27th September, 1855, and also the said covenant contained in the said indenture of the 23rd September, 1853 (being the said first mortgage to the Palladium Life Assurance Society), that the said Patrick Crean Lynch would charge the lands to be purchased by the said

sum of £5000 with the sum of £3900 and £1600, making together the sum of £5500, borrowed by him from the Palladium Insurance Society; and that the said Patrick Crean Lynch was indebted to the several persons named in the schedule thereto in the sums set opposite their names on foot of judgments registered as mortgages, the said Patrick Crean Lynch conveyed his life estate in all the lands comprised in the said settlement of the 14th October, 1845, and also in all the lands which he had as aforesaid afterwards acquired and settled by the said indenture of the 19th of January, 1857, unto Denis O'Connor and Patrick Edward Crean Lynch upon trust, among others to raise the sum of £4000, and apply the same in payment of certain debts enumerated in the schedule to the indenture now being stated, in which is included this said judgment debt, then vested in the said John Queely, and since assigned to the respondent in the case (Cooke) and subject thereto, out of the rents of the fee-simple lands comprised in said settlement of the 14th of October, 1845 (which did not include the said lands of Ballynew), to pay the interest upon the sum of £5000 so borrowed by the said trustees as aforesaid, and upon a sum of £8000 therein mentioned, and as to the residue of the said rents, and also the rents of all the lands and hereditaments brought into settlement by the said indenture of the 19th January, 1857, to pay the interest upon the sum of £5,500 so due to the trustees of the Palladium Insurance Society; and the interest upon the £4000 to be borrowed for the purpose aforesaid, and subject thereto, to pay Thomas Bellew in trust for the said Marcella Mary Lynch an annuity of £300 during the joint lives of himself, the said Patrick Crean Lynch, and Marcella Mary, his wife. The petition of appeal stated that several cause petitions (therein named), among which was *Queely v. Lynch*, were filed against Patrick Crean Lynch, and referred to Master Litton under the 15th section of the Court of Chancery (Ireland) Regulation Act; and the Master by an order, bearing date the 8th of August, 1857, ordered that the said several matters and all proceedings thereunder should be consolidated. That the said Master made a final order, dated 17th February, 1863, wherein the estates of Patrick Crean Lynch are divided and distributed into four distinct classes—viz., the life estate of Patrick Crean Lynch in certain lands then named and distinguished as class A.; the estate of Patrick Crean Lynch in one undivided third part of the lands therein named, held under leases for lives for 999 years, distinguished as class B.; the estate of Patrick Crean Lynch comprising the fee and inheritance in the lands therein named, as distinguished as class C.; and the life estate of the said Patrick Crean Lynch in all the lands comprised in the said classes B. and C., and as distinguished as class D. That the said Master, by his said final order, declared that the trustees of the Palladium Assurance Company had a charge on the life interest of the said Patrick Crean Lynch in all the estates put in settlement by the said indenture of the 14th of October, 1845, and hereinbefore described as class A. except the townland of Ballynew in respect to the first charge before mentioned—namely, the annuity of £208 17s.; and that there was due in re-

spect of said charge the sum of £1921 6s. 3d. up to the 1st of February, 1860. And by said order it was further declared that the said trustees of the Palladium Assurance Company had a charge in respect of their second security above referred to—namely, the security for the loan of £3900 on the life estate of Patrick Crean Lynch in all the lands comprised in the said indenture of marriage settlement of the 14th Oct., 1845; that is to say, upon all the lands forming class A.; and that the said Palladium Company had also a first charge for said amount on the estate described as class D, and that there was due on foot thereof a sum of £5389 15s. 4d. And it was further declared by said order that there was due to John Queely (who was one of the aforesaid petitioners in the Court of Chancery) on foot of a certain judgment obtained by him against Patrick Crean Lynch, on the 18th December, 1856, for the sum of £800 for principal, interest, and costs, the sum of £961 8s. 8d.; and that said judgment had been registered as a mortgage against some of the denominations of the lands put in settlement by the said indenture of the 14th Oct. 1845, and that said judgment was a charge on the life estate of the said Patrick Crean Lynch against the said denominations, against which it had been registered as a mortgage, which are part of the lands described as class A. On the 31st Mar. 1858, the said Patrick Crean Lynch and his trustees presented a petition in the Court for Sale of Incumbered Estates in Ireland for the sale of the said several estates; and the said estates were afterwards sold in the Landed Estates Court, with the exception of two denominations of said estates. That the trustees of the Palladium Life Assurance Company had been paid out of the produce of the sale of the said life estates the sum due to them, some of which estates being a portion of class A. were the lands charged with the judgment mortgage of the respondent; and the entire produce of the sale of the lands against which the said judgment, had by Queely, of Michaelmas Term, 1856, was registered as mortgage as aforesaid on the 19th December, 1856, was applied in payment of the demands of the Palladium Life Assurance Society, and by reason of such payment no funds whatever were available to pay Cooke. That the respondent, Cooke, filed an objection to the final schedule of incumbrances in the Landed Estates Court, "claiming that the said Robert Cooke, as assignee of Queely's judgment, should stand in the place of the said trustees of the Palladium Assurance Company, as against such parts of the lands included in their several securities as were not charged by the said judgment." That upon the objection coming on to be argued, Judge Hargreave by an order, bearing date the 17th and 22nd days of July, 1865, declared the said Robert Cooke entitled to stand in place of the trustees of the Palladium Insurance Company in respect of their security described as Nos. 3 and 4 upon the schedule to the Chancery order of the 17th of February, 1860, as against such parts of the lands as hereinafter described and distinguished in the said Chancery order as class A. (except Ballynew) as were not charged by the judgment obtained by John Queely against the owner, and assigned by the said John Queely to the said Robert Cooke, so far as may be

necessary to secure payment of Cooke's demand in the said judgment, that is to say, the life estate of the owner in the lands; and that the said Robert Cooke was further entitled in respect of the 2nd security of the said trustees of the said Palladium Insurance Company, described as No. 6 upon the said schedule to the said Chancery order, to stand in their place as against the said life estate in the said denominations, and also against the life estate of the owner in the lands of Ballynew, and also against the life estate of the owner in the lands described as class D. on the said Chancery order, so far as might be necessary to secure payment of the said judgment debt vested as aforesaid in the said Robert Cooke; and the said order allowed the objections of the said Robert Cooke to the extent above mentioned, but disallowed them so far as they sought to establish any further right. And it was further ordered by the said order that the said Robert Cooke, and Mrs. Marcella Mary Lynch, and Denis Burke, should have their costs of the said motion with their demands respectively; the petitioner's costs to be costs in the matter. From this order the present appeal was brought. By the respondent it was submitted, if Judge Hargreave's judgment should be reversed, all the sums due to him would be lost.

On the 22nd of July, 1865, Judge Hargreave gave judgment, setting forth his reasons for making the order now being appealed from, as follows:—

"The objection filed in this case raises a question as to the marshalling of the funds produced by the sale of Mr. Lynch's life estate. In reference to the lands called in the Master's Report 'Class A,' it appears that the charge of the Palladium Company affected the whole of this class, and that Queely's judgment, No. 17 in the Master's Report, affected only a portion of this class as against Mr. Lynch; therefore there can be no doubt that the rights of the judgment creditors could not be allowed to depend on the mere accident, whether the Palladium Company were in the first instance paid out of the portions affected by the judgment, or out of the portions not affected by them. The judgment creditor would be entitled to insist that the payment of the prior charge would ultimately be considered as made out of that part of the class 'A' which was not bound by his judgment. It is contended, however, on the part of Mrs. Lynch, who has a prior charge on all the lands, that this right does not prevail against her, as she derives under a registered deed, or that at all events it exists only as a right to throw the Palladium charge rateably on the two portions of the estate. I am of opinion that the title exists in the shape of a complete marshalling in favor of the judgment creditor, that this right constituted a material part of the title to the property when Mrs. Lynch or her friends purchased this interest for her, and that, therefore, she is necessarily bound by it. She could not have been ignorant of this right, unless she abstained from inquiring into Mr. Lynch's title; and if she did so abstain, she is equally bound. It has been said however, suppose Mrs. Lynch's security had included only that part of class 'A' which was not affected by Queely's judgment, Queely's judgment formed no part of the title to this part of the property, and therefore, Mrs. Lynch, on investigating the title, would not find and

ought not to be bound by it. I think, however, that even in that case she would be bound, she would not find Queely's judgments, but she would find the Palladium charge. She would then say, I am purchasing a part of the property which is liable to this charge, what indemnity or security have I, that the Palladium charge will not be levied off these lands? The answer would be, "You have the other lands which are in the Palladium charge and you have an equity to throw that charge upon them." Mrs. Lynch is then put upon looking to the title to these indemnity lands, and the moment she does so, she finds Queely's judgment, and know that in consequence of it, she cannot have the indemnity which is promised her. I am aware that in England it has been decided, that under similar circumstances where the third mortgagee had no notice of the second mortgage, (and from want of a registry, he had no means of finding it), the doctrine to be applied is that of contribution, and not that of marshalling. But in Ireland, where the right of marshalling exists, and is disclosed on the registry, and is in fact one of the constituent elements of the title which every *bona fide* purchaser must find and be aware of, I think it is clear the right prevails against the purchaser, and that the registration of the purchaser's deed can give him no priority over pre-existing equities which already appear upon the registry. Mr. Cook, as assignee of Queely's judgment, also claims the further right to throw the Palladium Company's charge upon class 'D' in exoneration of that part of class 'A' which is bound by his judgment. The claim is resisted by Mrs. Lynch, on the same grounds as her other claim (which for the reasons above given are in my opinion not tenable); and also on the further ground that class 'D' constituted no part of the original security of the Palladium Company, but was merely thrown in as an additional security in the case of the others should fail. The facts are that the lands called class 'A' were, when the Palladium Loan was contracted, subject to a power vested in the trustees of Mr. Lynch's marriage settlement of 1845, to charge them with £5,000, which was to be laid out in land to be settled to the same uses. If this power should be exercised, the security of the Palladium would be prejudiced to that extent, and they therefore contracted with Major Lynch that his life estate in the lands so to be purchased should stand charged with these incumbrances. The power was exercised, the £5000 was charged, and lands were purchased with £5000, Major Lynch's life estate in which constitutes class D., now sought to be affected. Under these circumstances I think the life estate in all the lands were equally affected with the Palladium charge, the life estate in class D. being a mere substitution for the life estate in the £5000 substituted from class A. It has been contended by Mr. Cooke that he has a direct charge on class D., inasmuch as he had a direct charge on part of class A., and that out of this part the £5000 was taken, which purchased the lands in class D., and that the purchased lands were liable to all the same trusts and charges as the lands out of which the £5000 was raised were subject to. I should accede to this view if Mr. Cooke's incumbrance was the result of a contract with Major Lynch. It was, how-

ever, merely an incumbrance acquired by the adverse proceedings of Queely, and only affected the specific lands which Queely chose to put into his affidavit. I am not prepared to say that an incumbrance of this kind has any equity against the purchased lands; but if Major Lynch's consent was necessary to the raising of the £5000, and if he did consent, I will not go so far as to say that an equity might not be based on the fact that Queely's security had been damaged by the act of his own debtor. I do not decide the case on this point, but on the same principle as I have before stated in reference to the two parts of class A. I am of opinion that the judgment creditor has the right to throw the Palladium security on class D. so as to leave class A. or that part of it which his judgment affects as clear as possible to meet his claims. In this case, as before, the right to marshal is an element of the title which no *bona fide* purchaser can avoid discovering, the deed of the 19th January, 1857, conveys class D. to the use of the settlement of 1845, *quoad* the settled lands. These uses include the life estate of Major Lynch, and therefore involve the inquiry—'What have been Major Lynch's acts in reference to the life estate?' This inquiry discloses the Palladium charge, suggests the necessity of inquiring what indemnity there is against it, and thus leads to the discovery that the indemnity cannot safely be accepted on account of the supposed indemnity land being affected by Queely's judgment."

*Blake, Q.C.* (with him *Kelly, Q.C.* and *H. O'N. Burke*) were heard in support of the appeal.—Patrick Crean Lynch had 18 denominations of land. He mortgaged all his interest in those 18 to the Palladium Insurance Company to secure them a sum of £5800. Subsequently Queely obtained a judgment mortgage on 13 out of the 18 denominations. Afterwards Mrs. Lynch got a deed executed by Lynch creating a charge for her over all the lands. The Palladium Company being paid off in full by the sale of the 13 denominations, and Mrs. Lynch having a charge on all the 18 denominations, Queely comes in and says that he has a right to be placed on the five denominations over which his judgment did not ride; in other words, Cooke is to have the securities marshalled to the prejudice of Mrs. Lynch, a subsequent mortgagee. The principal question for the Court to consider is—whether a statutable mortgagee is entitled to marshal the prior incumbrancers (the insurance company) to the prejudice of parties deriving as purchasers under a deed subsequent to said statutable mortgage. It is submitted that even if this mortgage was by deed and not a statutable mortgage—a mortgage by contract, and not got in *invitum*, that even in such case the principle of marshalling has never gone so far as to lead to the detriment of third parties. Lord Eldon thus expresses himself in *Aldrich v. Cooper* (8 Ves. 389), "It is clear if no third persons are concerned, the Court will arrange between the two estates." Now observe here how carefully Lord Eldon puts it—"If there are no third persons concerned." We thus see that Lord Eldon, in the application of the principle of marshalling securities, carefully avoids dealing with the rights of third persons intervening.—*Averall v. Wade* (Lloyd & Goold, temp. Sugden, 252). There a party seised of several estates, and indebted by

judgment, settled one of the estates for valuable consideration, with covenant against incumbrances, and subsequently acknowledged other judgments, and it was there held that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute. The above cases then go to show that they have no right to throw any part of a prior mortgage upon the lands not comprised in their mortgage. The next proposition we mean to submit for the consideration of the Court is, that even if the respondent, Cooke, had any right to throw any part of the prior charge upon the lands not comprised in the mortgage, it must be thrown *pari passu* upon the lands, and to that extent only would the judgment creditor be entitled to stand in the place of the prior mortgagees in the lands not included in the mortgage. This was the decision in *Barnes v. Racster* (1 Young & Coll. Cas. in Ch. 401), which was a case of contribution, not of marshalling, and the Court, while it declined to marshal the securities in that case, allowed contribution. That case was followed by *Bugden v. Bignold* (2 Young & Coll. 377). The effect of contribution, as compared with marshalling would be this—The 5 denominations out of the 18 which were unaffected by the judgment mortgage would, if marshalling were permitted, become charged with the full payment of the judgment mortgage, while if contribution were allowed, these 5 denominations would merely bear their proportion to the whole of the lands. That would merely leave the 5 denominations charged with a fractional part of the sum which those 5 denominations would have to bear if the Court upheld Judge Hargreave's decision.—*Gibson v. Seagrim* (20 Beav. 614). The marginal note in that case was—"Two properties, X and Y, were mortgaged to A, and afterwards X alone was mortgaged to B, and it was held that B is entitled to have the securities marshalled, so as to throw A's mortgage in the first instance on Y." This case, it will be said, is against us; but, on observation, it will be seen that no third parties were injured by this marshalling: not so with us. Thus far we have dealt with judgments by deed, and not judgments under the Judgment Mortgage Act. If, then, the Court will not marshal securities to the prejudice of third parties when the mortgage is by deed—neither will they marshal when the mortgage is one which is obtained under act obtained *in invitum*. A judgment mortgage is unlike a mortgage by deed in this, that a registered judgment under the provisions of the 3 & 4 Vict. ch. 105 (Ir.) and 13 & 14 Vict. c. 29 (Ir.) only affects such property as the debtor at the time of the judgment is lawfully possessed as of his own right, and over which he has the power of disposition, and does not displace the interest of a previous equitable mortgagee. This was decided in *Eyre v. M'Dowel* (9 H. L. C. 620)—in other words, a statutable mortgagee is not a purchaser, and therefore if a mortgagee by deed could not have a right to marshal to the prejudice of third parties, *a multo fortiori*, a judgment mortgage creditor who has no other equities than those given him by the statute, cannot marshal either, and on these grounds Judge Hargreave's judgment is unsustainable.

*Sherlock, Q.C.*, and *Finch White* were heard in support of the decision arrived at by Judge Hargreave.—The learned Judge below was perfectly correct in the conclusion he has arrived at. We are clearly entitled to be paid our demand out of the fund in Court. Now, in reference to the lands called in the Master's Report class A. The charge of the Palladium Company affected the whole of this class: and Quesly's judgment did not affect the whole, but only a portion thereof. Now assuredly we are entitled here to marshal those securities, and the mere accident of the Palladium Company being paid out of a portion affected by the judgment will not prejudice us, and will not preclude us from having the securities marshalled. Marshalling securities is the compelling him who has two means of indemnity, to rely upon one, when that will aid another without injuring him. *Aldrich v. Cooper* (8 Ves. 381, 388) was where the mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors were held entitled to stand in his place *pro tanto* against the freehold and copyhold estates. We are here precisely in the same position as if we were a mortgagee by deed. *Gwynne v. Edwards* (2 Russ. 289, note). There "a person mortgaged freehold estates, and two months afterwards he surrendered copyholds to the use of the mortgagee, to secure the same debt; in a suit after the death of the mortgagor for the administration of his assets, the freehold were sold with the consent of the mortgagee, and the personal estate having been exhausted, the mortgage debt was, by order of the Court satisfied out of the freehold. Held, that the specialty creditors of the mortgagor were entitled to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate."

THE LORD CHANCELLOR.—The appellant in this case is Marcella Mary Lynch, the wife of Mr. Patrick Crean Lynch; and the question we have to consider in this case is, whether she, under the state of facts that appear, can successfully struggle against a judgment mortgagee, marshalling securities prior to her. Now, we are all familiar with registered deeds of mortgage in this country, and I certainly see in no case that has been cited that a mortgagee by deed has been allowed to marshal a pre-existing registered mortgage to the prejudice of third parties. Well, the House of Lords, who are the best interpreters of their own Act, have held in *Eyre v. M'Dowel* (9 H. L. C. 620) that a statutable mortgagee takes no higher security than a mortgagee whose mortgage is by deed. It was there held that the judgment creditor, by making and registering an affidavit, shall have the same rights as he would have had if his debtor had made a mortgage to him of all his estate and interest in the lands enumerated in the deed of mortgage, and as if he had registered that mortgage, or as if he had obtained from his debtor a mortgage of all the estate and interest which the sheriff might have taken under an elegit—that is, all the beneficial interest of the debtor. I then cannot go beyond this case; I am bound by the case of *Eyre v. M'Dowel*. Well, now, the equitable estate would therefore take precedence of the statutable mortgagee; and in this case, I find a

covenant by Mr. Lynch to settle all after-acquired estates to the same uses as those that were put in settlement by his marriage settlement. That Mrs. Lynch had then an equitable interest in those lands is sufficiently clear, and that the judgment-mortgagee could not enjoy more than the beneficial interest of the debtor. I then cannot follow Judge Hargreave, distinguished as he is for his abilities. I am unable, I say, to come to the conclusion he has come to in this case. I think it would be a most mischievous doctrine, that if a man was lending his money on one estate, that he should have to find out that that estate was affected with incumbrances from another. I am, then, of opinion that on these grounds the respondent's assignee, Mr. Cooke, is not entitled to marshal the securities, and that Mr. Queely cannot throw his demand on the estates, or any of them, against which he has not obtained a statutable mortgage.

THE LORD JUSTICE OF APPEAL concurred.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

THE ATTORNEY-GENERAL v. TOTTENHAM AND OTHERS.

May 30, 31; July 2, 1865; Feb. 22, 1866.

*Charter—Construction of—Visitorial powers of the Lord Chancellor.*

*Queen Elizabeth, by her charter made in the 20th year of her reign, enchantered the Hospital of the Holy Trinity at N. R., and incorporated the Master, Brethren, and Poor thereof, and their successors, thenceforth for ever, as a body incorporate, and her said Majesty did thereby ordain that the Masters of said hospital, and the heirs of one T. G., with the advice and consent of the sovereign, and four of the members of the council of the said town of N. R. for the time being, or the major part of them, might have power and authority of electing a secular priest for the said Master, Brethren, and Poor who should be received as brethren of said hospital. And said charter granted that "the heirs of T. G., with the consent and advisement of the sovereign and four elder councillors of the town of N. R., or the greatest part of them, for ever may have power and authority.....of electing and making a master of the hospital from time to time for ever." The heirs of T. G. could not now be found—Held, that the Lord Chancellor, in his capacity of visitor as Chancellor, had full power and authority to appoint such persons, as he might be advised thereto, to represent said heirs of said T. G.*

*Held also, that the town commissioners constituted under the 3 & 4 Vict. c. 108 (the Act for the Regulation of Municipal Corporations in Ireland), represent the said sovereign and old corporation.*

*Said charter, though it provided for the appointment of said secular priest, was silent as to what the re-*

*ligion of the Master, Brethren, or Poor of said hospital should be. Held, that although the religion of the founder must be presumed to be that of the Established Church, yet that as there was no preference given in said charter to any particular faith, members of all faiths were equally admissible thereto, notwithstanding usage to the contrary.*

*Held also, that as said charter only provided for the election and reception of a secular priest of the Established Church into said hospital, the exception to Master Murphy's scheme, which provided for the election and reception of a Roman Catholic priest thereto, must be allowed.*

THIS was a cause petition filed by the Attorney-General at the relation of Michael P. Howlett and others, the inhabitants of New Ross, in the county of Wexford, against Charles Tottenham, of Ballycurry, in the county of Wicklow, Esq. The petition prayed that it might be referred to the Master to inquire and report a proper and befitting scheme for conducting and managing a certain charity, in the town of New Ross, and that the Master be directed to inquire and report the amount and particulars of the property of every kind whatsoever belonging to the said charity, and to take an account of the amount received out of the of said property by the respondent, the said Charles Tottenham, or by or on behalf of his predecessors, and that the said respondent be directed to render such account, and that the said Master of the Court be directed to inquire and report who may be a fit and proper person to be Master of said charity, and what person or persons would be fit and proper to have the power of electing a master, brethren, sisters, and poor of said hospital. The petition opened by stating certain letters of the 12th of February, 1577, made by her late Majesty, Queen Elizabeth, which were duly enrolled and made patent on said last-mentioned day, which letters are as follows:—"Whereas Thomas Gregory, late of the town of New Ross, in our county of Wexford, merchant, deceased, built a house or hospital for the poor, sick, and impotent of the town, near the Chapel of Saint Saviour; and the executors of his will, Anastasia, his widow, Patrick Walsh and George Conway, his sons-in-law, besought us to bestow a portion of his goods, tenements, and hereditaments, in constituting the aforesaid poor, in form of law, into a certain fraternity; we consenting to the humble supplication of the executors, and estimating the charity and pious intention of the said George Gregory, of our special grace, we give and grant licenses for us, our heirs, and successors, as much as in us lies, that in our town of New Ross, otherwise Rossepointe, in our kingdom of Ireland, there shall be a Master, Brethren, and Poor, in the house lately built by Thomas Gregory, near the Chapel of Saint Saviour, in the town aforesaid, and that the said Master, Brethren, and Poor, and their successors, by the name of the Master, Brethren, and Poor of the Hospital of the Holy Trinity of New Ross, henceforth for ever shall be called, known, named, and nuncupated; and also we will and ordain by these presents, that the Master, Brethren, and Poor, and their suc-

cessors, henceforth for ever, in fact, reality, and in name, shall be one body incorporate, and shall have perpetual succession, and a common seal to serve for the affairs of the said hospital; and also of our more abundant grace, we appoint and ordain the aforesaid George Conway, for the term of his life, Master of the said hospital; and that the said George Conway and his successors, masters of the said hospital, and the heirs of the said Thomas Gregory, with the consent and advice of the sovereign and four of the seniors of the council of the town for the time being, or the major part of them, may have power and authority, from time to time, for ever, of electing, nominating, and receiving in the said hospital, a secular priest for celebrating divine service for the Master, Brethren, and Poor in the Church or Chapel of Saint Michael of New Ross, who shall be accepted and received a brother of the said hospital for the time being, and who shall be removed and expelled for reasonable cause, and another nominated in his place, when it shall seem expedient to them; and also so many and such poor of either sex whom they shall choose of the sick, infirm, and impotent wandering about the town, and they so elected, nominated, and received with the Master, shall be one body corporate for ever; and that the said Master, Brethren, and Poor, so elected, ordained, and received, and their successors, shall be persons able and capable in law to acquire, have, and possess to them and their successors for ever, in fee-simple and perpetuity, or otherwise lands, tenements, rents, reversions, services, and other hereditaments, whatsoever of the annual value of two hundred pounds lawful money of Ireland, over charges and reprises, and no more, as well in the said town of New Rosse, and within the franchises thereof, as elsewhere within our said kingdom of Ireland, from any person or persons whatsoever; and that they, the Brethren and Poor, and their successors, by the name of the Master, Brethren, and Poor of the Hospital of the Holy Trinity of New Ross, may plead, and be impleaded, answer, and be answered, in all causes, suits, quarrels, and cases, real, personal, and mixed, of whatever kind or nature they may be, before any justices or judges, temporal or spiritual, or other persons whomsoever in any courts, to be prosecuted, and may and can plead, and be impleaded, answer, and be answered, and may do and take all other things as other liege subjects of us, or of our heirs and successors, could do, in future; and by that name they shall be called for ever; and we do grant to the aforesaid Master, Brethren, and Poor, and their successors, that they may acquire lands, tenements, rents, revenues, services, and other hereditaments whatsoever, as well spiritual as temporal, as well in demesne as in reversion, within the said town and franchises, and elsewhere in our said kingdom of Ireland, although they should be held of us or of others, in capite, of the value of two hundred pounds lawful money of Ireland by the year, over charges and reprises, and no more, from any person or persons whatsoever; To have and to hold to the said Master, Brethren, and Poor, and their successors for ever, in aid, sustentation and support of the affairs of the Master, Brethren, and Poor of the hospital; and also we give and grant by these

presents, to any person or persons, that he or they may give, bequeath, or assign, to the said Master, Brethren, and Poor, and their successors for ever, lands, tenements, rents, reversions, and other hereditaments whatsoever, as well spiritual as temporal, of the annual value aforesaid, without impeachment, impediment, disturbance or aggrievance of us, our heirs, or successors, or of the justices, escheators, sheriffs, coroners, bailiffs, or other ministers of us whomsoever, and without any inquisition by authority of a writ of *ad quod damnum*, or of any other mandate from us, in that behalf to be taken or made or prosecuted, and without any licence from us, or any letters patent to be made or granted to them in that behalf; the statute concerning the not putting of lands and tenements in mortmain in any wise notwithstanding; and also we will and do grant, that the heirs of the said Thomas Gregory, with the consent and advice of the sovereign and four senior councillors of the town, for the time being, or the major part of them, for ever, may have power and authority after the death, resignation, cession, or deprivation of the said George, or of any other master there, to elect and appoint a master of the said hospital, from time to time for ever, as often or whensoever to them shall seem expedient, and that the Master, Brethren, and Poor of the said hospital, and their successors, and the heirs of the said Thomas Gregory, with the consent and advice of the sovereign and four of the senior council of the said town, for the time being, or the major part of them, may have authority and faculty to make rules and ordinances necessary for the good government and rule of the said hospital, and for the affairs belonging to the said hospital, and to annul and revoke them as often as and whensoever from time to time to them should seem expedient, and may appoint and constitute the Brethren and Sisters, and all others, as in other hospitals, for ever; and that the said Master, Brethren, and Poor for the time being, may have authority of building and making sepulchres for all dying in the hospital, in the Church or Chapel of Saint Michael, and the cemetery thereof, and of administering all sacraments, or sacramental or ecclesiastical rights to the inhabitants of the hospital, in as ample manner and form as in other churches or cemeteries hath been accustomed to be done, and that they may for ever have the tithes, oblations, and obventions of all those dwelling in the hospital."—*February 12, 20 Elizabeth.*

The petition then stated, that after the death of Patrick Walsh the corporation of New Ross, as appears by the books so far back as 1655, assumed to themselves the control and dominion over said hospital corporation illegally; that in 1665 said corporation usurped the power to elect, and did in fact elect, a master of the said hospital; and the said corporation continued so to act and to exercise said power and authority from 1665 to 1759, and in 1759 appointed one Charles Tottenham, the ancestor of the respondent, Charles Tottenham, to be master of the said hospital; and, as it appeared from the entries in the books of said corporation, said Charles Tottenham dealt with the property of said hospital as if same were his private property and within his exclusive dominion. That the heirs and descendants of said



Charles Tottenham had been successively the principal proprietors and owners of the town of New Ross; and that the respondent, Charles Tottenham, of Ballycurry, in the County Wicklow, M.P. for said borough of New Ross, was now the proprietor of the greater portion of said town and the property adjoining thereto. That the father of Charles Tottenham was sovereign of the said town; and that he was enabled to exercise great influence over the said corporation body of New Ross, which, before the passing of the Municipal Corporation Act, consisted of a few members. That on the 26th January, 1835, the respondent, Charles Tottenham, was by the said council elected master of the said hospital in the room of his father, and that he has ever since continued as such master; and that he has received and managed the rents of such property belonging to such hospital as he thought fit. The said Attorney-General and said relators then charged that the corporation of New Ross had no legal power or authority whatsoever to appoint said master, or to assume to themselves the power of transferring and handing over the property of the said charity to any nominee of the said corporation, but that according to the provisions of the said will of the said Thomas Gregory and the said letters patent, the sanction of the Sovereign and of the four senior councillors was necessary for the appointment of the master brethren and sisters when previously nominated by the heirs of the said Thomas Gregory, the founder of the said charity. The petition then stated, that pursuant to the Acts of Parliament in that case made and provided, the aforesaid corporation of New Ross has been succeeded by commissioners adopted and elected under the Towns Improvement Act. And the informant at the relation aforesaid charged that neither the corporation of New Ross nor the commissioners so elected in their stead as aforesaid have nor hath, either or any of them, any power or authority to nominate or appoint a master or governor of said charity; nor hath said Charles Tottenham a right to assume to himself the guardianship, management, or control of the property belonging to said charity. And that the patronage and authority assumed by the respondents has been accordingly increased arbitrarily, and at his mere will, caprice, and pleasure, and in contravention of the trusts of said will of Thomas Gregory.

The case coming on before the Lord Chancellor, his Lordship by order of the 2nd of December, 1861, referred the case to Master Murphy, to settle a scheme for the due and proper management of the said hospital; and further, that the Master should inquire and report who were the heirs of Thomas Gregory. That accordingly the Master, by his report, bearing date the day of 1865, reported, among other things, that the Rev. John Corvin, vicar of the parish of New Ross, had intervened for the purpose of protecting the rights alleged on behalf of the said Rev. John Corvin as the vicar of the said parish, or of the curates of the said parish, in respect of the religious character of the said charitable institution. The Master further found that upon the construction of the charter (above mentioned) the house or hospital was purely an eleemosynary institution, and erected by said Thomas Gregory for the poor sick and impotent of New Ross, and that the charter

granted that the "heirs of Gregory, with the consent and advice of the Sovereign and four seniors of the town council, were to elect the master, when it should seem to them expedient." The report further found that the poor of all religious denominations are admissible as objects of said charity, and that he was unable to report who were the heirs of said Thomas Gregory. In the scheme for the future management of the hospital Master Murphy reported that the governing body of the affairs of the said hospital should consist of the following persons, viz. a person to represent the heirs of Thomas Gregory, the original founder; a master to hold office for life, or until resignation or deprivation; the Protestant vicar and the Roman Catholic priest of St. Mary's for the time being as brethren and chairmen; and four of the town commissioners of the borough of New Ross, two of such commissioners to be Protestants, and two Roman Catholics. That the respondent, Charles Tottenham, the present master, shall continue as master during life, save in case of his resignation or deprivation. That in case of the death, resignation, or discontinuance of said Charles Tottenham as master, a master shall be elected by the persons for the time being representing the heirs of Thomas Gregory; and the chairman and the four town commissioners then selected as hereinafter mentioned, or the major part of them, and in case of the equality of votes of persons attending at such election, then in such case the persons representing the heirs of Thomas Gregory shall have a casting vote: and that the said four commissioners shall be elected annually by the whole body of commissioners; and the annual election of the said commissioners shall take place at the first monthly meeting held by the said commissioners after the annual election of the commissioners on the 15th October in every year; and that of said commissioners two are to be Protestants, and the other two to be Roman Catholics. To this report of the Master, the Rev. John Corvin, the said vicar, excepted on the ground that the hospital would be opened not alone to members of the Established Church, but to all other religious persuasions; and further that the body was to contain both the Protestant and Catholic clergymen.

*John T. Ball*, Q.C. (with *Leslie Montgomery*) appeared for the Rev. John Corvin, the intervenient. —Clearly, the introduction of any religious element differing from the state religion is in opposition to the spirit of the charter, because at the time of that charter no other religion was tolerated—per *Keogh, J. in Thelwall v. Yelverton* (14 Ir. C. L. 221); and the religious intention of the founder is presumed to be, that the hospital was to be of the Established Faith—*Attorney-General v. Calvert* (23 Beav. 248). Master Murphy was in error then in admitting the Roman Catholic Priest be a member of the body, contrary to the founder's presumed intentions.

*Brewster*, Q.C. (with *W. C. Smith* and *E. Gibson*). —This is not a religious body at all; it is purely eleemosynary, and the charter is silent as to the religion of the poor or of the governing body, and there is nothing in the charter to justify the exclusion of all faiths but one, and the founder will not be presumed to have preferred any one faith to the exclusion of others.—*Attorney-General v. Calvert* (23 Beav. 248).

*The Solicitor-General, J. E. Walsh* Q.C., and

Tottenham were for the respondent, Charles Tottenham.—The Chancellor has no jurisdiction at all in this case to comply with the prayer of the petition. He cannot appoint an heir to Gregory or a person to represent that heir, we admit it is true that a person to represent the heir of Gregory can be appointed; but the Crown and the Crown alone is the person so to appoint, and that power cannot be delegated—*Attorney-General v. Black* (11 Ves. Jun. 191). So in *Ex parte Wrangham* (2 Ves. Jun. 609). That was a petition to the Lord Chancellor as visitor of Trinity Hall, Cambridge—there being no heir to the founder—to declare the election of a fellow void, and the Lord Chancellor in that case dismissed the petition as he had no jurisdiction therein. The old corporation, or more correctly to speak, the Sovereign and four seniors mentioned in the charter, have only a veto on the appointment of the master, and not the appointment, &c. The other side are in error when they seek to establish that the present town commissioners have a number of votes in their individual capacity.

*Breuster, Q.C., Cusack Smith, and E. Gibson*, appeared for the relators.—The Lord Chancellor has ample power to appoint a person to represent the heir of Gregory. In his capacity of visitor it is clear he can do so—*Attorney-General v. Earl of Clarendon* (17 Ves. 491). The town commissioners have, jointly with the heirs of Gregory, the power of appointing the master and the secular priest; and jointly with those three persons the objects of the charity; and those commissioners had votes in their individual capacity and not on vote or veto only.

July 2, 1865.—THE LORD CHANCELLOR.—I must allow the exception to so much of the Master's scheme in his report, as recommends the Roman Catholic Priest to be one of the body. I don't see anything in the charter to warrant this. The Master of the hospital and the heirs of Gregory, with the consent and advice of the sovereign and four of the council of New Ross, for the time being, or the greater part of them, had the power to nominate a secular priest to celebrate divine worship to the inmates, and he was also to be a brother of that hospital. Well, clearly, the secular priest was at that time a priest of the Church of England, as by law established, and the founder has desired, and the charter grants that such priest shall be accepted and nominated a brother of the hospital for the time being. I must, therefore, conform to the wishes of the founder, and I cannot make a new charter. On the next point, as to the religion of the inmates, there is nothing to justify the exclusive selection of the objects of the charity. Persons of all denominations and opinions are within the scope of this charity. The instrument of the foundation is that from which the will of the founder may be inferred, and not from any custom of exclusion, and that instrument is silent as to the religion of the inmates. I think, then, that Master Murphy was right not to confine this hospital to members of the Established Church, seeing that the founder had not done so. If the founder had intended this to be a religious establishment, nothing could be easier for him than to say so. I perfectly agree with Master Murphy that this hospital was eleemosynary. Now, as to the heirs

of Gregory, the Master has reported that those heirs are not to be found—perhaps, for all we know, he has no heirs. I apprehend you will have to go to the Crown for a new charter. I shall, however, consider the case, and mention it at a future time.

Feb. 15, 1866.—THE LORD CHANCELLOR.—The petition in this case is filed by the Attorney-General against Mr. Tottenham and other persons residing in New Ross, in the county of Wexford; and the question here arises on the charter of Queen Elizabeth, which charter begins by reciting the will of Thomas Gregory. (His Lordship read the charter.) Well, the patent here was that the master of this hospital and the heirs of Thomas Gregory, with the consent and advice of the Sovereign and four of the elders of the council of the town of New Ross, or the greater part of them, shall have the power of appointing a secular priest; and also that the heirs of Thomas Gregory, with the consent of the Sovereign and four elder councillors for the time being of New Ross, or the greater part of them for ever, may have the power of appointing the master of the hospital. The information states that for a great number of years the Tottenham family have acted as the masters of this hospital, and the objection is—that the control over this hospital has entirely fallen into the hands of the corporation of New Ross. The case came before me in 1861, and I was then of opinion that I could not remove Mr. Tottenham from the office of master. On the 2nd of December a decretal order was made by me dismissing so much of the petition as sought the removal of Mr. Tottenham. Well, the cause petition prayed for an account as against Mr. Tottenham, and the Master, Murphy, has found all the accounts to be most satisfactory. Now, a question of great difficulty occurs here. Master Murphy does not report who were the heirs of Gregory at all; he reports that by the patent the heirs of Gregory may have power and authority to elect a master, but he finds that he is unable to report who are the heirs of Gregory; and the question is—how is that gap to be supplied. Master Murphy reports also that Mr. Tottenham is the present master, and that the governing body of the affairs of the hospital consist, among others, of the heirs of Thomas Gregory, the original founder, and four of the town commissioners of the borough of New Ross. I did entertain grave doubts when this case was argued before me, that I had power to appoint a representative of the heirs of Gregory, but I have now overcome those doubts, and I am of opinion that when the heirs of Gregory cannot be found, the duty of finding persons to represent the heirs that are unknown and cannot be found, is cast upon me in my capacity of visitor, inasmuch as the office of visitor devolves upon me in right of my being Chancellor of the Crown; and the Master was quite right in saying that somebody should be appointed. I will therefore make an order that the Master shall from time to time appoint a person to represent the heir of Gregory. I cannot, however, accept any scheme until the town commissioners are before me, and until they are before me I can make no order that will bind them. I cannot therefore now go into the question as to whether the corporation have several votes or one, the town commissioners not being before me;

and on looking into the 117th section of the Corporation Act, upon the true construction of that section I must hold municipal corporations represent the sovereign and councilless of the old corporation.

## Court of Exchequer Chamber.

Reported by William Woodcock, Esq., Barrister-at-Law.

[BEFORE MONAHAN, C.J., PIGOT, C.B., CHRISTIAN AND O'HAGAN, JJ., AND FITZGERALD, HUGHES, AND DEASY, BB.]

MURPHY v. O'SULLIVAN.—*Jan.; Feb. 12, 1866.*

*Contract—Agreement not to be performed within a year—Statute of Frauds, 7 Wm. 3, c. 12 (Ir.) sec. 2.*

*An agreement whereby, in consideration of A. not taking certain proceedings against B's son, B. agreed to maintain and clothe A., and supply him with the grass of two sheep during his (A.'s) life, Held, not to come within s. 2 of the Irish Statute of Frauds (st. 7 Wm. 3, c. 12), and therefore not to require a writing.*

APPEAL from the Court of Queen's Bench. This action was tried before Mr. Justice O'Brien at the Spring Assizes for the County of the City of Cork, in the year 1865, when a verdict was found for the plaintiff for £50 damages. The summons and plaint contained one count, which stated that one Herbert Baldwin, son of Herbert Baldwin, deceased, by his gross negligence and carelessness deprived the plaintiff of his eye-sight by a gun-shot wound, and the said Herbert Baldwin, deceased, as compensation for the injury so inflicted on plaintiff, and that plaintiff should not take any proceedings against his said son on account of said injury and in consideration thereof, agreed in his lifetime with the plaintiff that the plaintiff should, at the expense of said Herbert Baldwin, deceased, be maintained, boarded, kept, and clothed, and be also supplied with the grass of two sheep, during his (plaintiff's) life; and plaintiff averred that in consideration of said agreement he, at the request of said Herbert Baldwin, in his lifetime, did not take any proceedings against the said Herbert Baldwin, his son, and accepted said agreement as compensation for said injury; and that the said Herbert Baldwin, the son, afterwards died, and was survived by his father; and that although said Herbert Baldwin, the father, in his lifetime duly performed his said agreement up to and until his death, to wit, on the 1st day of January, 1861, yet since his death plaintiff had not been maintained, boarded, or kept, or clothed, at the expense of said Herbert Baldwin, deceased, nor had the grass of the sheep been supplied at his expense to the plaintiff during the period; and the defendant, as his executrix, had therein made default to the plaintiff's damage of £80. The defendant traversed the agreement, and also set up the

Statute of Limitations. Upon the trial the plaintiff was examined as a witness on his own behalf, and stated that his father, who died in 1860, had been tenant of Dr. Baldwin; that plaintiff, who had lived with his father, was employed at Dr. Baldwin's house, going of messages, &c.; that on one occasion, in 1843, Herbert Baldwin, junior, being alone with plaintiff in the parlour of Dr. Baldwin's house, had a gun in his hands, and presented it at plaintiff; that plaintiff put up his arm, and that the gun went off; that the gun-shot passed through the fleshy part of plaintiff's arm, entered his eyes and blew away part of his temple bone; that plaintiff never saw or had his eye-sight since, that Dr. M'Sweeny (who was in a couple of days after brought to him by Dr. Baldwin) attended plaintiff and gave him over; that plaintiff was ill in Dr. Baldwin's house for over three months afterwards, and had several conversations with Dr. Baldwin about the matter; that when plaintiff was out of danger and nearly getting well, Dr. Baldwin on one occasion told plaintiff that plaintiff's father had come for him and wanted to take him home, but that Dr. Baldwin told plaintiff's father to go home and do for the rest of his family, and that he, Dr. Baldwin, would do for plaintiff. Plaintiff stated the rest of the conversation which took place between him and Dr. Baldwin on that occasion, and on which plaintiff relied as proving said agreement. In the course of said conversation Dr. Baldwin said to plaintiff that it was not through any bad intention Herbert Baldwin, jun. took up the gun, but only through his wildness, but that would not save him from the power of the law. It also appeared from plaintiff's evidence that under that agreement plaintiff remained in Dr. Baldwin's house and took no proceedings, and from that until Dr. Baldwin's death, in January, 1861, plaintiff was maintained, boarded, and kept, and clothed by Dr. Baldwin, and got the grass of two sheep; that Herbert Baldwin, jun., had died in 1867; that on Dr. Baldwin's death defendant, his only surviving child, succeeded to his property, and that she knew plaintiff had been living all said time in said Dr. Baldwin's house. Plaintiff also stated various conversations which he had with defendant's son and defendant, in 1861, after Dr. Baldwin's death, about making a provision for plaintiff; that defendant's son told him defendant wanted to know whether plaintiff would sooner stop in the house or get something yearly; that defendant's son said he thought defendant would give plaintiff yearly £5 and a suit of clothes; that the plaintiff objected, and said that would not keep him up; that afterwards plaintiff had a conversation with defendant, when she gave him a suit of clothes and £5, and plaintiff said it was too little; that defendant said she would not put him off with that, but would make it better for him next year. Plaintiff further stated that sometime after Dr. Baldwin's death plaintiff had gone to the house where his wife had lived as dairy-woman to Dr. Baldwin; that about January or February, 1862, he got another suit of clothes from defendant, and afterwards got £5, viz.: 30s. from her clerk, and the balance in the price of a cow plaintiff bought from her man; that in 1863 he got from defendant's clerk and son £5 more in cash and hay, and asked defendant for clothes; that she

said she had asked clothes from her sons and did not get them, and she did not know what to do; that plaintiff got no clothes afterwards; that about July, 1864, he wrote defendant a letter and gave it to her servant, and went to defendant's house next day for an answer by the servant's directions, when the servant told him that defendant said she would neither stand money or clothes for the future. It was admitted on behalf of the plaintiff that there was no agreement in writing. Plaintiff having closed his case, counsel on behalf of defendant required the learned judge to non-suit the plaintiff, or to direct a verdict for the defendant on the ground that there was no contract in writing within the Statute of Frauds, as the agreement relied on was not to be performed within a year. His Lordship declined so to do, but reserved leave to the defendant to move the Court to change the verdict, if had for the plaintiff, into one for the defendant; whereupon the defendant went into evidence, and the learned judge having charged the jury, counsel for defendant objected to the charge, and called upon his Lordship to direct a verdict for the defendant, which he declined, but reserved leave as before. The jury found a verdict for the plaintiff as stated. Defendant on the 22nd April, 1865, obtained a conditional order to set aside the verdict and for a new trial, on the ground of misdirection. Cause was shown against said order on behalf of the plaintiff, and thereupon by order of the Court of Queen's Bench, made the 14th of June, 1865, it was ordered that the cause shown against said conditional order be allowed with costs, and that the verdict had for the plaintiff do stand, with liberty to the defendant to appeal from the decision of the Court with respect to the objection of Mr. Chatterton, Q.C., defendant's counsel, at said trial—namely, that the agreement relied on was one not to be performed within one year, and therefore required to be in writing, but defendant was not to be at liberty to rely in support of such appeal on any other ground. The question for the Court of Appeal was—whether the agreement relied on was an agreement that was not to be performed within the space of one year from the making thereof, within the meaning of the Statute of Frauds, and therefore required to be in writing.

*Chatterton, Q.C., and William O'Brien,* were for the appellants.

*Exham, Q.C., and O'Riordan,* for the plaintiff.

The nature of the arguments, and the authorities cited, sufficiently appear in the judgment.

*Cur. adv. vult.*

Feb. 12.—O'HAGAN, J., stated the pleadings, and the facts of the case, and proceeded to say that it was admitted on behalf of the plaintiff that there was no contract in writing. The judge was called on to direct a non-suit or a verdict for the defendant upon that ground. The question was whether the agreement was one which required to be in writing. There was but one point in the case, which was to be determined according to the true construction of the fourth section of the Statute of Frauds—"That no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the de-

fendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The contract which grounded the action was, as stated in the summons and plaint, that plaintiff should not take any proceedings against the son of Dr. Baldwin on account of the injury mentioned, and in consideration thereof, Dr. Baldwin agreed in his lifetime with the plaintiff that plaintiff should, at the expense of said Herbert Baldwin, deceased, be maintained, boarded, kept, and clothed, and be also supplied with the grass of two sheep during his, plaintiff's life. Was that contract such a one as needed to be in writing? If the matter were easy to grapple with, and had come for the first time, he should find some difficulty in it. The view as to the first part of the section seemed to be adopted by Lord Holt. As to the second, there was no room for controversy. The third was the one which we had to deal with, if the contract might have been performed within the year. Whatever might have been the contention or doubt, the question was so settled by authority that he should have thought the ruling of the Court of Queen's Bench right beyond controversy, if he did not know that the controversy was maintained by some of his brethren. The statute was of great importance, and had been the subject of repeated consideration by the most eminent judges. The earliest case upon it was *Peter v. Compton* (Skinner, 353). There the agreement was a promise by the defendant for one guinea to give the defendant so many at the day of his marriage. The marriage did not happen within the year, and Holt, C.J. held that the agreement was within the statute, and should have been in writing, but the other judges held otherwise, upon the ground that where the agreement was to be performed upon a contingent, and it did not appear within the agreement that it was to be performed after the year, there a note in writing was not necessary, for the contingent might happen within the year; but where it appeared by the whole tenor of the agreement that it was to be performed after the year, then a note was necessary, otherwise not. Now, taking this decision to be law, he was unable to say that the agreement before the Court could be held to be within the statute. Marriage in one case, and death in the other, might have happened within the year, and if a note in writing was not necessary in one case, neither was it in the other. Lord Holt was, no doubt, a great authority, and he had before held the same view as in this case, though there was reason to think he changed afterwards; but the judgment had been accepted ever since. Thus in *Anonymous* (1 Salk. 280), there was a parol promise to pay so much money upon the return of such a ship, which ship happened not to return within two years' time after the promise was made. It was held that the promise need not be in writing. In

*Fenton v. Emblers* (3 Bur. 1279) the same question arose, and there was the same decision. Lord Mansfield affirmed the principle of *Peter v. Compton*. Denison, J., said—"The Statute of Frauds means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon contingency." Another authority was *Wells v. Horton* (4 Bingham 40). There the facts, as stated in the declaration, were that one Blissett whose executor the defendant was, was indebted to Mary, the wife of the plaintiff in £10,000, and that sum being due, the said Blissett, in his lifetime, after the intermarriage of the plaintiff and Mary, in consideration that the plaintiff would forbear to proceed against him for the recovery of said £10,000 during his lifetime, promised the plaintiff that his executors should after his decease, as such executor, pay to plaintiff said sum of £10,000. The liability of Blissett and his contract were proved by oral evidence only. This was certainly a strong case. The consideration was identical with that in the case before the Court, and the contract was held not to be within the statute, because it was on a contingency which might happen within the year. Best, C. J., referred to the decisions, and to the words of the statute, and said the plain meaning of those words "is confined to contracts which by agreement are not to be carried into execution within a year, and does not extend to such as may by circumstances be postponed beyond that period; otherwise there is no contract which might not fall within the statute." In *Souch v. Strawbridge* (2 C. B. 808) the action was for board and lodging supplied by the plaintiff to a child at the request of the defendant. It appeared that the child was placed by the defendant under the care of the plaintiff shortly after its birth in 1842, and that the defendant agreed to pay for its maintenance 5s. per week, or one guinea per month. At first it was proposed that the plaintiff should keep the child for one year; but the defendant objected to that on the ground that 5s. per week was too much for so young a child, and ultimately it was settled that the child should remain with the plaintiff "until Strawbridge gave notice," or, in the language of another witness, "as long as Strawbridge should think proper." The child remained with the plaintiff until February, 1845. The defendant paid for one month himself, and afterwards gave or sent the money to the child's mother, that she might pay it. The action was brought to recover a balance of £15. The contract, which was by parol, was held not to be within the statute, and not to require a writing. All the judges adopted the principle of *Peter v. Compton*, and Cresswell, J., said, "Upon the evidence reported to us, it is quite clear that this was not a contract within the fourth section of the Statute of Frauds, inasmuch as there was no stipulation or understanding that it was not to be performed within a year." These were sufficient, and the principle which pervaded them all would be found in *Ridley v. Ridley* in the Rolls (34 L. J., Ch. 462), where it was stated that the 4th section of the Statute of Frauds "has long since been settled not to extend to cases where the accomplishment or performance of the agreement may by possibility or by accident be extended beyond the space of one year; but

to be confined to cases where the agreement is not to be performed, and cannot be carried into execution within that space of time." He thought that that construction could not now be called in question, and if not, then the ruling of the Court of Queen's Bench seemed to be right. There was here a contingency by which the contract was to be terminated. In this state of facts the principle of the authorities seemed to preclude the operation of the statute. He did not enter into any speculation as to the policy of the statute. We were not, in his opinion, at liberty to deal with it as if its construction remained to be ascertained. The question seemed to be decided, and in a system like ours broadening on from precedent to precedent, which found its usefulness in telling men what in a given state of circumstances is the law, it was of great consequence not to unsettle what had been long held. He adopted the words of Burrough, J., in *Wells v. Horton*—"The question has long since been set at rest, and I hope it will not be again disturbed." But we had been referred to *Boydell v. Drummond* (11 East. 142); *Dobson v. Collis* (1 H. and N. 81), and to *Roberts v. Tucker* (3 Exch. 632). In *Boydell v. Drummond* the whole tenor of the agreement clearly demonstrated that it could not be performed within the year. The numbers of the Shakespeare, which the subject of the contract formed, were to be published *de anno in annum*; one number, at least, was to be annually published after the delivery of the first. The case was, therefore, perfectly distinguishable, and rather tended, by the contrast of the facts, to make clearer the principle on which we should decide. So, in *Dobson v. Collis*. There the contract, which was verbal, was that the plaintiff should be employed by the defendants until the 1st September, 1855, and for a year thereafter, unless the employment was determined by three months' notice. That contract clearly expressed the year, and the circumstance that it was defeasible did not make it other than a contract for more than a year. So in *Roberts v. Tucker*. There the terms of the contract clearly showed that it was not contemplated by either party to be performed in the year. These cases did not seem to him to be like that before us. It had been argued in reference to them that as the measure of a life is larger than any term of years, however long, and as the parties to this agreement must have contemplated that it would last beyond a year, the contract was within the statute. But he did not think that a legal fiction could supply the want of intention; and secondly, he did not think that there was any evidence of such an intention as is alleged. The same argument might have been urged in the cases which he had already referred to; yet the agreements in those cases were held not to be within the statute, because of the contingency, and the doctrine on which they were grounded seemed to exclude this case from its operation. Therefore, he thought the agreement here was not within the Statute of Frauds, and needed not to have been in writing.

FITZGERALD, B., stated the contract, and proceeded to say that the agreement was not very clearly stated in the plaint, but he understood that the consideration was that the plaintiff should abstain from taking proceedings against the son of Dr. Baldwin, and the promise was of maintenance and other matters to be

supplied during the life of the plaintiff. The agreement was made in 1843, and the breach was in 1861. The agreement was not in writing. The second sect. of the Statute of Frauds (Ireland), st. 7 Wm. 1, c. 12 (Ir.) enacted "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The single question in the case was whether the agreement stated in the plaint was an agreement not to be performed within a year. It seemed to his Lordship reasonably clear that the consideration and the promise must have been co-extensive in the contemplation of the contracting parties. Having regard to the premises, the Court of Queen's Bench had decided that the agreement was not within the statute, because it might have been performed within the year if the plaintiff had died within the year. There was authority for the position that if a contract might be completely performed within the year the statute did not apply. He had no intention of interfering with anything that had been decided, but he would not, on the other hand, go one step beyond what had been decided. It was said that though the agreement might not be performed within the year, yet if performance was possible the agreement was not within the statute. Though the agreement might be performable within the year, yet if by reasonable construction of its terms it appeared that the parties intended that the performance should extend beyond the year, it was within the statute. It seemed to him that the agreement was considered to be within or without the statute as the parties contemplated and made provision for its performance within or outside the year. "The cases have decided," said Bayley, J., in *Boydell v. Drummond*, "that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must have been the understanding of the parties that it was not to be performed within a year." The question was, could it be collected from the terms of the agreement here that the parties did not contemplate a performance within the year. An agreement to clothe and feed A. for ten years would be within the statute, though it might be performed by the death of A. within the year. The decisions were conversant with two classes of cases. The first was where, by the terms of the agreement, a point or occasion as distinct from a particular space of time was specified. The second was where the terms of the agreement provided for performance during some time specified in the agreement. In each class the thing to be ascertained from the terms of the contract was the time for the performance of

the contract. In the first class there was no time fixed. The time intended for performance could only be collected by inference from the terms of the agreement. The agreement might become contingent. In the second class the time was specified. The question was as to the meaning of words in their ordinary use. Did the specified time, according to ordinary use, mean a greater time than a year? The question here was—did the time of A.'s life mean in ordinary language a period longer than a year? In the first class of cases the effect of the language was that the performance was not necessarily postponed for more than a year. He accepted the law as laid down in *Peter v. Compton*. He substituted the word "event" for the word "contingency;" and would read the judgment thus—"where the agreement is to be performed upon an event, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the event might happen within the year; but where it appears by the whole tenour of the agreement that it is to be performed after the year, there a note is necessary." The cases of the second class were within the statute when the time for performance was beyond the year. *Giraud v. Richmond* (2 C. B., 835) was an instance of that. In the present case the question appeared to be—did the words mean necessarily something more than a year? The words "during A.'s life" did in ordinary use mean something longer than a year. He might quote Shakspeare to prove that—

"To carve out dials quaintly, point by point,  
Thereby to see the minutes how they run,  
How many make the hour full complete;  
How many hours bring about the day;  
How many days will finish up the year;  
How many years a mortal man may live."

*Henry VI.* part 3, act 2, sc. 5.

It was true that a life might not last an hour, but still the parties fixing that event had something more than a year in contemplation. He was obliged to hold that the agreement in the present case was within the statute, and ought therefore to have been in writing.

DEASY, B. concurred with Fitzgerald, B.

PIGOT, C.B.—I do not think a question has often occurred in which two most excellent judgments have more clearly indicated how plain words may be rendered most doubtful by a long line of cases decided by illustrious judges. I confess it seems to me a matter of the utmost surprise that a question on this section ever could have arisen. If I were deciding for the first time I could not have the least doubt of giving the construction which the majority of the judges gave on the first occasion. The words are—"No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Now, I do not think that those words can have any meaning but this:—An agreement stipulating for a thing which by the agreement is not to be done within a year, and where the subject of the con-

tract is not to be done within a year. On the whole, in conformity with that view, I hold that this contract is not within the statute.

MONAHAN, C. J.—I am authorised by Christian, J. and Hughes, B. to state their concurrence altogether with the judgment which has been delivered by O'Hagan, J. I can also state my own concurrence with that judgment; and I think it sufficient to state, that so far as I myself am individually concerned I prefer placing my judgment on the ground of authority; and without considering what might or might not have been the most useful construction to put on the statute, I find it impossible to distinguish this case from that of *Wells v. Horton*. I shall put the two together. *Wells v. Horton* was this: A young lady had a debt of £10,000 due to her by some gentleman, and this gentleman contracted with her that in consideration of the lady not suing him during his life for the £10,000, his executors would pay her a sum of £10,000 on his decease. The case was tried. It happened that he lived for fifteen or eighteen years after this parol contract; and it was proved that in fact the debt originally existed, and that this plaintiff had undertaken not to sue during the life of the debtor; that she had performed the promise; and the question was—whether the executor was liable. The simple question was—whether a forbearance to sue during the life of A. B., in consideration of which A. B. promised that a sum should be paid after his death, was a contract not to be performed within a year. Well, the case was argued as this case was argued before us, that a portion of the consideration was continuing; and that as to the promise itself, the time for performing any part of it was not to arrive until the death of the debtor. Well, the present case is this: In consideration of your not suing my son, who is suffering from an accident, I will maintain you during your life. I confess that it appears to me that if a promise that was not to be performed till a man's death was not within the statute; neither is this. Therefore, I confess, without going more into detail, adopting the clear reasoning of O'Hagan, J. on the subject, I am unable to distinguish this case from *Wells v. Horton*; and I can only say that perhaps if we were to put a construction for the first time on the statute we would not decide in this way, considering the policy of the statute; but as the Court has always agreed to a different construction, it would be too much to introduce a new one now. If the observation of Burrough, J., made in *Wells v. Horton*—"the question has long since set at rest, and I hope it will not be again disturbed"—was right in 1826, I confess I think I may make a similar observation with even more force at this length of forty years. Therefore, in my opinion, the judgment of the Court of Queen's Bench ought to be affirmed. Of course, the judgment now pronounced is to be entered as that of Christian, J. and Hughes, B. as well as of the judges that are here.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE LEBFROY, C. J., AND O'BRIEN, J.]

SINNOTT v. CLEARY.—Jan. 15, 16, 22.

### *Estoppel—Reversion—Assignment.*

*A reversion created by estoppel is capable of assignment, and the assignee stands in the same position as the original reversioner as against the party bound by the estoppel.*

THIS was an action of ejectment for non-payment of rent brought to recover possession of part of the lands of Coolanickmore, in the barony of Ballaghkeene South and county of Wexford, tried before the honorable Mr. Justice O'Brien and a common jury, at the last Summer Assizes, for the county of Wexford. The summons and plaint averred that the premises were held under a lease at the yearly rent of £31 13s. 8d., and that there was due £366 16s. 8d., being ten years' rent up to the 25th March, 1865. Defence was taken by one of the defendants, Johanna Cleary, for the entire of the premises, and the issue was whether Johanna Cleary held the lands or any part thereof as tenant to the plaintiff. There was a verdict for the plaintiffs. Mr. Walshe, Q.C. stated the plaintiffs' case, which as stated by him was as follows:—The ejectment was brought to evict a lease dated the 14th April, 1835, by which Bryan Murphy, since deceased, demised to Thomas Cleary, also since deceased, 27a. Or. 36p, of the lands of Coolanick, for sixty-one years, from the 25th of March, 1835, at the yearly rent of £31 13s. 8d. He further stated a deed of the 30th Dec. 1835, made between the lessor, Bryan Murphy, of the first part, Mary Murphy, his eldest daughter, and one of the plaintiffs of the second part, and Charles C. C. Gray, also one of the plaintiffs, of the third part, the marriage settlement of Charles C. C. Gray and Mary Murphy, by which Bryan Murphy, in execution of a power reserved to him by his own marriage settlement, dated the 11th August, 1817, appointed twenty acres of the land comprised in the lease of 14th April, 1835, to his daughter, Mary Gray; that Bryan Murphy's interest being chattel, this marriage settlement operated as a good appointment, or if not, as an assignment of Bryan Murphy's interest. Mr. Walshe, Q.C. also stated a deed of the 3rd of August, 1841, by which the same Bryan Murphy purported to appoint to his daughter the plaintiff, Mary Gray, 7a. Or. 36p., the residue of the lands comprised in the lease of 14th of April, 1835. He further stated that Bryan Murphy was dead for some years, and that by a deed dated the 18th day of May, 1855, Charles and Mary Gray had assigned all their interest in the premises to the plaintiff, Nicholas Sinnett. G. C. Roberts was the first witness examined for the plaintiffs; he produced the following documents:—Lease dated 29th March, 1800, from James Dance to Timothy Murphy. This was a demise to Timothy Murphy of the lands of Coolanick for eighty-nine years, from the 1st of May then next. The lands demised by this lease included *inter alia* the subject matter of the ejectment. Probate of the will



of the said Timothy Murphy, dated the 20th of January, 1809. By this will he appointed his widow, Catherine Murphy, executrix, to whom probate was accordingly granted. Lease of 4th April, 1835, between Bryan Murphy of the first part and Thomas Cleary of the other part. This was the lease on which the ejectment was brought. William Murphy was then examined for the plaintiff, and stated he was son-in-law of Bryan Murphy, the lessor. This witness produced and proved the execution of the deed, dated the 30th of December, 1835, between Bryan Murphy of the first part, Mary Murphy, his eldest daughter, of the second part, and Charles C. Gray of the third part. This was the settlement executed on the marriage of Mary Murphy, one of the plaintiffs, and Charles Gray, one other of the plaintiffs. It recited that Bryan Murphy, under his marriage settlement, dated the 11th of August, 1817, was possessed of 100 acres of the lands of Coolanick, for the residue of a term of 89 years, and that said settlement directed that the lands should be disposed of by the said Bryan Murphy to and amongst his children in such shares and proportions as he might think proper. It then witnessed that in pursuance of the power he directed, limited and appointed that, after his decease, twenty acres of said lands, which, with 7a. Or. 36p. now were in the occupation of the said Thomas Cleary should be and remain to the use and behoof of the said Mary Murphy as her marriage portion, and "consequently, to the use and behoof of the said Charles Gray" in case said intended marriage should be effected, to hold for the residue of said term of 89 years. This witness, William Murphy, also proved Bryan Murphy's signature to a deed dated 3rd of August, 1841, between Bryan Murphy of the first part, the plaintiff, Mary Gray, otherwise Murphy, of the second part, and Samuel Atkin of the third part, which deed purported to appoint 7a. Or. 36p., the residue of the lands comprised in said lease of 4th April, 1835, to the use of the said Mary Gray, for her life, and "consequently" to the said Charles Gray, in case he should survive the said Mary Gray, and to the issue of the said marriage. The witness then stated that he was married to Ellen Murphy, the third daughter of the said Bryan Murphy. That he searched in his own house where he was in the habit of keeping papers for Bryan Murphy's marriage settlement of 1817. He searched that day. He never saw the settlement himself. The next witness examined for plaintiff was Mathew Furlong, one of the plaintiffs. He produced an attested copy of an order purporting to be an order appointing new trustees of the marriage settlement of 1817. Counsel for the defendant objected to the reception of this order in evidence, on the ground that neither the petition or statement of facts, master's certificate, or any of the preliminaries grounding the jurisdiction, were given in evidence; also upon the ground that there was, as yet, no evidence of the settlement of 1817. His Lordship received the order subject to the objection. The witness Mathew Furlong stated he had no other documents but the order. He never saw the settlement of 1817. It never was among his papers or those of his co-trustee. Was not sure as to his co-trustee. Did not know where the settlement was. Never saw it.

Never searched for it among the Murphy papers. Did not know the late Robert Carty. Did not know Hercules Atkin. The next witness examined was John Furlong, one of the plaintiffs, and the co-trustee named in the order under the Trustee Act. Never saw the settlement of 1817. Never searched for it among his own papers. The next witness examined was Nicholas Sinnott, one of the plaintiffs. A deed of conveyance dated the 18th of May, 1855, from the said Charles Gray and Mary, his wife, to the said plaintiff, Nicholas Sinnott, was handed to this witness. The witness Nicholas Sinnott stated he knew Charles and Mary Gray. Proved the signature of Charles Gray to the deed. Saw him execute the deed. Heard Gray had died in America. Last saw him in 1855. He handed to Mr. Laurence Corcoran, his solicitor, the deed of 30th December, 1835, and 3rd of August, 1841. He also handed him counterpart of Cleary's lease of 4th of April, 1835. Witness never saw the settlement of 1817, nor had he in his possession. Did not know where it was. And on cross-examination this witness stated Mr. Corcoran was present when the deed of 1855 was executed. He had not been paid any rent by the Clearys since he got the conveyance from the Grays ten years ago. On old Dora Murphy's death, four years ago, he asked the defendant, Johanna Cleary, for the rent. She said she would not pay him. She would pay those she always paid. A notice to quit, dated the 22nd day of September, 1858, was here produced to witness, who proved his signature. This was a notice to quit the premises mentioned in the ejectment, directed to the defendant, Johanna Cleary, and treating her as holding from year to year. Being re-examined, he stated after she was served with the notice to quit, she said she had a lease. Witness asked where it was. She said in Dublin. He never saw it until it was produced in court that day. The next witness examined for the plaintiff was Mr. Laurence William Corcoran, the plaintiffs' attorney. He stated that on the execution of the conveyance of 18th of May, 1855, the deeds of appointment of 30th December, 1835, and of 3rd of August, 1841, had been handed to him, but he never saw Bryan Murphy's marriage settlement of 1817, nor Cleary's lease of 4th April, 1835. That he had called on defendant, Johanna Cleary, about her rent in 1858, on behalf of the plaintiff Sinnott, when she produced her receipts. The witness stated that he had asked for payment of the rent of the lands of Coolanick, held by her late husband, Thomas Cleary. She was then his widow. She told witness she had paid the rent, £10 half-yearly to Dorothea Murphy, and she produced the receipts. These receipts were for £10 half-yearly from Dorothea Murphy, up to the 25th March, 1858; also receipts for head-rent, from the Rev. Walter Green; year's rent £8 9s. 7d. down to 1st May, 1858. She also produced her tithe rent-charge, poor-rate, and income-tax receipts to then last gale day. Mr. Walshe, Q.C. for the plaintiff then offered in evidence the attested copy of the memorial of Bryan Murphy's marriage settlement of the 11th Aug. 1817. Counsel for the defendant objected to its reception on the ground—Firstly, that a foundation had not been laid for the admission of secondary

evidence; and secondly, that at all events the memorial was no evidence of the contents of the original deed as against his clients. The learned judge received the copy memorial in evidence subject to his objection. The plaintiffs' witness, William Murphy, was re-called, and stated that Bryan Murphy and Catherine Murphy, his wife, had one son and eight daughters. That of those the son and six daughters had survived their father, Bryan, who had been dead for several years. Robert Murphy was the son. The daughters were Mary Gray, Ellen Murphy, witness's wife, who died before her father, Alice Murphy, Margaret Sutton, who also died in her father's lifetime, Eliza Kehoe, otherwise Murphy, and Sarah Cardiff, and two others whose names witness did not mention. Witness also stated the last time he had seen Charles Gray he had told witness his wife was alive in America. This was in 1855. When asked as to the reputation of the family about Mary Gray's death, he stated he had very little communication with the family, and could not say what is the family reputation on the subject. The plaintiffs' case closed, reading the several documents proved in the course of the evidence. Mr. Hemphill, Q.C. on behalf of the defendant, Johanna Cleary, called upon his lordship for a non-suit or direction in his favour upon the following grounds:—Firstly—That no title had been shewn in the plaintiffs or any of them to the reversion expectant on the lease from Bryan Murphy to Thomas Cleary, dated the 4th April, 1835, and it was admitted that no rent had ever been received under the lease by any of the plaintiffs. Secondly—That neither of the deeds of 30th December, 1835, or 3rd of August, 1841, were valid executions of the power contained in settlement of 11th of August, 1817. Thirdly—That the legal estate was outstanding in the original trustees of that settlement, or if not, it was vested in the legal personal representative of Bryan Murphy, who was not a plaintiff. Fourthly—That there was no proof of the execution of the deed of 18th of May, 1855, by Mary Gray. His lordship having refused to non-suit or direct a verdict for the defendant, counsel stated the defendant's case. The first witness examined for the defendant was Eliza Kehoe, one of Bryan Murphy's daughters. She stated she recollected when Charles Gray came back from America in 1855. He had been in America for some time before. Witness had a conversation with him the very day he came back from America, and he told her, his wife, Mary Gray, was dead. She and her husband had left Ireland some years before. That they had three children at that time, and she had seven children when she died. And on cross-examination this witness stated she heard of Charles Gray having died about three months after he returned to America in 1855. The family reputation was that he had been dead for years. He went back that year to America. The learned judge charged the jury, and the only question which he left them was—Whether Mary Gray was dead at the time of the execution of the conveyance to the plaintiff, Nicholas Sinnott, in 1855; if not, was she dead before the commencement of the present action? and a like question as to the plaintiff, Charles Gray. At the close of his lordship's charge, counsel called upon his lordship to direct a verdict for the defendant, on the grounds

already relied upon at the close of the plaintiffs' case; and he also called upon his lordship to tell the jury, that inasmuch as under the deeds of 30th December, 1865, and 3rd of August, 1841, whether regarded as appointments or assignments, Charles Gray and Mary, his wife, took only life estates, in portions at least, of the premises, with remainder to their children, that if the jury were of opinion that the said Charles Gray and Mary, his wife, were both dead before the commencement of this action, they should find a verdict for the defendant, but his lordship declined to do so. The jury found that both Charles Gray and Mary, his wife, were alive at the execution of the deed of the 18th May, 1855, but that they were both dead before the commencement of the action. On that finding counsel again called upon his lordship to direct a verdict for the defendant, but his lordship refused to do so, and directed a verdict for the plaintiff.

On the 4th November, 1865, the defendant obtained a conditional order to turn the verdict into a non-suit or a verdict for the defendant, or that the verdict should be set aside, and a new trial had upon the ground of misdirection, and the reception of illegal evidence. Against this cause was now shewn by the plaintiff.

*John E. Walshe*, Q.C. and *Ryan* for the plaintiff.  
*Hemphill*, Q.C. and *Nunn* for the defendant.

For the plaintiffs it was argued that though Bryan Murphy had only a life estate at the date of the lease of the 14th April, 1835, still as between him and the lessee the latter was estopped from denying his title, and that the reversion thus created by estoppel passed to Charles and Mary Gray, and from them to the plaintiff Sinnott. It was also contended that any objection as to the legal estate being outstanding in trustees, was answered by s. 52 of the Landlord and Tenant Act. The defendants argued that the doctrine of estoppel could not apply in this case to the length to which it was sought to push it, that the legal estate was outstanding, and that on the construction of the deeds Charles Gray took only a life estate. The following authorities were cited:—*Palmer v. Ekins* (2 Lord Raym. 1550); *Walton v. Waterhouse* (2 Wms. Saunders, 418, (c.), n. (d).); *Cuthbertson v. Irving* (4 H. & N. 742; s.c. in Error, 6 H. & N., 135); *Anonymous* (Kelynge, 6); Co. Litt. 292 (a); Stat. 23 & 24 Vict. c. 154, s. 52; *Lampet's case* (10 Co. Rep. 46, a); *Manning's case* (8 Co. Rep. 94, b).

*Cur. adv. vult.*

Jan. 22. LEFROY, C.J.—There are two questions here. With respect to the estoppel, the plaintiff insists upon it, that being the assignee of the reversion, he is entitled to avail himself of the estoppel which existed between the defendant and the plaintiff, from whom he took the lease, and who executed the lease to him; and that he, the plaintiff, standing in the place of that reversioner is entitled to have the benefit of the same estoppel against the defendant, which the lessor, whose title he has now, would be entitled to. He shews also that he has an equitable title to the reversion to which the rent was incident; that he was entitled to sue for the rent, and that by the Landlord and Tenant Act the outstanding legal title of

which he was *cestui que* trust, could not be set up to his prejudice. Now these are the points, and I need not go over the several authorities which were cited in the course of the argument to establish these propositions. We are satisfied that on those authorities, into which I do not propose to go more in detail, as I know my brother is well prepared for the examination and discussion of them, on both these grounds the present plaintiff is entitled to the rent which he claims. The second question, with respect to the deduction of the equitable title, depends on the construction of a deed of a very inartificial shape, raising questions of difficulty as to the intention of the parties and encumbering it with qualifications. I would rather rest the case on the doctrine of estoppel, which is so clearly established by the number of the cases in the note to Saunders; and the decision lately of the Court of Error is to uphold the doctrine as to the position of the person who stood in the position of assignee, that the benefit of the estoppel passes to the assignee of the interest. Upon these grounds I have no difficulty in saying that we are of opinion that the plaintiff is entitled to hold his verdict.

O'BRIEN, J.—I quite concur with my Lord Chief Justice upon both points. On the first point the plaintiff, Sinnott, has established his title to the rent. On the other point I also concur in saying that it is one on which there are formidable difficulties in the way of the plaintiff establishing his title if it were necessary to do it. There was a lease in 1835. Bryan Murphy had no estate. In 1817 the lands were put in settlement on the marriage of Bryan Murphy, and conveyed to trustees for his use for life, with power of appointment. But, unquestionably, he had no legal estate whatever at the time of the lease of 1835; and accordingly the effect of that lease was to create between him and the defendant—to create in him an estate by estoppel—a legal reversion expectant on the term granted by that lease. Whatever estate was then created by estoppel still continues. First, then, was that estate so created by estoppel an estate in fee or not? *Prima facie* it would be an estate in fee; but we must have regard to the fact that the deeds disclose that the estate was one for a term of years, and this shows that the estate created by estoppel, though *prima facie* an estate in fee, is not necessarily so, for it appeared that the estate was an estate for a term of years, and in the case of an underlease of such a term, this absurdity would arise that the estate, if we held that the reversion created by estoppel was a reversion in fee, would go to the heir, but the benefit to the executor. The lease being for years, the deeds and documents shewing that rent was paid, the estoppel would be to give an estate for a chattel interest. It is necessary to bear that in mind, because it is contended that the personal representative of Bryan Murphy would be the person entitled. The effect of these deeds vesting the estate by estoppel in Sinnott would be very different if the reversion was in fee instead of being a chattel interest. The next question is one on which, up to that late case, there was a conflict of authorities, but I look on it that whatever the controversy was, it is settled by the case of *Cuthbertson v. Irving*. The proposition decided in that case is—that the estate or re-

version created by estoppel between lessor and lessee may be assigned by deed, and that the assignee may establish his title, though the deeds shew there was no original estate in him. The lease here shows no defect of title. Though the subsequent assignments shew the defect, *Cuthbertson v. Irving* shews that the assignee may avail himself of the estoppel. That being so, it would seem to simplify matters very much. We are to assume that Bryan Murphy had in fact the legal estate which he had acquired by estoppel, and that that was the estate which was dealt with by the subsequent deeds. The one of December, 1835 there is no controversy about. The deed of 1835 was executed on the marriage of Mary Murphy, and dealt with twenty acres of the land. Now, though that deed purports to be an appointment in pursuance of a power, there is no doubt it would operate as an assignment and transfer of the legal estate; and we are to consider were there apt words to convey the legal estate if it existed in the grantor. It is admitted that the deed of 1835 would have operated as an assignment of any legal estate Bryan Murphy had. Charles Gray, during the life of Mary Murphy, assigned to the plaintiff by the deed of 1855, and that vested. So far the title of the plaintiff's is complete to the twenty acres. It is said it is necessary to establish the title to the whole, and not to a part. I concur with that, and I think the plaintiff has done so. The deed of 1841 has been referred to by my Lord Chief Justice, who remarks that the limitations in it are very inartificial, and that it would be very difficult to put any construction on it. But let us consider it as dealing with the legal estate which we are to assume that Bryan Murphy had. It grants the lands to the use of Mary Gray for her life, and consequently to Charles Gray in case he should survive her, and to the issue of the marriage. Now, considering what equitable interest is afforded by that, there appears to be some ground for saying that under that she took an equitable interest for life only, and that the equitable estate after her death would go to her husband and children in default of appointment. That might be; but so far as the legal estate is concerned the matter is different. The two cases in 8 & 10 Coke's Reports establish that if a term of years is assigned for life, or for a single day, all the limitations over are executory, and the whole interest vests in that party to whom the term for life is granted. That being so, under the first limitation here it would give Mary Gray the whole of the term in the seven acres, and it would vest in her husband, and it would stand in the same position as the twenty acres. I think, therefore, the plaintiff has established his title on the doctrine of estoppel. As to the other point on the 52nd section of the Landlord and Tenant Act, I do not go with the plaintiff's title. Assuming it applies to a lease like this, where an equitable estate becomes separated, this is the case where the parties having the legal estate were not at all in privity with the rent. Bryan Murphy was, under the settlement, entitled to an equitable estate for life. He dies. There was no dealing between the tenant here and those claiming under these deeds, which would create a new tenancy. I therefore am of opinion, with my Lord Chief Justice, that the cause shewn should be allowed.

[BEFORE LEFROY, C.J. AND O'BRIEN, J.]

BARRETT v. DRISCOLL.—Jan. 1866.\*

*Judgment—Revivor—Penal Sum.*

*A writ of revivor of a judgment obtained for a penal sum given to secure a smaller sum, should claim execution only for the sum intended to be secured and interest due, and not for the penal sum for which the judgment was originally marked.*

IN this case a motion was made to set aside a writ of revivor issued at suit of the plaintiff as executor to revive a judgment, on the ground that the writ did not assign breaches, and because it claimed to have execution for the penal sum £1,000, instead of the sum actually due, namely, £500 and interest, which it appeared by the warrant of attorney, and by an affidavit filed in the cause the judgment was given to secure. Upon the argument, the point as to the assignment of breaches was given up, it being conceded that under the decisions on the former statute, 9th William III., cap. 10, sec. 145 of the Common Law Procedure Act, did not apply to the case of a mere money bond, and the objection to the writ was now rested on the other grounds.

O'Brien in support of the motion referred to sections 149 & 150 of the Common Law Procedure Act, relating to suggestions; section 151 relating to writs of revivor; the form No. 11 in schedule to the Act, and the 109th General Order, section 152, allowing a plea of payment to a judgment, and to 6th of Anne, cap. 10, secs. 12 & 13, as shewing the meaning of the words "the sum due" as distinguished from the penal sum, and that the former meant the sum secured, and not the sum recovered by the judgment.

W. Johnson, on the other side, contended that the plaintiff was entitled to revive for the full penal sum, and that that was the amount due by force of the judgment, and insisted that if the plaintiff were now confined in his execution to the principal sum of £500 and interest, and that the amount was not levied, and if the interest was afterwards to accrue, the plaintiff would be deprived of all remedy. He referred to *Farran v. Beresford* (10 Cl. & Fin. 319); *Farrell v. Gleeson* (11 Cl. & Fin. 702); and also to the forms of *scire facias*, for which the present system was substituted, and under which, undoubtedly, the plaintiff was entitled to revive for the full amount of the judgment. He also relied upon the intention of the Legislature, as shewn by section 146 of the Common Law Procedure Act, that the plaintiff should have the security of the full penal sum for all liability that might accrue, and which security ought to extend as well to the case of a bond given to secure a certain sum and interest as for the performance of a covenant or agreement. Among other objections, he urged that the plaintiff, if he were allowed to revive only for the amount immediately due, might be very much embarrassed by the effect of the Statute of Limitations on the rest of his demand.

O'BRIEN, J. delivered the judgment of the Court. After reviewing the various arguments and the sec-

tions of the statute, he said that the Court considered that the proceeding to revive under the present system differed from the former *scire facias*, and involved both a revivor of the judgment and an award of execution, which, under the express terms of the statute could only be for the amount actually due and not for the penal sum. They, therefore, required the writ to be amended, by claiming thereon the sum only which the bond and warrant were given to secure, namely, £500, with such interest as was due, the costs of both parties to be costs in the cause.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

BERRY v. HILLAS AND ANOTHER.

*Plea alleging a will prior in date to one alleged in the declaration.*

*To a declaration alleging a will, a plea alleging undue execution of that will, as well as incapacity and undue influence, and also averring that such will was not the last will of the said deceased, for that the said deceased made his last will, &c. (alleging a former will), is a good plea, provided the former will is alleged with the same formalities as are required in a declaration.*

PALLES, Q.C. (Carton with him) moved to set aside one of the pleas filed by the defendant. The declaration propounded in the ordinary form as the last will and testament of the deceased, a will bearing date the 1st December, 1865. To that declaration the defendant, Hillas, had pleaded—first, undue execution; secondly, want of testamentary capacity; thirdly, undue influence; and fourthly, that the said alleged will of the 1st December, 1865, was not the last will of the deceased; for that the said deceased made his last will and testament in writing, bearing date the 28th day of June, 1859. This kind of plea—that the will alleged is not the last will of the deceased—was a common plea in England, but has been discontinued by Sir J. P. Wilde. In *Owen v. Davies* (33 L. J., Pr. 201) he directed such a plea to be set aside and not to be pleaded in future. [Keatinge, J.—Yes. But here the plea goes on to allege another will, no doubt, not in proper form; but that can be put right by amendment.]

Buckley for defendant, Hillas:—The plea complained of is, I admit, not in proper form, but I am willing to amend it. Similar pleas have been filed in several cases, and, amongst others, in *Kelly v. Dunbar* by an intervenient.

LLOYD, Q.C. appeared for the heir-at-law, in support of the motion.

KEATINGE, J.—As the plea now stands, if a motion were made to fix the mode of trial, no issue could be raised on the first will. The capacity of the testa-

\* Ex relatione.

tor could not be traversed, for it is not alleged. The due execution of the will could not be traversed, for neither is it alleged. It is, therefore, necessary to amend the plea by alleging that will with the same form as is necessary in a declaration. If that is done it will be a good plea. I will, therefore, give leave to amend the plea.

*Order accordingly.*

### M'CARTHY v. MATHEWS.

*Abatement—Suggestion—Notice of motion.*

*Notice of motion is requisite for leave to file a suggestion of the death of a plaintiff who was named sole executor of the deceased in the will which was in dispute, and to whose goods letters of administration had been granted to the applicant.*

Price moved, without notice, for leave to file a suggestion on the record stating the death of the plaintiff, and that letters of administration of his goods as in case of intestacy, had been granted to the person for whom he applied, and who was universal legatee, subject to some trifling legacies. The case had been ready for hearing, save that a motion was pending on the part of the plaintiff for leave to cite persons claiming as legatees under a former will. The defendant had pleaded undue execution, want of capacity, undue influence, and forgery. Counsel cited *Casey v Casey* (10 Ir. Jur. N. S. 58), where a similar application was granted, but that was in the case of the death of a defendant.

KEATINGE, J.—It occurs to me that you ought to give notice of the application to the other party, and also that you will, at the same time, renew the motion of which the late plaintiff had given notice.

*No rule.*

The motion on notice accordingly came on upon a later day, when the order was made.

[NOTE.—Notwithstanding the above case, and *Casey v. Casey* cited in it, it may be questioned whether the practice of entering a suggestion is correct. It is manifestly borrowed from the law and equity practice, but it is clear that the latter is founded on express statutes. Thus, in equity, a suggestion is permitted in certain cases, under 13 & 14 Vic. c. 89, s. 29, but the Court only permits it in cases of a *respondent's* death or transmission of interest; in other cases either a petition of revivor, or a supplemental petition or information, is the correct mode (see Gamble, Ch. Pr. 155, *et seq.*) Again, at law a suggestion may be filed under special clauses in the Procedure Act of 1853 (s. 157 & 158) in case of a sole plaintiff or defendant dying; but no similar provision is made in any of the Acts or Rules respecting the Probate Court. In the Prerogative Court, after issue joined, the suit did not abate by death, but that was because the proc-

tor was the *dominus litis*. The more correct practice in the Probate Court would appear to be, in cases of abatement or rather of death of parties, to issue a citation, and in fact commence a new suit, the former one being at an end. This was at law the course prior to the Procedure Act if a sole defendant died before verdict or interlocutory judgment. In that case a fresh action was necessary. The rule was—“*actio personalis moritur cum personâ*”; and so prior to the 9 W. 3, c. 10, s. 7 (similar to the above clause of the Procedure Act, 1853, s. 156) a like rule applied in the case of the death of a plaintiff (Ferg. Pr. Act, 196 and 200).]

### Assize Court.

Reported by Oliver J. Burke, Esq. Barrister-at-Law.

GALWAY ASSIZES, MARCH 21.

[BEFORE MR. JUSTICE CHRISTIAN.]

IN RE JACKSON.

*Grand jury law—Malicious injuries—Presentment.*

*The grand jury has full power to make a presentment for compensation for malicious injuries, although the presentment for such injuries had been thrown out at the presentment sessions.*

THIS was an application to the judge to direct the grand jury to consider an application which was made to them on the part of a man named Jackson for compensation for the malicious houghing of his cattle. The presentment sessions refused the application, and the grand jury were now apprehensive that they had no power to entertain a presentment which was thrown out by the presentment sessions.

Morris, Q.C. was heard in support of the application.—The applicant has already applied to the presentment sessions. The 38th sec. directs that application for *public works* must be approved of by the presentment sessions. This section is merely conversant with public works, and has nothing to do with malicious houghing of cattle or burning, which is entirely regulated by the 135th taken in conjunction with the 138th section, both of which deal entirely with compensation for malicious injuries.

Blake, Q.C. appeared for the grand jury, who had grave doubts as to their powers to present, the presentment sessions having thrown out the presentment. The grand jury were apprehensive that they were constrained by the 17th and 138th section of the 6 & 7 Wm. IV. (the Grand Jury Act).

PER CURIAM.—The grand jury, in cases for malicious injuries, has full power to make a presentment therefor, although the application had been thrown out at the presentment sessions.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

McDONNELL v. JEBB AND OTHERS.—Feb. 20.

*Will—Construction of—Joint tenancy—Tenancy in common.*

*R. C., by his will made 6th February, 1849, willed that his wife should have during her life £1,000 a year, and that his brother Andrew should have £500 a year during his life: and the testator then expressed a hope that they would "continue to live together in kindness and love as heretofore, which cannot, in consequence of my brother's health, be long.....After the death of my wife and brother, my executors will dispose of all my property in the most advantageous manner." By codicil to the above will, the testator desired "my wife and brother shall be my residuary legatees, and enjoy all the benefits arising from this appointment." Held, that under the terms of said will and codicil the testator's widow and brother took the residuary gift bequeathed to them as joint tenants, and not as tenants in common.*

THIS was an appeal taken by Keith Hallows, John Armstrong, and the Rev. George Allman Armstrong from so much of a decretal order made by the Master of the Rolls, on the 7th of November, 1865, as in effect declared that Andrew Carmichael and Jane Carmichael became joint tenants of the residue of the property of the late Richard Carmichael, under his will and codicil, the contention of the appellants (who are the executors and residuary legatees of Andrew Carmichael the brother of said Richard) being that the said Andrew Carmichael and Jane Carmichael became tenants in common of such residue under the said will and codicil. The petition in this matter was filed on the 1st day of April, 1865, by John McDonnell, as surviving executor of the will and codicil of the said Richard Carmichael, late of Rutland-square, in the city of Dublin, dated respectively the 6th of February, 1849, and the 30th of March, 1849, against Robert Jebb, the executor of the will and codicil, dated respectively the 29th of May, 1858, and the 16th of November, 1864, of the said Jane Carmichael, the widow, and one of the residuary legatees of the said Richard Carmichael, and against Wellington Colomb and James Adamson Bell, who, with the said Robert Jebb, are trustees for the residuary legatees of the said Jane Carmichael, and against the appellants, who are the executors and residuary legatees named in the will, dated the 12th of April, 1850, of the said Andrew Carmichael, who was the other residuary legatee and brother of the said Richard Carmichael, and which said Andrew Carmichael died in the lifetime of the said Jane Carmichael. The following are the material portions of the will of said Richard Carmichael:—"Rutland-square, Dublin, February 6, 1849. This being the seventieth anniversary of my birthday,

having been born on the 6th of February, 1779, I sit down to dispose (after my decease) of the property which it has pleased the Almighty God to permit me to accumulate. If I should be deprived of life so suddenly as to be unable to make a more regular and formal will, the following disposition of my property is to be considered as my last will and testament. It is my will and desire that my entire property be vested in trustees; and I hereby name as my trustees and executors my brother Andrew Carmichael, my brother-in-law the Rev. William Bourne, and Dr. John McDonnell. It is my desire that my wife Jane Carmichael shall have during her life one thousand pounds per annum, and the use of my house in Rutland-square, furniture, plate, carriages, horses, and everything contained in it during the period of her natural life. It also my will and pleasure that my brother Andrew shall have five hundred pounds per annum during the period of his natural life. They will continue, I know, to live together in kindness and love as heretofore, which cannot, in consequence of my brother's health, be long. But as long as he lives he will continue to enjoy every comfort which this world can afford. It is also my will and pleasure that my sister Mary Meadows, residing with Miss Roberts in North Wales, shall have during her life one hundred pounds per annum. After the death of my wife and brother, my executors will dispose of all my property in the most advantageous manner the times will permit within the year after their demise, and bestow the amount, which will probably bring in a sum of more than sixty thousand pounds. After the death of my wife and brother, my trustees will secure a sufficient sum (two thousand pounds, for instance) to continue to my sister, Mary, her annuity of one hundred pounds, which, after her demise, will go into the general fund for the following bequests:—"Here follow the pecuniary legacies. "The above bequests, as I have already stated (I shall now recapitulate in figures), are only to be paid after the death of my wife and brother, with the three exceptions mentioned, viz.: That to the College of Surgeons, Richmond School of Medicine, and my sister Mary." Here follows a recapitulation in figures of the pecuniary bequests:—"In the foregoing settlement of my property I have not arranged or specified, that, in case of the demise of my wife or brother, my desire relative to the annuity settled upon each. My will then is that the survivor of either shall enjoy, during his or her life, the annuity settled upon the other. Thus, in case of the demise of either, the survivor would then, after this event, enjoy fifteen hundred pounds annually. It is my will and pleasure that my wife shall, in addition to the annuity of one thousand pounds settled upon her, enjoy, after my decease, the interest or rents arising from my mortgages, bonds, and tenements. And it is my will and desire that, at her demise, my marble bust shall be presented to the proprietors of the Richmond School of Medicine."—"Codicil to my will, dated February 6th, 1849. Should any accident or illness deprive me of life, it is my will and pleasure that (after the disposal of my property, according to dispositions stated in my will of the 6th of February, 1849, and wit-

passed 11th of the same month), my wife and brother shall be my residuary legatees, and enjoy all the benefits arising from this appointment." In the summer of 1849, said Richard Carmichael died, leaving his brother Andrew, and Jane, his wife, him surviving. The following are the material portions of the will of the said Andrew Carmichael, viz.:—"I, Andrew Carmichael of Rutland-square, Dublin, do hereby make my last will and testament. In the disposition of my property, so large a share of which I owe to the fraternal kindness of my brother Richard Carmichael, my ambition is in following his example, in bestowing it where it will be most serviceable, not where it would be a superfluity, and to make all my arrangements in such a way as not to disturb the actual state of any property to which I am entitled as one of my brother's residuary legatees, during the lifetime of the other, my dear and affectionate sister-in-law, Jane Carmichael; and in this view I shall confine my immediate bequests to such property as is more peculiarly my own; and to friends who have largely conduced to my happiness, and have long subsisting claims upon my regard. It consists, at present, of about two thousand pounds, and I have lately become the proprietor of two hundred preference shares in the Great Southern and Western Railway Company. In prosecution, therefore, of the views I have stated, I hereby give, devise, and bequeath to my friends, Keith Hallows, Esq., one of the solicitors, John Armstrong, Esq., barrister-at-law, and the Rev. George Allman Armstrong, clerk, and the survivor of them, and the heirs, executors, and administrators of such survivor, all the property of whatsoever nature or kind of which I shall die possessed, or to which I shall be in any way entitled, in trust." Here follow the trusts:—"And in further trust after the decease of my above-named sister-in-law, Jane Carmichael, to pay the following legacies—that is to say, [Here follow the legacies.] These last detailed sums amount altogether to eight thousand five hundred pounds, the calculated amount of the residuary legacy bequeathed to me by my brother. And I hereby appoint the above-named Keith Hallows, John Armstrong, and the Rev. George Allman Armstrong my residuary legatees. And I nominate, constitute, and appoint the above-named Keith Hallows, John Armstrong, and the Rev. George Allman, executors of this my last will and testament." The will of the said Jane Carmichael (which was made after the death of the said Andrew Carmichael) commences with a recital in these words, viz.:—"Whereas I am entitled to a moiety of the residue of the property of my late husband, under his will, dated the 6th day of February, 1849, and the codicil thereto dated the 30th day of March, 1849. And whereas I am also possessed of certain Great Southern and Western Stock and Preferential Shares, and money in the Government Funds, to the value of eight thousand pounds, or thereabouts;" and after referring to a sum of ten thousand pounds which the said Richard Carmichael had given her the disposal of for marriage portions for two of her nieces, and having stated the way in which she wished five thousand pounds, part of that sum, to be disposed of in case one of such nieces should not be married in her lifetime, the said

Jane Carmichael directed as follows:—"But in case of this disposal of the said sum of five thousand pounds being questioned or disputed, so that the same shall not be paid to the use of the said Harriette as last aforesaid, I hereby direct that my said trustees retain, for the use of the said Harriette, as aforesaid, the sum of five thousand pounds out of the residue to which I am or may be entitled under the said will and codicil of my late husband, or as far as the said residue may extend, instead of paying the said residue to the legatees hereinafter mentioned of the same, provided that if the said residue shall amount to more than the sum of five thousand pounds, then the balance shall be divided rateably among the said legatees." And the said Jane Carmichael bequeathed to certain parties therein named her property of every kind, upon trust, to pay out of the residue to which she was, or might be entitled under the will of her late husband, certain pecuniary legacies, and subsequently disposed of the property before referred to as consisting of Great Southern and Western Railway Stock, and Preferential Shares, and Government Stock, to which she stated she was entitled in her own right. The said cause petition further stated that a question had arisen between the respondents thereto as to the construction of the will and codicil of the said Richard Carmichael and their respective rights under the same; that the appellants and other legatees named in the will of the said Andrew Carmichael alleged that under the will and codicil of said Richard Carmichael, and upon the true construction thereof, the said Andrew Carmichael and Jane Carmichael were tenants in common of the residue of the estate of the said Richard Carmichael, and that one moiety of the said residue belonged, and was payable, to the legatees of the said Andrew Carmichael; but that, on the other hand, the said Robert Jebb, and the said Wellington Colomb and James Adamson Bell, as such trustees as therein mentioned, alleged that the said Jane Carmichael and Andrew Carmichael were joint tenants of the said residue; and that upon the death of the said Andrew Carmichael, the said Jane Carmichael became entitled to the whole of the said residue; and that the same then belonged, and was payable, to the legatees of the said Jane Carmichael; and the petition submitted the said question to the decision of the Court of Chancery; and the said cause petition prayed, amongst other things, for an order that the trusts of the will of the said Richard Carmichael, and the codicil thereto, might be carried into execution; and for a declaration of the true construction and effect of the said will and codicil, in relation to the residue of the estate of the said Richard Carmichael, and for an administration of his real and personal estate. The said cause petition came on for hearing, before the Master of the Rolls, on the 6th and 8th days of June, 1865, whereupon it was ordered and declared, that according to the true construction of the will and codicil of the said Richard Carmichael, deceased, the said Andrew Carmichael and Jane Carmichael became, and were upon the death of the said Richard Carmichael entitled to the residue of the property of the said Richard Carmichael after payment of his debts, legacies, and funeral expenses, as joint tenants, and not as tenants in



common; and that upon the death of the said Andrew Carmichael, the said Jane Carmichael, who survived the said Andrew Carmichael, became entitled to the entire of the said residue. And the said order then went on to direct the taking of the usual accounts in an administration suit.

*J. T. Ball, Q. C.*, with *W. D. Andrews*, were heard in support of the appeal.—The Master of the Rolls has decided erroneously that Andrew Carmichael and Richard Carmichael took as joint tenants, whereas he should have decided that they were tenants in common. Andrew Carmichael understood that he was tenant in common, and on looking into Richard Carmichael's will it is evident he calculated that the life of his brother would not be as long as that of his widow, for he says so plainly; reading the will and codicil together, he meant them to be tenants in common of the residue. That a residue may be taken in joint tenancy was decided by Lord Eldon in the case of *Crooke v. De Vandes* (9 Ves. 197). Lord Eldon has there laid down a rule which one of the recent Chancellors of England has lately remarked upon that it ought to be overturned by Act of Parliament. And the judges in latter years have invariably struggled against this description of tenancy as clearly contrary to the feelings and wishes of the testator. If a person chooses to create a joint tenancy he should so express his intention; and Sir Edward Sugden expresses himself as against joint tenancies in *Alloway v. Alloway* (4 Dr. & War. 391). That was where "a testator by his will charged his estates with £6000, and directed same to be paid to and among such of my young children as shall survive my said wife, in such shares and proportions and at such times after his death as she shall direct by her will or deed." His wife by her will "directed and appointed £3000 to the two elder girls." And it was there held that (although those elder girls were not treated by their mother, the testator's said wife, as a class, yet, nevertheless) they took as tenants in common, and not as joint tenants; and Sir Edward Sugden, in giving judgment in that case, page 390, thus expresses himself: "It is very possible that if another judge were sitting in this place he might arrive at a different conclusion; but still in the absence of a clear intention to create a joint tenancy, I think I have adopted a true construction, and that which effectuates the intention."—*Norman v. Fraser* (3 Hare, 84). Now look to the language the testator uses in the codicil: "It is my will that my wife and brother shall be my residuary legatees." He there uses the plural number; but if the surviving joint tenant was to take, it is evident he would signify his intention by using the singular number, as only one would then enjoy same. Lastly—the very will shows that Dr. Carmichael was when making his will *inops consilii*. That Richard Carmichael thought that his brother would pre-decease his wife Jane is manifest, from the expression of hope he makes use of that his wife and brother will live together, which, however, from the state of his brother's health, cannot be long. This expression then implied that the testator's expectation was that his wife would survive his brother, and this overturns the argument in favour of joint tenancy.

*Brewster, Q.C.* appeared in support of the order

of the Master of the Rolls.—It is a matter of strict law, no matter how strongly judges may lament it and may struggle against it, that the law is that laid down by Lord Eldon in *Crooke v. De Vandes* (9 Vesey, 197), and the current of authority is clear—*Morley v. Bird* (3 Vesey, junior, 628). In that case the Master of the Rolls says—"I wish to give my opinion very explicitly. Great doubts have been entertained by judges both in law and in equity as to words creating a joint tenancy, or a tenancy in common; and it is clear that the ancient law was in favour of a joint tenancy, and that law still prevails. Unless there are some words to sever the interest between it is at this moment a joint tenancy, notwithstanding the leaning of the Court lately in favour of a tenancy in common."—*Bustard v. Saunders* (7 Beav. 92) following *De Witte v. De Witte* (11 Sim. 41). A very late case is *Williams v. Hensman* (1 John. & Hem. 546); *Oliver v. Whyte* (31 L.J., n.s., 689); *McGregor v. McGregor* (1 De Gex, F. & J., 62).

THE LORD CHANCELLOR.—I am of opinion that the Master of the Rolls has arrived in this case at a correct conclusion; and I think that the law is well settled on this point, that the appointing two persons residuary legatees merely, creates a joint tenancy. We would be breaking down the well established rules if we were to decide otherwise. No doubt, if the testator had used such words as would imply that he meant a tenancy in common, the case would be otherwise, but I do not see anything in this will that would lead to such a presumption.

THE LORD JUSTICE OF APPEAL did not see any words in this will which would lead him to hold that there was a tenancy in common created by this instrument.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

REEVES v. MALCOMSON.—April.

*Fishery Appeal—Sending back case—Evidence of tides.*

*Case sent back to the Commissioners to inquire by further evidence whether any part of a weir was above low water mark of ordinary spring tides, or whether it was below low water mark.*

*Brewster, Q.C.*, on behalf of the appellant, moved to have the case sent back to the Commissioners of Fisheries, to inquire by further evidence whether any part of the Parcrudh weir was above the low water mark. It will be seen that on a former occasion (*vid. ante*, vol. 10, p. 392) the Court decided that as the whole fishing gear of this weir was situated below low water mark, the weir should be abated. The finding of the Commissioners as to the position of the weir was, it appeared, based upon the evidence of one witness, whose oppos-

tunities of observation had been limited to one occasion. Affidavits were now made by persons living on the coast in the neighbourhood of the weir, stating that it was very difficult to ascertain the limits of low-water at ordinary tides, that the storms in the Atlantic had a great effect upon them, and that it would be necessary to have more observations made as to the tides in this locality. Counsel referred to a case of *Attorney-General v. Hickson*, pending in Chancery, where the Lord Chancellor had directed a series of observations to be made to ascertain what was the limit of low-water mark.

*Tandy* followed on the same side.

There was no appearance for the respondent.

THE COURT made the order sought.

#### CHESNEY v. O'NEILL.—April.

##### *Trespass—Damages—Evidence—New trial motion.*

*In an action for trespass committed by sheep of the defendant upon mountain land belonging to the plaintiff, the judge directed the jury that they should only give damages for the actual amount of injury done. The jury gave £10. The Court, although the sum was greater than the injury done could possibly have amounted to, refused to set aside the verdict on the ground of the damages being excessive.*

*Certain sheep of the defendant having trespassed upon lands of the plaintiff, plaintiff's herd was driving them to pound, and on his way met the defendant's son. In a conversation between them, the defendant's son used some expressions tending, if admissible, to shew that the trespass was wilful. A short time subsequently defendant's son drove away the sheep. An action of trespass having been brought, the above conversation was, on the trial, offered in evidence by the plaintiff, and objected to by the defendant. The evidence having been admitted by the judge, the jury found for the defendant with £10 damages. The Court refused to set the verdict aside, on the ground of the reception of illegal evidence.*

*Quære—Has the rule that the Court will not grant a new trial on the ground of the verdict being against evidence, where the verdict is under £20, been altered by the Common Law Procedure Acts of 1853 and 1856?*

THIS was a motion to show cause against a conditional order for a new trial obtained by the defendant on the 4th November, on the grounds of the reception of illegal evidence, and also of the damages being excessive. The summons and plaint, which was tested the 19th June, 1865, complained that the defendant, on the 1st June, 1865, and on divers other days between that day and the commencement of the suit, broke and entered certain lands of the plaintiff at Ballaghaneery, in the parish of Kilkeel and County of Down, and pastured the same with cattle and sheep, to the

plaintiff's damage of £100. To this the defendant pleaded that at the time of the alleged trespasses he was possessed of certain lands adjoining the said lands of the plaintiff, and the plaintiff and all others the tenants and occupiers of the said lands of the plaintiff then and at all times of right ought to have maintained and repaired the fences between the said lands of the defendant and the said lands of the plaintiff, so as to prevent cattle and sheep lawfully being and depasturing on their lands respectively from escaping out of the one lands into the other of them through want or defects of the said fences, and because said fences, at the time of the alleged trespasses, were ruinous and in decay for want of repair thereof, the said cattle then lawfully being and depasturing on the said lands of the defendant, escaped out of the said lands of the defendant into the said lands of the plaintiff, which were the alleged trespasses. The issue was whether this defence was true in substance and in fact.

At the trial before Hayes, J. at the Summer Assizes of 1865 for the County of Antrim, it appeared that the plaintiff, Major-General Chesney, had purchased in 1853 in the Incumbered Estates Court the lands of Ballaghaneery, comprising, along with certain arable lands, the mountain land on which the alleged trespass was committed; that said mountain land formed part of the Mourne Mountains, and was not separated from the mountain lands on either side by any fence. It further appeared that the mountain lands on the south and west of plaintiff's mountain land belonged to the trustees of the Earl of Kilmorey, and that the defendant was their tenant of part of the said mountain, and that the mountain land to the north of said mountain belonged to a Mrs. M'Creight. On the part of the defendant (who began) it was urged that though it was true that some sheep of the defendant had escaped upon the plaintiff's land on the 1st June, yet that this arose from the want of fences between the lands of the defendant and of the plaintiff which adjoined each other, and that efforts had been ineffectually made to induce the plaintiff to join in constructing such fences. A considerable correspondence between the plaintiff and the trustees of Lord Kilmorey's estate, the defendant's landlords, on the subject of erecting fences, was read. This correspondence commenced in 1861, and was continued down to 1863. From it it appeared that Major-General Chesney constantly complained of the trespasses from time to time committed on his land by O'Neill's sheep; that the trustees were willing to join with him in constructing a fence between the portions of mountain belonging to them respectively at their joint expense; that the plaintiff insisted that this would be useless to prevent trespass, and that his share of the expense, which would amount to £150, would be spent in vain, unless what he insisted upon should be done, namely, that the fence to the north should be continued by the trustees at their own expense to a point called "the great Cairn" at some distance in the Mourne Mountains, so as to prevent any trespass being committed on the plaintiff's mountain by cattle escaping from the mountain of the trustees or their tenant, and getting round to the plaintiff's mountain by way of the mountain lands of Mrs. M'Creight. To this the trustees did not accede. It further appeared

in evidence that the plaintiff had summoned the defendant in August, 1863, before the Petty Sessions Court of Kilkeel for certain trespasses committed by his sheep in that month, and that the magistrates had dismissed the complaint without prejudice, it having been proved that the defendant had gone to the plaintiff, and offered to bear one half the expense of making a fence between the respective mountains. It also appeared that in October, 1863, the plaintiff processed the defendant before the Chairman of the County of Down for trespass on the said mountain, when the said Chairman pronounced a decree for sixpence damages. On the 6th June last, the plaintiff again summoned the defendant before the Kilkeel Petty Sessions for alleged trespass on the 1st June (the subject of the present action), and that case on the application of the defendant was adjourned to the next court day on account of the absence of Mr. Henry, the agent of Lord Kilmorey's trustees, whereupon the plaintiff commenced the present action. The defendant was produced at the trial, and expressly denied that the trespass of his sheep was in any respect wilful or intentional on his part. He was not cross-examined as to his son or any acts of his. The plaintiff's counsel then stated the plaintiff's case, and demanded substantial damages for what he represented as a wilful and intentional act of trespass on the part of the defendant. The plaintiff being examined, admitted that the entire mountain portion of his property was set for £30 a year when he purchased, and for some time afterwards. The only other witness called for the plaintiff was one Michael M'Cartan, who had acted as his herd in the month of June last. This witness stated that on the 1st June last he saw some sheep and cattle on the plaintiff's mountain; that there were sixty-two sheep there belonging to the defendant which witness collected and drove down the road to take them to pound, along with the cattle which did not belong to the defendant; that he on his way met young Hugh O'Neill, the son of the defendant, part of whose occupation was to look after his father's sheep, but whom he had not seen that morning before. Young O'Neill was then leading a horse which was drawing sea-rack in a cart along the road. Plaintiff's counsel then proposed to examine M'Cartan as to a conversation which he alleged he had on that occasion with young O'Neill. Counsel for the defendant objected to this conversation being admitted in evidence, but the learned judge received it subject to objection. M'Cartan then stated that he asked young O'Neill to come and look if any of the sheep were his father's; that he replied that it was not sheep he was looking after, that he was employed in drawing rack. M'Cartan replied that some of the sheep were his, young O'Neill's, father's, for one had the initials of his father's name branded upon it. The witness further stated that he then proceeded to drive the sheep towards the pound according to his instructions, and that young O'Neill crossed him again at the lane leading to his father's horse driving the cart of rack, and demanded sixty-two of the sheep; witness then stated that he said to young O'Neill that he, O'Neill, knew that he, witness, was employed to watch the mountain, and he, witness, asked him were they going to pay the trespass, when young O'Neill said

"No," and added, "You know you tried this before, and you know what you made of it." All this conversation was objected to on behalf of the defendant, but was received by the judge subject to objection. Witness was then asked had he seen young O'Neill driving sheep on the plaintiff's mountain, and witness said he had seen him doing so about a fortnight since. Counsel for the defendant objected to this evidence, as the alleged act deposed to had occurred after action brought, but the learned judge received the evidence. No evidence was given of any damage having resulted to the plaintiff from the alleged trespass, the subject-matter of the action, nor was it shown or attempted to be shown how or when the sheep had escaped, or come upon the plaintiff's mountain. The learned judge was called upon, on behalf of the plaintiff, to tell the jury that there was evidence to show that the acts of trespass were intentional and wilful; he then read over to them the evidence of M'Cartan which had been objected to, but he expressly told the jury that they ought only to give the plaintiff compensation for the damage which he had sustained. The jury found for the plaintiff with £10 damages, which the learned judge in his report, stated he thought high. A conditional order for a new trial having been obtained by the defendant as above stated, cause was now shown against it on behalf of the plaintiff. It was admitted that the action was really and in fact defended by the trustees of Lord Kilmorey.

*Harrison, Q.C. and Jackson*, in support of the conditional order.—The damages here were excessive. The sheep could not have consumed £10 worth of grass while on the plaintiff's mountain. The evidence of the conversation between M'Cartan and young O'Neill was by no means admissible, and it certainly influenced the jury.—1st Taylor on Evidence, par. 534, 539; *Fairlie v. Hastings* (10 Ves. 123); *Langhorne v. Allnutt* (4 Taunt. 513); *Pools v. Whitcombe* (3 Fost. & Finl. 70) Mayne on Damages, 345; *Great Western Railway Co. v. Willis* (34 L. J. n. s. C. P. 195); *Starkie on Evidence*, p. 806; *Pearson v. Lemaitre* (5 M. & Gr. 700); *Finnerty v. Tipper* (2 Campb. 72); *Garth v. Howard* (8 Bingh. 451).

*Ferguson, Q.C., and Falkiner*, contra.—There was no obligation on the plaintiff to join in building the wall, and if the defendant allowed his sheep to escape, he must bear the consequences.—*Singleton v. Williamson* (31 L. J. Exch. 17); *Addison on Wrongs*, 463. The whole question was legitimately before the jury for the purpose of damages. Where intention is involved, the jury is to decide *ex antecedentibus et consequentibus*.—*Mortimer v. M'Callan* (6 M. & W. 69); *Harris v. Dignum* (29 L. J. Exch. 23); *Milne v. Leisler* (31 L. J. Exch. 257; s. c. 7 H. & N. 786); *Merest v. Harvey* (5 Taunt. 442). The judge has not stated that he is dissatisfied with the verdict.—*Irwin v. Callwell* (12 Ir. C. L. R. 144). The rule formerly was not to disturb verdicts for less than £20. That rule has not been abolished by the Common Law Procedure Act. *Hawkins v. Alder* (18 C. B. 640).

*LEFROY, O.J.*—We are all of opinion not to disturb this verdict. A vast number of topics have been introduced, with respect to the relevancy of which observations might be made; but it is unnecessary to

those observations with a view to give a reason for the decision we have come to. A good deal of the difficulty with respect to the hardship of the party was said to arise from a party wall between the several lands of the plaintiff, and of those that are virtually the defendant. It appears that the trustees of Lord Kilmacree really the persons defending this action. But with respect to the law as to lands adjoining each other, the law is perfectly clear. If the parties can come to an agreement for a common boundary between them all is well, but if they are so obstinate that neither will agree with his neighbours or make a boundary himself, it will come to this that if they do not choose to defend their lands either mutually or each for himself, they must, at their peril, take care of their cattle and keep them from their neighbours' ground. Therefore, with respect to the liability of the party here, there could be no doubt, for the evidence is beyond all question that some of the sheep of the defendant had been found and taken on the land of the plaintiff. The consequence of that was that the liability to damages arose, and one question is whether the damages given for the trespass were excessive. The direction of the learned judge to the jury was as correct as could possibly be, for he told them that they should take into consideration only the amount of the damage, the exact amount of the damage that really the party suffered by this trespass. We must take for granted, therefore, that the jury followed this direction, and that they estimated what, on the evidence before them, appeared to be the damage, and there is nothing to show that £10 was not the amount of the injury, or that it was in excess over the amount of the injury. We have no means of measuring that excess, and on the contrary, we must presume that the jury followed the directions of the judge, and told them to give the amount of the actual damage and no more. We will not take on ourselves to measure what damages ought to have been given. If it appear from the circumstances of the case as it has done on some occasions, that the damages were excessive on the face of them, I think we would interfere, but there is nothing of the sort here. Then with respect to the other objection, the admission of illegal evidence, the illegal evidence is alleged to be the examination of the herd who was not merely in charge on that occasion, but was in the habit of herding these sheep, and he was driving them to avoid their being put into pound. He was doing his duty to his master in interfering to prevent the sheep being impounded for trespass on other persons' land. He was asked about the sheep, and he said at once that they were his master's sheep. He was competent to do that: he accompanied it by some taunting observation of his own, but that can in no way affect the case. The very amount of the damages shews that that observation, whatever the value of it, could not by possibility have influenced the minds of the jury, to have visited the owner of the sheep with any excess beyond what was reasonable. Upon the whole, therefore, I have not the slightest doubt that the verdict should not be disturbed; that it would be a most mischievous proceeding to do so where there is nothing extravagant in the amount of damages, but on the contrary. If we were to hunt for all the cases in which

verdicts have been set aside on account of the excessive amount of the damages, I do not think we would find one set aside for such an amount as that in the present case. It is true that the damages are given to carry costs; but that alone is not enough. We could by no means come to an assessment of damages that would enable us through that ground to say that the damages were excessive or extravagant. On the whole, therefore, I am of opinion that the verdict should stand.

O'BRIEN, J.—I concur with the opinion expressed by my Lord Chief Justice, though I must confess that at one time I had some doubt on the matter. The two questions as to the admissibility of the evidence and as to the excess of the damages are in some respects connected, as the only ground of objecting to the evidence is that it influenced the jury as to damages. We are not on a bill of exceptions, but on a new trial motion, and the Court must always consider how far the evidence is material, or affected the verdict, so that here the two questions are in some respects connected. Now, I would not concur in the view that the damages should be confined to actual compensation in money for the injury done, because in actions of trespass the jury should consider the circumstances under which the trespasses are committed, and certainly on the correspondence, without going into the question who was right or wrong, but on the correspondence it is manifest there was sufficient evidence for the jury to conclude that the trespass was done, as the counsel for the plaintiff called on the judge to leave to the jury, wilfully and intentionally, and the object was manifestly to force General Chesney to an arrangement as to the boundary between the two properties. The judge told the jury that they were to estimate the amount of the damages by pecuniary compensation. The jury do not seem to have done that, for the sixty-two sheep trespassing on the land for a couple of hours could not amount to £10, but I think the jury were entitled to take into consideration the circumstances and the previous acts of the parties to shew that it was done for another purpose, and to attain another object. That being so, we are asked to set aside the verdict on the ground of the damages being excessive. Before the Common Law Procedure Act it was a rule not to send back a case where the damages were so small, because the party obtaining the verdict had to pay the costs of the first trial. I doubt if that rule is altered now, and that is the opinion which I recollect entertaining when the conditional order was obtained. It occurred to me, and it was suggested by Mr. Harrison, that that is altered by the Common Law Procedure Act, which according to the amount of the verdict either deprives the plaintiff altogether of costs, or entitles him only to half costs. But is it so clear that this is a case which would come within the provisions of the Act of either 1853 or 1856? First, is it not perhaps an action brought to try a right more extensive than the sum required? The defendant relied on this that he was justified in the trespass because General Chesney had failed to keep up the fence. That was the ground on which he rested his defence, and which he failed to establish; so, it would be by no means clear that if the verdict was under £5 the section would apply. Even if the

parties lived within the same civil bill jurisdiction, I am by no means satisfied that the judge would not certify, having regard to the controversy between the parties, and the length of time that it lasted, so that, even if we were to consider the old practice altered, we would not necessarily depart from the old rule of the Court, of not sending back the case to a new trial. Well, now, the damages themselves do not seem to be excessive in amount. But, now, as to the evidence that has been objected to. This boy was, undoubtedly, the herd of the defendant. The man was driving the sheep, and he asked him to point out his father's, and the boy came back and selected the defendant's sheep, and the plaintiff's herd asked him was he going to pay for trespass. Was that not a proper question? Was it not part of the transaction, and was not the answer likewise so? The answer was impertinent and taunting. If it was put on the ground that the defendant was bound to pay damages for that, I would not go the length of saying that the damages ought to be increased for that, but that does not affect the admissibility of the evidence, because the answer of the boy came in answer to a question properly put. But did it so affect the jury? It struck me at first that the counsel might have called on the judge to direct the jury that they were not to increase the damages on account of that answer of the son of the defendant. The counsel for the defendant did not ask that, but on the contrary, I find that Mr. Harrison states that the judge told the jury that they were not. So here I have the evidence admitted; but the judge tells the jury that they are not to increase the damages on account of it. I am not, therefore, to come to the conclusion that they did so, especially when on the whole of the case there was ample matter to justify the jury in giving the damages which they did. If the act was done by the son it is difficult to say that it was not evidence. I do not think on the face of the report that the damages were excessive.

FITZGERALD, J. concurred.

*Case shown allowed with costs.*



## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**CORP. v. THE BELFAST & CO. DOWN RAILWAY CO.**  
*April.*

*Setting aside defences.*

*To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway,*

*unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B. and C preference shares; and that the profits never exceeded the amount sufficient."* &c. The Court refused an application by the plaintiff that this plea should be set aside or amended.

THE first count of the summons and plaint complained that by the Belfast and County Down Railway Act, 1846, a company was incorporated by the name of the Belfast and County Down Railway Company; and thereby the said company were authorized to raise a capital of £500,000, divided into 10,000 shares of £50 each. And by the Belfast and County Down Railway Act, 1855, after reciting that the said company had in fact issued 7830 shares, of which 2996 had been forfeited for non-payment of calls, the said original company was dissolved and a new company was incorporated, by the name of the Belfast and County Down Railway Company, being the defendants in this action. And it was enacted (by sec. 15) that the capital of the company should be £500,000, and that it should be lawful for the company to create and issue new shares, and also to issue shares in the stead of those so forfeited as aforesaid, but so that the whole nominal amount of the capital of the company in shares should not exceed £500,000; and the shares so to be created and issued should be entitled to a fixed annual dividend at the rate of £5 per cent. per annum upon the sums for the time being paid up thereon, provided there should be no arrear of calls upon such shares, such dividend being from time to time paid in preference to the payment of dividends on the existing shares of the company. And further (by sec. 16), that the shares so to be issued and created should be of such amount as would conveniently allow the same to be apportioned among the shareholders of the company, and should be considered as part of the general capital of the company. And further (by sec. 17), that the shares so to be created or issued should, in the first instance, be offered to the persons who had then already subscribed for the same and paid the deposit thereon; and any shares not so disposed of should be offered to the existing shareholders of the company other than those who had so subscribed in proportion to the number of shares held by such existing shareholders; and such offer should be made by letter, under the hand of the secretary, given to each such shareholder, or sent by post, addressed to him according to his address in the shareholders' address-book, or left at his usual place of abode; and if any such shareholder should fail, for one month after such offer, to accept the said shares and pay the instalments called for in respect thereof, it should be lawful for the company to dispose of the same shares in the manner they should deem most advantageous for the company. And the plaintiff further saith that after the passing of the said last-mentioned Act the defendants did issue new or preference shares to the number of 3361, and of the nominal amount of £50 each; and that by the Belfast and County Down Railway Act, 1858, after reciting that by the said Act of 1855 the defendants were authorized to issue certain new shares of such nominal

go into those observations with a view to give a reason for the decision we have come to. A good deal was said with respect to the hardship of the party not agreeing to a party wall between these several lands of the plaintiff, and of those that are virtually the defendants. It appears that the trustees of Lord Kilmorey were really the persons defending this action. But with respect to the law as to lands adjoining each other, the law is perfectly clear. If the parties can come to an agreement for a common boundary between them all is well, but if they are so obstinate that neither will agree with his neighbours or make a boundary himself, it will come to this that if they do not choose to defend their lands either mutually or each for himself, they must, at their peril, take care of their cattle and keep them from their neighbours' ground. Therefore, with respect to the liability of the party here, there could be no doubt, for the evidence is beyond all question that some of the sheep of the defendant had been found and taken on the land of the plaintiff. The consequence of that was that the liability to damages arose, and one question is whether the damages given for the trespass were excessive. The direction of the learned judge to the jury was as correct as could possibly be, for he told them that they should take into consideration only the amount of the damage, the exact amount of the damage that really the party suffered by this trespass. We must take for granted, therefore, that the jury followed this direction, and that they estimated what, on the evidence before them, appeared to be the damage, and there is nothing to show that £10 was not the amount of the injury, or that it was in excess over the amount of the injury. We have no means of measuring that excess, and on the contrary, we must presume that the jury followed the directions of the judge, and told them to give the amount of the actual damage and no more. We will not take on ourselves to measure what damages ought to have been given. If it appear from the circumstances of the case as it has done on some occasions, that the damages were excessive on the face of them, I think we would interfere, but there is nothing of the sort here. Then with respect to the other objection, the admission of illegal evidence, the illegal evidence is alleged to be the examination of the herd who was not merely in charge on that occasion, but was in the habit of herding these sheep, and he was driving them to avoid their being put into pound. He was doing his duty to his master in interfering to prevent the sheep being impounded for trespass on other persons' land. He was asked about the sheep, and he said at once that they were his master's sheep. He was competent to do that: he accompanied it by some taunting observation of his own, but that can in no way affect the case. The very amount of the damages shews that that observation, whatever the value of it, could not by possibility have influenced the minds of the jury, to have visited the owner of the sheep with any excess beyond what was reasonable. Upon the whole, therefore, I have not the slightest doubt that the verdict should not be disturbed; that it would be a most mischievous proceeding to do so where there is nothing extravagant in the amount of damages, but on the contrary. If we were to hunt for all the cases in which

verdicts have been set aside on account of the excessive amount of the damages, I do not think we would find one set aside for such an amount as that in the present case. It is true that the damages are given to carry costs; but that alone is not enough. We could by no means come to an assessment of damages that would enable us through that ground to say that the damages were excessive or extravagant. On the whole, therefore, I am of opinion that the verdict should stand.

O'BRIEN, J.—I concur with the opinion expressed by my Lord Chief Justice, though I must confess that at one time I had some doubt on the matter. The two questions as to the admissibility of the evidence and as to the excess of the damages are in some respects connected, as the only ground of objecting to the evidence is that it influenced the jury as to damages. We are not on a bill of exceptions, but on a new trial motion, and the Court must always consider how far the evidence is material, or affected the verdict, so that here the two questions are in some respects connected. Now, I would not concur in the view that the damages should be confined to actual compensation in money for the injury done, because in actions of trespass the jury should consider the circumstances under which the trespasses are committed, and certainly on the correspondence, without going into the question who was right or wrong, but on the correspondence it is manifest there was sufficient evidence for the jury to conclude that the trespass was done, as the counsel for the plaintiff called on the judge to leave to the jury, wilfully and intentionally, and the object was manifestly to force General Chesney to an arrangement as to the boundary between the two properties. The judge told the jury that they were to estimate the amount of the damages by pecuniary compensation. The jury do not seem to have done that, for the sixty-two sheep trespassing on the land for a couple of hours could not amount to £10, but I think the jury were entitled to take into consideration the circumstances and the previous acts of the parties to shew that it was done for another purpose, and to attain another object. That being so, we are asked to set aside the verdict on the ground of the damages being excessive. Before the Common Law Procedure Act it was a rule not to send back a case where the damages were so small, because the party obtaining the verdict had to pay the costs of the first trial. I doubt if that rule is altered now, and that is the opinion which I recollect entertaining when the conditional order was obtained. It occurred to me, and it was suggested by Mr. Harrison, that that is altered by the Common Law Procedure Act, which according to the amount of the verdict either deprives the plaintiff altogether of costs, or entitles him only to half costs. But is it so clear that this is a case which would come within the provisions of the Act of either 1853 or 1856? First, is it not perhaps an action brought to try a right more extensive than the sum required? The defendant relied on this that he was justified in the trespass because General Chesney had failed to keep up the fence. That was the ground on which he rested his defence, and which he failed to establish; so, it would be by no means clear that if the verdict was under £5 the section would apply. Even if the

parties lived within the same civil bill jurisdiction, I am by no means satisfied that the judge would not certify, having regard to the controversy between the parties, and the length of time that it lasted, so that, even if we were to consider the old practice altered, we would not necessarily depart from the old rule of the Court, of not sending back the case to a new trial. Well, now, the damages themselves do not seem to be excessive in amount. But, now, as to the evidence that has been objected to. This boy was, undoubtedly, the herd of the defendant. The man was driving the sheep, and he asked him to point out his father's, and the boy came back and selected the defendant's sheep, and the plaintiff's herd asked him was he going to pay for trespass. Was that not a proper question? Was it not part of the transaction, and was not the answer likewise so? The answer was impertinent and taunting. If it was put on the ground that the defendant was bound to pay damages for that, I would not go the length of saying that the damages ought to be increased for that, but that does not affect the admissibility of the evidence, because the answer of the boy came in answer to a question properly put. But did it so affect the jury? It struck me at first that the counsel might have called on the judge to direct the jury that they were not to increase the damages on account of that answer of the son of the defendant. The counsel for the defendant did not ask that, but on the contrary, I find that Mr. Harrison states that the judge told the jury that they were not. So here I have the evidence admitted; but the judge tells the jury that they are not to increase the damages on account of it. I am not, therefore, to come to the conclusion that they did so, especially when on the whole of the case there was ample matter to justify the jury in giving the damages which they did. If the act was done by the son it is difficult to say that it was not evidence. I do not think on the face of the report that the damages were excessive.

FITZGERALD, J. concurred.

*Case shown allowed with costs.*



## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**GOREY v. THE BELFAST & CO. DOWN RAILWAY CO.**  
*April.*

*Setting aside defences.*

*To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway,*

*unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B, and C preference shares; and that the profits never exceeded the amount sufficient," &c. The Court refused an application by the plaintiff that this plea should be set aside or amended.*

THE first count of the summons and plaint complained that by the Belfast and County Down Railway Act, 1846, a company was incorporated by the name of the Belfast and County Down Railway Company; and thereby the said company were authorized to raise a capital of £500,000, divided into 10,000 shares of £50 each. And by the Belfast and County Down Railway Act, 1855, after reciting that the said company had in fact issued 7830 shares, of which 2996 had been forfeited for non-payment of calls, the said original company was dissolved and a new company was incorporated, by the name of the Belfast and County Down Railway Company, being the defendants in this action. And it was enacted (by sec. 16) that the capital of the company should be £500,000, and that it should be lawful for the company to create and issue new shares, and also to issue shares in the stead of those so forfeited as aforesaid, but so that the whole nominal amount of the capital of the company in shares should not exceed £500,000; and the shares so to be created and issued should be entitled to a fixed annual dividend at the rate of £5 per cent. per annum upon the sums for the time being paid up thereon, provided there should be no arrear of calls upon such shares, such dividend being from time to time paid in preference to the payment of dividends on the existing shares of the company. And further (by sec. 16), that the shares so to be issued and created should be of such amount as would conveniently allow the same to be apportioned among the shareholders of the company, and should be considered as part of the general capital of the company. And further (by sec. 17), that the shares so to be created or issued should, in the first instance, be offered to the persons who had then already subscribed for the same and paid the deposit thereon; and any shares not so disposed of should be offered to the existing shareholders of the company other than those who had so subscribed in proportion to the number of shares held by such existing shareholders; and such offer should be made by letter, under the hand of the secretary, given to each such shareholder, or sent by post, addressed to him according to his address in the shareholders' address-book, or left at his usual place of abode; and if any such shareholder should fail, for one month after such offer, to accept the said shares and pay the instalments called for in respect thereof, it should be lawful for the company to dispose of the same shares in the manner they should deem most advantageous for the company. And the plaintiff further saith that after the passing of the said last-mentioned Act the defendants did issue new or preference shares to the number of 3361, and of the nominal amount of £50 each; and that by the Belfast and County Down Railway Act, 1858, after reciting that by the said Act of 1855 the defendants were authorized to issue certain new shares of such nominal



go into those observations with a view to give a reason for the decision we have come to. A good deal was said with respect to the hardship of the party not agreeing to a party wall between the several lands of the plaintiff, and of those that are virtually the defendants. It appears that the trustees of Lord Kilmorey were really the persons defending this action. But with respect to the law as to lands adjoining each other, the law is perfectly clear. If the parties can come to an agreement for a common boundary between them all is well, but if they are so obstinate that neither will agree with his neighbours or make a boundary himself, it will come to this that if they do not choose to defend their lands either mutually or each for himself, they must, at their peril, take care of their cattle and keep them from their neighbours' ground. Therefore, with respect to the liability of the party here, there could be no doubt, for the evidence is beyond all question that some of the sheep of the defendant had been found and taken on the land of the plaintiff. The consequence of that was that the liability to damages arose, and one question is whether the damages given for the trespass were excessive. The direction of the learned judge to the jury was as correct as could possibly be, for he told them that they should take into consideration only the amount of the damage, the exact amount of the damage that really the party suffered by this trespass. We must take for granted, therefore, that the jury followed this direction, and that they estimated what, on the evidence before them, appeared to be the damage, and there is nothing to show that £10 was not the amount of the injury, or that it was in excess over the amount of the injury. We have no means of measuring that excess, and on the contrary, we must presume that the jury followed the directions of the judge, and told them to give the amount of the actual damage and no more. We will not take on ourselves to measure what damages ought to have been given. If it appear from the circumstances of the case as it has done on some occasions, that the damages were excessive on the face of them, I think we would interfere, but there is nothing of the sort here. Then with respect to the other objection, the admission of illegal evidence, the illegal evidence is alleged to be the examination of the herd who was not merely in charge on that occasion, but was in the habit of herding these sheep, and he was driving them to avoid their being put into pound. He was doing his duty to his master in interfering to prevent the sheep being impounded for trespass on other persons' land. He was asked about the sheep, and he said at once that they were his master's sheep. He was competent to do that: he accompanied it by some taunting observation of his own, but that can in no way affect the case. The very amount of the damages shews that that observation, whatever the value of it, could not by possibility have influenced the minds of the jury, to have visited the owner of the sheep with any excess beyond what was reasonable. Upon the whole, therefore, I have not the slightest doubt that the verdict should not be disturbed; that it would be a most mischievous proceeding to do so where there is nothing extravagant in the amount of damages, but on the contrary. If we were to hunt for all the cases in which

verdicts have been set aside on account of the excessive amount of the damages, I do not think we would find one set aside for such an amount as that in the present case. It is true that the damages are given to carry costs; but that alone is not enough. We could by no means come to an assessment of damages that would enable us through that ground to say that the damages were excessive or extravagant. On the whole, therefore, I am of opinion that the verdict should stand.

O'BRIEN, J.—I concur with the opinion expressed by my Lord Chief Justice, though I must confess that at one time I had some doubt on the matter. The two questions as to the admissibility of the evidence and as to the excess of the damages are in some respects connected, as the only ground of objecting to the evidence is that it influenced the jury as to damages. We are not on a bill of exceptions, but on a new trial motion, and the Court must always consider how far the evidence is material, or affected the verdict, so that here the two questions are in some respects connected. Now, I would not concur in the view that the damages should be confined to actual compensation in money for the injury done, because in actions of trespass the jury should consider the circumstances under which the trespasses are committed, and certainly on the correspondence, without going into the question who was right or wrong, but on the correspondence it is manifest there was sufficient evidence for the jury to conclude that the trespass was done, as the counsel for the plaintiff called on the judge to leave to the jury, wilfully and intentionally, and the object was manifestly to force General Chesney to an arrangement as to the boundary between the two properties. The judge told the jury that they were to estimate the amount of the damages by pecuniary compensation. The jury do not seem to have done that, for the sixty-two sheep trespassing on the land for a couple of hours could not amount to £10, but I think the jury were entitled to take into consideration the circumstances and the previous acts of the parties to shew that it was done for another purpose, and to attain another object. That being so, we are asked to set aside the verdict on the ground of the damages being excessive. Before the Common Law Procedure Act it was a rule not to send back a case where the damages were so small, because the party obtaining the verdict had to pay the costs of the first trial. I doubt if that rule is altered now, and that is the opinion which I recollect entertaining when the conditional order was obtained. It occurred to me, and it was suggested by Mr. Harrison, that that is altered by the Common Law Procedure Act, which according to the amount of the verdict either deprives the plaintiff altogether of costs, or entitles him only to half costs. But is it so clear that this is a case which would come within the provisions of the Act of either 1853 or 1856? First, is it not perhaps an action brought to try a right more extensive than the sum required? The defendant relied on this that he was justified in the trespass because General Chesney had failed to keep up the fence. That was the ground on which he rested his defence, and which he failed to establish; so, it would be by no means clear that if the verdict was under £5 the section would apply. Even if the

parties lived within the same civil bill jurisdiction, I am by no means satisfied that the judge would not certify, having regard to the controversy between the parties, and the length of time that it lasted, so that, even if we were to consider the old practice altered, we would not necessarily depart from the old rule of the Court, of not sending back the case to a new trial. Well, now, the damages themselves do not seem to be excessive in amount. But, now, as to the evidence that has been objected to. This boy was, undoubtedly, the herd of the defendant. The man was driving the sheep, and he asked him to point out his father's, and the boy came back and selected the defendant's sheep, and the plaintiff's herd asked him was he going to pay for trespass. Was that not a proper question? Was it not part of the transaction, and was not the answer likewise so? The answer was impertinent and taunting. If it was put on the ground that the defendant was bound to pay damages for that, I would not go the length of saying that the damages ought to be increased for that, but that does not affect the admissibility of the evidence, because the answer of the boy came in answer to a question properly put. But did it so affect the jury? It struck me at first that the counsel might have called on the judge to direct the jury that they were not to increase the damages on account of that answer of the son of the defendant. The counsel for the defendant did not ask that, but on the contrary, I find that Mr. Harrison states that the judge told the jury that they were not. So here I have the evidence admitted; but the judge tells the jury that they are not to increase the damages on account of it. I am not, therefore, to come to the conclusion that they did so, especially when on the whole of the case there was ample matter to justify the jury in giving the damages which they did. If the act was done by the son it is difficult to say that it was not evidence. I do not think on the face of the report that the damages were excessive.

FITZGERALD, J. concurred.

*Costs shown allowed with costs.*

## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**CORRY v. THE BELFAST & CO. DOWN RAILWAY CO.**  
April.

*Setting aside defences.*

*To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway,*

*unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B. and C preference shares; and that the profits never exceeded the amount sufficient," &c. The Court refused an application by the plaintiff that this plea should be set aside or amended.*

THE first count of the summons and plaint complained that by the Belfast and County Down Railway Act, 1846, a company was incorporated by the name of the Belfast and County Down Railway Company; and thereby the said company were authorized to raise a capital of £500,000, divided into 10,000 shares of £50 each. And by the Belfast and County Down Railway Act, 1855, after reciting that the said company had in fact issued 7850 shares, of which 2996 had been forfeited for non-payment of calls, the said original company was dissolved and a new company was incorporated, by the name of the Belfast and County Down Railway Company, being the defendants in this action. And it was enacted (by sec. 16) that the capital of the company should be £500,000, and that it should be lawful for the company to create and issue new shares, and also to issue shares in the stead of those so forfeited as aforesaid, but so that the whole nominal amount of the capital of the company in shares should not exceed £500,000; and the shares so to be created and issued should be entitled to a fixed annual dividend at the rate of £5 per cent. per annum upon the sums for the time being paid up thereon, provided there should be no arrear of calls upon such shares, such dividend being from time to time paid in preference to the payment of dividends on the existing shares of the company. And further (by sec. 16), that the shares so to be issued and created should be of such amount as would conveniently allow the same to be apportioned among the shareholders of the company, and should be considered as part of the general capital of the company. And further (by sec. 17), that the shares so to be created or issued should, in the first instance, be offered to the persons who had then already subscribed for the same and paid the deposit thereon; and any shares not so disposed of should be offered to the existing shareholders of the company other than those who had so subscribed in proportion to the number of shares held by such existing shareholders; and such offer should be made by letter, under the hand of the secretary, given to each such shareholder, or sent by post, addressed to him according to his address in the shareholders' address book, or left at his usual place of abode; and if any such shareholder should fail, for one month after such offer, to accept the said shares and pay the instalments called for in respect thereof, it should be lawful for the company to dispose of the same shares in the manner they should deem most advantageous for the company. And the plaintiff further saith that after the passing of the said last-mentioned Act the defendants did issue new or preference shares to the number of 3361, and of the nominal amount of £50 each; and that by the Belfast and County Down Railway Act, 1858, after reciting that by the said Act of 1855 the defendants were authorized to issue certain new shares of such nominal

go into those observations with a view to give a reason for the decision we have come to. A good deal was said with respect to the hardship of the party not agreeing to a party wall between these several lands of the plaintiff, and of those that are virtually the defendants. It appears that the trustees of Lord Kilmorey were really the persons defending this action. But with respect to the law as to lands adjoining each other, the law is perfectly clear. If the parties can come to an agreement for a common boundary between them all is well, but if they are so obstinate that neither will agree with his neighbours or make a boundary himself, it will come to this that if they do not choose to defend their lands either mutually or each for himself, they must, at their peril, take care of their cattle and keep them from their neighbours' ground. Therefore, with respect to the liability of the party here, there could be no doubt, for the evidence is beyond all question that some of the sheep of the defendant had been found and taken on the land of the plaintiff. The consequence of that was that the liability to damages arose, and one question is whether the damages given for the trespass were excessive. The direction of the learned judge to the jury was as correct as could possibly be, for he told them that they should take into consideration only the amount of the damage, the exact amount of the damage that really the party suffered by this trespass. We must take for granted, therefore, that the jury followed this direction, and that they estimated what, on the evidence before them, appeared to be the damage, and there is nothing to show that £10 was not the amount of the injury, or that it was in excess over the amount of the injury. We have no means of measuring that excess, and on the contrary, we must presume that the jury followed the directions of the judge, and told them to give the amount of the actual damage and no more. We will not take on ourselves to measure what damages ought to have been given. If it appear from the circumstances of the case as it has done on some occasions, that the damages were excessive on the face of them, I think we would interfere, but there is nothing of the sort here. Then with respect to the other objection, the admission of illegal evidence, the illegal evidence is alleged to be the examination of the herd who was not merely in charge on that occasion, but was in the habit of herding these sheep, and he was driving them to avoid their being put into pound. He was doing his duty to his master in interfering to prevent the sheep being impounded for trespass on other persons' land. He was asked about the sheep, and he said at once that they were his master's sheep. He was competent to do that: he accompanied it by some taunting observation of his own, but that can in no way affect the case. The very amount of the damages shews that that observation, whatever the value of it, could not by possibility have influenced the minds of the jury, to have visited the owner of the sheep with any excess beyond what was reasonable. Upon the whole, therefore, I have not the slightest doubt that the verdict should not be disturbed; that it would be a most mischievous proceeding to do so where there is nothing extravagant in the amount of damages, but on the contrary. If we were to hunt for all the cases in which

verdicts have been set aside on account of the excessive amount of the damages, I do not think we would find one set aside for such an amount as that in the present case. It is true that the damages are given to carry costs; but that alone is not enough. We could by no means come to an assessment of damages that would enable us through that ground to say that the damages were excessive or extravagant. On the whole, therefore, I am of opinion that the verdict should stand.

O'BRIEN, J.—I concur with the opinion expressed by my Lord Chief Justice, though I must confess that at one time I had some doubt on the matter. The two questions as to the admissibility of the evidence and as to the excess of the damages are in some respects connected, as the only ground of objecting to the evidence is that it influenced the jury as to damages. We are not on a bill of exceptions, but on a new trial motion, and the Court must always consider how far the evidence is material, or affected the verdict, so that here the two questions are in some respects connected. Now, I would not concur in the view that the damages should be confined to actual compensation in money for the injury done, because in actions of trespass the jury should consider the circumstances under which the trespasses are committed, and certainly on the correspondence, without going into the question who was right or wrong, but on the correspondence it is manifest there was sufficient evidence for the jury to conclude that the trespass was done, as the counsel for the plaintiff called on the judge to leave to the jury, wilfully and intentionally, and the object was manifestly to force General Chesney to an arrangement as to the boundary between the two properties. The judge told the jury that they were to estimate the amount of the damages by pecuniary compensation. The jury do not seem to have done that, for the sixty-two sheep trespassing on the land for a couple of hours could not amount to £10, but I think the jury were entitled to take into consideration the circumstances and the previous acts of the parties to shew that it was done for another purpose, and to attain another object. That being so, we are asked to set aside the verdict on the ground of the damages being excessive. Before the Common Law Procedure Act it was a rule not to send back a case where the damages were so small, because the party obtaining the verdict had to pay the costs of the first trial. I doubt if that rule is altered now, and that is the opinion which I recollect entertaining when the conditional order was obtained. It occurred to me, and it was suggested by Mr. Harrison, that that is altered by the Common Law Procedure Act, which according to the amount of the verdict either deprives the plaintiff altogether of costs, or entitles him only to half costs. But is it so clear that this is a case which would come within the provisions of the Act of either 1853 or 1856? First, is it not perhaps an action brought to try a right more extensive than the sum required? The defendant relied on this that he was justified in the trespass because General Chesney had failed to keep up the fence. That was the ground on which he rested his defence, and which he failed to establish; so, it would be by no means clear that if the verdict was under £5 the section would apply. Even if the

parties lived within the same civil bill jurisdiction, I am by no means satisfied that the judge would not certify, having regard to the controversy between the parties, and the length of time that it lasted, so that, even if we were to consider the old practice altered, we would not necessarily depart from the old rule of the Court, of not sending back the case to a new trial. Well, now, the damages themselves do not seem to be excessive in amount. But, now, as to the evidence that has been objected to. This boy was, undoubtedly, the herd of the defendant. The man was driving the sheep, and he asked him to point out his father's, and the boy came back and selected the defendant's sheep, and the plaintiff's herd asked him was he going to pay for trespass. Was that not a proper question? Was it not part of the transaction, and was not the answer likewise so? The answer was impertinent and taunting. If it was put on the ground that the defendant was bound to pay damages for that, I would not go the length of saying that the damages ought to be increased for that, but that does not affect the admissibility of the evidence, because the answer of the boy came in answer to a question properly put. But did it so affect the jury? It struck me at first that the counsel might have called on the judge to direct the jury that they were not to increase the damages on account of that answer of the son of the defendant. The counsel for the defendant did not ask that, but on the contrary, I find that Mr. Harrison states that the judge told the jury that they were not. So here I have the evidence admitted; but the judge tells the jury that they are not to increase the damages on account of it. I am not, therefore, to come to the conclusion that they did so, especially when on the whole of the case there was ample matter to justify the jury in giving the damages which they did. If the act was done by the son it is difficult to say that it was not evidence. I do not think on the face of the report that the damages were excessive.

FITZGERALD, J. concurred.

*Causes shown allowed with costs.*

## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**CORRY v. THE BELFAST & CO. DOWN RAILWAY CO.**  
April.

*Setting aside defences.*

*To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway,*

*unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B. and C preference shares; and that the profits never exceeded the amount sufficient," &c. The Court refused an application by the plaintiff that this plea should be set aside or amended.*

THE first count of the summons and plaint complained that by the Belfast and County Down Railway Act, 1846, a company was incorporated by the name of the Belfast and County Down Railway Company; and thereby the said company were authorized to raise a capital of £500,000, divided into 10,000 shares of £50 each. And by the Belfast and County Down Railway Act, 1855, after reciting that the said company had in fact issued 7830 shares, of which 2996 had been forfeited for non-payment of calls, the said original company was dissolved and a new company was incorporated, by the name of the Belfast and County Down Railway Company, being the defendants in this action. And it was enacted (by sec. 15) that the capital of the company should be £500,000, and that it should be lawful for the company to create and issue new shares, and also to issue shares in the stead of those so forfeited as aforesaid, but so that the whole nominal amount of the capital of the company in shares should not exceed £500,000; and the shares so to be created and issued should be entitled to a fixed annual dividend at the rate of £5 per cent. per annum upon the sums for the time being paid up thereon, provided there should be no arrear of calls upon such shares, such dividend being from time to time paid in preference to the payment of dividends on the existing shares of the company. And further (by sec. 16), that the shares so to be issued and created should be of such amount as would conveniently allow the same to be apportioned among the shareholders of the company, and should be considered as part of the general capital of the company. And further (by sec. 17), that the shares so to be created or issued should, in the first instance, be offered to the persons who had then already subscribed for the same and paid the deposit thereon; and any shares not so disposed of should be offered to the existing shareholders of the company other than those who had so subscribed in proportion to the number of shares held by such existing shareholders; and such offer should be made by letter, under the hand of the secretary, given to each such shareholder, or sent by post, addressed to him according to his address in the shareholders' address book, or left at his usual place of abode; and if any such shareholder should fail, for one month after such offer, to accept the said shares and pay the instalments called for in respect thereof, it should be lawful for the company to dispose of the same shares in the manner they should deem most advantageous for the company. And the plaintiff further saith that after the passing of the said last-mentioned Act the defendants did issue new or preference shares to the number of 3361, and of the nominal amount of £50 each; and that by the Belfast and County Down Railway Act, 1858, after reciting that by the said Act of 1855 the defendants were authorized to issue certain new shares of such nominal

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FITZGERALD, J. concurred.

*Case shown allowed with costs.*



## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**CORRY v. THE BELFAST & CO. DOWN RAILWAY CO.**  
*April.*

*Setting aside defences.*

*To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway,*

*unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B. and C preference shares; and that the profits never exceeded the amount sufficient," &c. The Court refused an application by the plaintiff that this plea should be set aside or amended.*

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amount as might be deemed expedient in the stead of forfeited shares, or of shares unissued; and that they were required to attach to such new shares a preferential dividend at the rate of £5 per cent. per annum; and that such new shares, to the number of 6361, had been issued, of the nominal value of £50 each; and that inasmuch as it had been found inconvenient to have the same shares of so large an amount as £50 each, it was expedient that the same should be divided, it was enacted (by section 5) that it should be lawful for the directors to divide the shares already issued as aforesaid under the powers of the Act of 1855 into shares of a smaller denomination; and (by sections 6 & 7) that notwithstanding anything contained in the 15th and 17th sections of the said Act of 1855, it should be lawful for the directors from time to time to issue all or any part of the shares which by the said 15th section were authorized to be created but which had not been already issued; and that the directors might issue such shares or any part thereof either without a preferential dividend or with a preferential dividend not exceeding the rate of £5 per cent. per annum, provided always that no preference, or priority of dividend, or other advantage granted by virtue of that Act should prejudice or affect any preference or priority in the payment of interest or dividend on any other shares or stock which should have been granted by the company in pursuance of or which might have been confirmed by any previous Act of Parliament, or which might otherwise be lawfully subsisting. And the plaintiff saith that by the Belfast and County Down Railway Acts, 1855 and 1858 respectively, it was also enacted that the Companies Clauses Consolidation Act, 1845, should be, and the same was thereby incorporated with the said Acts respectively. And the plaintiff further saith that the defendants, in pursuance of the powers conferred upon them by the said Act of 1858, did make a division of certain of the £50 preference shares issued under the said Act of 1855 into shares of a lesser denomination; and all the said preference shares so issued under the said Act of 1855 now consist of, or are represented by, four classes of preference shares; viz. class A, £50 shares (being those which still remain undivided), and class B, £25 shares; class C, £15 shares; and class D, £10 shares, being and representing the residue of the said £50 shares divided into shares of those lesser amounts respectively. And the plaintiff further avers that the defendants, in further pursuance of the said powers conferred upon them by the said Acts of 1855 and 1858, to wit, in the month of February, 1860, duly issued certain, to wit, 1105 £10 shares, distinguished by the letter E, with a preferential dividend of £4 5s. per cent. per annum, and upon each of which said shares the entire nominal amount thereof, that is to say, the sum of £10 was then fully paid to the said company, and the certificate of each of which shares (save as to the name of the proprietor and the date thereof, which was duly inserted therein) was and is in the form following, to wit—

E preference share, £10.

The Belfast and County Down Railway Company.  
Pursuant to the Belfast and County Down Railway Act, 1855, and the Belfast and County Down Rail-

way Act, 1858, this is to certify that A. B. is the proprietor of the preference share of £10 sterling, No. E of the Belfast and County Down Railway Company, subject to the regulations of the said Company, and is entitled to fixed annual dividend at the rate of £4 5s. per cent. per annum in preference to the payment of dividends on the [original existing shares of the Belfast and County Down Railway Company.

Given under the common seal of the said company the day of, &c.

THOS. WARD, Secretary.

And the plaintiff further saith that no dividend whatever has yet been declared or paid by the said defendants upon the said last mentioned or E preference shares. And the plaintiff further avers that he became and was the transferee and proprietor of all, to wit, 1105 of the said E shares, with all arrears of dividends remaining unpaid thereon; and that the several transfers to him of the said E shares were respectively duly delivered to the secretary of the defendants in pursuance of the statute in that behalf; and the plaintiff was duly entered by the defendants in the register of shareholders in the said company as the proprietor of the said E shares according to the statutes in that behalf, and thereupon became, and was, and is entitled as well to all arrears of dividends remaining unpaid on the said shares at the time of such transfer and registration respectively, as also to all dividends thereafter becoming payable thereon. And the plaintiff saith that thereupon it became and was the duty of the said defendants from time to time in apportioning the profits of their said railway applicable to dividend, so far as the same might be sufficient for the purpose, and rateably and *pari passu* with their declaration and payment of dividend and arrears of dividend upon the said A, B, C, and D, preference shares respectively to declare to be payable upon each of the said E preference shares, and pay to the plaintiff, being such registered proprietor thereof as aforesaid, such sum and sums of money as would be sufficient to pay a dividend at the rate of £4 5s. per cent. per annum upon the amount thereof, and also all arrears of the like dividend thereon still remaining unpaid, or so much of such dividends and arrears respectively as upon such rateable apportionment by way of dividend as aforesaid the said profits would be sufficient to pay. And the plaintiff further avers that since the plaintiff became such transferee and registered proprietor as aforesaid the defendants have received and realized large sums of money as the profits of their said railway, and all conditions have been performed, and all things have happened, and all times have elapsed necessary to entitle the plaintiff to have such dividend and arrears of dividend as aforesaid declared payable on the said E preference shares, and paid to him as aforesaid; yet the defendants, although since the plaintiff became such transferee and registered proprietor of the said E shares as aforesaid, they have declared large sums by way of dividend to be payable upon the said A, B, C, and D preference shares respectively, and have paid the same to the proprietors thereof respectively, have wholly neglected, and in fact refused, to declare on the said E preference shares, or pay to the plain-



tiff as proprietor thereof any dividend or sum by way of dividend whatsoever whereby the plaintiff has sustained damage to the amount of £3,500 sterling. The second count claimed the dividends since the plaintiff became the transferee. The first plea pleaded to the 1st and 2nd counts stated as to the sum of £718 11s. 7d., parcel of the plaintiff's claim; that after 1015 of said E shares were issued, and before issuing the remainder, and before the plaintiff became the transferee of any of said shares in the first and second counts mentioned, dividends to the extent of £718 11s. 7d. were declared upon said 1015 of said E shares and paid by the defendants to the proprietors thereof, deducting income tax. The second defence was as follows:—And as to the residue of said first and second counts, excepting the said sum of £718 11s. 7d., defendants say that after payment of said dividends and arrears of dividends on said A, B, C, and D preference shares, as in first and second counts mentioned, there were no profits of said railway at any time over and above said sum of £718 11s. 7d. applicable to the payment of any dividends on said E shares or any of them, or in respect to which any dividends ought or could be legally declared by the defendants upon said E preference shares. The third defence was as follows:—And for a further plea in this behalf to the said first and second counts respectively defendants say that pursuant to the powers in that behalf given them by the said Act of 1858, they issued the said E preference shares upon the terms that no dividend thereon should be declared by the defendants or paid by them out of the profits of said railway unless where said profits exceeded the amount sufficient to pay all dividends and arrears of dividends for the time being on said A, B, C, and D preference shares. And defendants say (except as to the said sum of £718 11s. 7d. which the defendants duly paid and applied as in the first plea mentioned) the profits of said railway never exceeded the amount sufficient to pay the dividends and arrears of dividends for the time being due on the said A, B, C, and D preference shares.

*Law, Q.C.* (with him *Bruce*) for the plaintiff, applied that the second and third defences might be set aside or amended.—The application had been made to a judge in Chamber, and stood over for the consideration of the Court. It does not appear whether the terms mentioned refer to an agreement by parol, or an agreement under seal, or a resolution of the railway company, or to an Act of Parliament. If by terms the defendants mean a verbal agreement we would demur; if an Act of Parliament, we would go to trial; if a resolution of the company, we do not ask them to say what resolution, but that there was a resolution. We do not seek to know what is the defendants' evidence, but what is the class of evidence.—*Hutton v. Hutchens* (4 Ir. C. L. 234); *Clarke v. Scully* (10 Ir. C. L. App. vi.)

*Macmahon contra.*

*Bruce* replied, and cited *Dixon v. Franks* (7 Ir. Jur. 239).

*Motion refused.*

*ARMSTRONG v. FORTESCUE.—April.*

*Setting aside defences—Plea of privileged communication—Grounds of belief.*

*Although it be no ground of general demurrer to a plea of privileged communication to an action for libel that it does not disclose the grounds of the defendant's belief, yet if the plea state that the defendant acted upon information which he had received, the Court will grant a motion to have it amended by setting forth the nature of the defendant's information or the grounds of his belief.—Godfrey v. Cross (12 Ir. C. L. 333) followed.*

THE first count of the summons and plaint complained that the plaintiff for a long time before and at the time of committing the grievances by the defendant hereinafter mentioned had been and still is an Attorney-at-Law, and also a Solicitor of the High Court of Chancery, and the plaintiff had as such attorney and solicitor been employed by the defendant and concerned for him in making a certain agreement between the defendant and one John Edward Redmond for the loan and in the loan by the defendant to the said John Edward Redmond, pursuant to said agreement of a sum of £22,000, at interest at the rate of four and a-half per centum per annum, upon the security of certain property of the said John Edward Redmond, and also in the loan by the defendant of a sum of £3,000 at interest, at the rate of £6 per centum per annum, to one Mary Donnelly by way of mortgage on the security of certain property of the said Mary Donnelly, and the plaintiff as such attorney and solicitor was also employed by the defendant and concerned for him in procuring the repayment of a certain mortgage debt of £22,000, charged on certain lands of one Edward Burke White Venables, situate in the counties of Cavan and Tyrone; yet, the defendant well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff in his credit and reputation, and also in his profession and business, falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning the matters aforesaid the words following, that is to say: 1. "My (meaning the defendant's) recent visit to Dublin was for the purpose of personal inquiry into my (meaning the defendant's) affairs in your (meaning the plaintiff's) hands generally, more particularly the Redmond affair (meaning the said loan to the said John Edward Redmond). The result has been that I (meaning the defendant) learned what much surprises me, (meaning the defendant) viz.—that Mr. Venables (meaning the said Edward Burke White Venables) had offered me (meaning the defendant) through his solicitor, Mr. Carmichael, to you (meaning the plaintiff) the sum of £500 or thereabouts, to allow his (meaning the said Edward Burke White Venables) mortgage to continue at £4 per cent, but which offer you (meaning the plaintiff) are aware you (meaning the plaintiff) never communicated to me (meaning the defendant) or I, (meaning the defendant) should not have allowed his (meaning the said Edward Burke White Venables) mortgage to be paid off, as

that sum would have been tantamount to four and a-half per cent. for five years. 2. Next, as to the advance of the £22,000 to Mr. Redmond, (meaning said loan to the said John Edward Redmond) £400 of this sum was previously retained for yourself, (meaning the plaintiff) and the remainder paid over to him (meaning the said John Edward Redmond). 3. The agreement (meaning said agreement) made by you (meaning the plaintiff) with Mr. Redmond (meaning the said John Edward Redmond) on my (meaning the defendant's) behalf, dated 26th November, 1863, you (meaning the plaintiff) are aware you (meaning the plaintiff) never communicated to me (meaning the defendant) until nearly a year after on my (meaning the defendant's) application. Vide my note (meaning defendant's letter) to Mr. Ormsby, 28th April last, or I (meaning the defendant) should certainly have rejected it, as every gentleman to whom I (meaning the defendant) have shown it would have done. 4. The result now is, vide your (meaning the plaintiff's) letter, 16th May, that I (meaning the defendant) have but lot five to reimburse me, (meaning the defendant) the whole of my (meaning the defendant's) advance, barring a small sum on lot No. 3. Thus, this 'prime security' and 'first mortgage on a valuable estate, purchased for £35,000,' vide your (meaning the plaintiff's) letters 23rd June, 3rd September, 16th December, 1863, and 'ample security,' £40,000 to secure £22,000, vide your (meaning the plaintiff's) letter 30th April, 1864, to your (meaning the plaintiff's) brother William has dwindled down to what lot five may produce, and notwithstanding your (meaning the plaintiff's) statements 11th December, 1863, 'I (meaning the plaintiff) have duly examined and looked over Mr. Redmond's (meaning the said John Edward Redmond's) Wexford estate in company with Messrs. Brassington, who met me (meaning the plaintiff) on the lands in September last. They are well known, and are men of large experience, and concur with me (meaning the plaintiff) that this estate is ample for your (meaning the defendant) mortgage,' and again, (15th February last) "no doubt is entertained by any one that Mr. Redmond's (meaning the said John Edward Redmond's) estates are ample for all demands upon them." I (meaning the defendant) am assured in writing by Mr. Brassington that "in the slob property he does not think there is a margin of value large enough to render it safe to allow interest to remain unpaid," though in your (meaning the plaintiff's) note of 16th May, you (meaning the plaintiff) still state that all parties consider this lot five will discharge my (meaning the defendant's) demand and interest (while the Ordnance Valuation £891 17s. 1d.) alone without multiplying here other authorities to the same effect, shews the present insecure and unstable nature of the property (producing little or nothing) and quite unsuitable (as all my, meaning the defendant's friends agree) for such a large amount in mortgage. 5. You (meaning the plaintiff) are quite aware that in respect to the paying off Mr. Venable's mortgage (meaning said mortgage of said Edward Burke White Venables) and its reinvestment with Mr. Redmond (meaning said John Edward Redmond) you (meaning the plaintiff) sought for, obtained, and approved, my (meaning the

defendant's) leaving matters entirely in your (meaning the plaintiff's) hands, recommending me (meaning the defendant) even in the Venable's affair, (meaning the said affair of the said Edward Burke White Venables) not to correspond with Mr. Carmichael. Vide your (meaning the plaintiff's) letter 23rd May, 1863 and assuring me (meaning the defendant) there is no kind of obstacle likely to arise to prevent the completion of Mr. Redmond's mortgage (meaning said mortgage of the said John Edward Redmond). Vide your (meaning the plaintiff's) letter 27th November, 1863, and thus having obtained my (meaning the defendant's) entire confidence, and assuring me (meaning the defendant) continually, that my (meaning the defendant's) interests were always in view and duly attended to on the proceedings, vide your (meaning the plaintiff's) letter of the 22nd March, 1864, I (meaning the defendant) have been misled and deceived, and my (meaning the defendant's) interests utterly lost sight of. 6. After much painful consideration, I (meaning the defendant) feel myself (meaning the defendant) compelled to withdraw from you (meaning the plaintiff) the further management of my (meaning the defendant's) affairs now in your (meaning the plaintiff's) hands. I (meaning the defendant) am urged to this step by the consideration that at my (meaning the defendant's) time of life, and after the many years of my (meaning the defendant's) proved cousinly regard and confidence, I (meaning the defendant) ought not to have been subjected to the extreme annoyance and anxiety, deprivation of my (meaning the defendant's) necessary income, and involving perplexing testamentary alterations which the miscarriage of the Redmond and Donnelly affairs (meaning the miscarriage by the plaintiff of the said affairs with the said John Edward Redmond and said Mary Donnelly) entails upon me (meaning the defendant). Neither can I (meaning the defendant) blind myself (meaning the defendant) to the personal considerations which induced you (meaning the plaintiff) to overlook my (meaning the defendant's) interests in entering into these so-called mortgages." The second count complained that the libel was published of the plaintiff in relation to his profession and business of an attorney and solicitor. The defendant pleaded several defences, one of which, the plea of privileged communication was as follows:—And for a further defence and which the defendant prays may be taken as pleaded separately to each of the counts of the said plaint, the defendant says that, before the said writing and publishing the defendant had, through the plaintiff as his solicitor, lent a sum of £22,000 to the said Edward Burke White Venables in mortgage at £5 per cent. per annum, and defendant contemplated calling in the said loan and lending out said money again; and defendant employed plaintiff as his solicitor in reference to calling in and re-lending said money, and instructed him to apprise and inform defendant of all material offers, proposals, and negotiations touching said money; and defendant did, in fact, afterwards and before the said writing and publishing call in the said loan, and through the said plaintiff as such solicitor, entered into an agreement with the said John Edward Redmond for a loan to him of the said £22,000 to be secured by mortgage of certain slob

lands, then about to be sold in the Landlord's Estates Court, and known as Lots No. 8 and No. 3, and which the said John Edward Redmond represented he was about to purchase and agreed to purchase in said Landlord's Estates Court; and also before the said writing and publishing, the defendant, through the plaintiff as his solicitor as aforesaid, had lent to the said Maria Donnelly a sum of £3,000 (and divers proceedings became and were necessary in the Court of Chancery and other courts consequent on and in reference to the said loans, in all which matters and business the plaintiff was the solicitor of the said defendant, and during the said times the defendant and also the plaintiff as such attorney and solicitor employed Henry Ormsby, Esq., one of her Majesty's Counsel as counsel for the defendant in the matters of and in relation to the said loans and proceedings incident thereto and arising therefrom; and the defendant had been to the plaintiff's knowledge and while the plaintiff was acting as the defendant's solicitor as aforesaid in the habit of writing to and communicating with the said Henry Ormsby as the defendant's counsel in relation to the said business and transactions, and in relation to the management thereof by the plaintiff, and the defendant says that, also, before the said writing and publishing the defendant was informed and believed that the said Edward Burke White Venables had, through his solicitor, Mr. Carmichael, offered to the plaintiff for and on behalf of the defendant a large sum of money to wit £500, or thereabouts, to allow the said mortgage of the said Edward Burke White Venables to continue at £4 per cent. per annum, which offer the defendant says the plaintiff never communicated to defendant, as it was his duty to have done. And the defendant says that also before the said writing and publishing the defendant was informed and believed that £400 of the £2,000 advanced to the said John Edward Redmond was previously retained for the plaintiff himself, under color and by way of costs, payable by the said John Edward Redmond on the said loan: and defendant says that the particulars of the said agreement with the said John Edward Redmond were not, in fact, communicated to the defendant until nearly a year after the said agreement was entered into; and the defendant, before the said writing and publishing, believed and still believes that the said agreement was disastrous to the defendant and his interests, and will involve the defendant's loss of many thousand pounds: and the defendant says that before the said writing and publishing, the plaintiff had written to the defendant the several letters touching the said loan to the said John Edward Redmond in the said alleged libel referred to, and has thereby made the several representations in the said alleged libel in this behalf mentioned: and the defendant, before the said writing and publishing, believed and still believes that the said representations were not substantially true, and that the security agreed to be taken from the said John Edward Redmond was not a prime security on a valuable estate purchased for £35,000, nor ample security for £22,000, and that Messrs. Brassington did not concur with the plaintiff that the said estate of the said John Edward Redmond was ample for all demands upon it; and that

all parties did not consider that the said Lot 3 would discharge the defendant's demand and interest, and on the contrary, the defendant says that the defendant, before the said writing and publishing, believed and still believes that the only security for the said £22,000 and interest is, what the said Lot 3 may produce; and that the said property of the said John Edward Redmond, that is to say, the said Lot 3 was and is an insecure and unstable security and quite unsuitable for so large an amount in mortgage, and that the defendant would and will be ultimately a loser of several thousand pounds by such insufficiency in value of the said lot: and the defendant says that before and at the time of the said writing and publishing there was a large amount due for interest on the said loan to the said John Edward Redmond; and the said Messrs. Brassington had, in fact, assured the defendant in writing that in the said "slob property," that is to say, the said Lot 3, the said Messrs. Brassington did not think there was a margin of value large enough to render it safe to allow interest to remain unpaid: and defendant says that, in respect to the paying off the said Edward Burke White Venables' mortgage, and its re-investment with the said John Edward Redmond, the plaintiff sought for, obtained, and approved of the defendant's leaving matters entirely in the plaintiff's hands, and recommended the defendant in the affair of the said Edward Burke White Venables not to correspond with Mr. Carmichael, the solicitor of the said Edward Burke White Venables; and the plaintiff, by his said letter, dated the 27th day of November, 1863, assured the defendant there was no kind of obstacle likely to arise to prevent the completion of the said Mr. Redmond's mortgage, and by another letter, dated the 22nd day of March, 1864, the plaintiff assured the defendant that the defendant's interests were always in view and duly attended to in the proceedings: and the defendant says that, by the said line of conduct, representations, and answers, the plaintiff obtained the defendant's entire confidence: and defendant says that, afterwards and before the said writing and publishing, the defendant was informed and believed that, instead of calling in the said loan from the said Edward Burke White Venables, it might have been to the defendant's advantage continued to the said Edward Burke White Venables, and that the security taken from the said John Edward Redmond was precarious and insufficient, and would certainly result in a heavy loss as aforesaid to the defendant; and the defendant believed that the plaintiff's costs on a continuance of the said loan to the said Edward Burke White Venables would have been trifling compared with his costs upon a new loan to the said John Edward Redmond: and the defendant knew that the said plaintiff had, without apprising the defendant of his intention so to do, secured and kept to himself the said sum of four hundred pounds, under the name and color of costs on the said loan to the said John Edward Redmond: and the defendant believed that personal gain and profit to himself upon and arising from the new loan which would not have attended a continuance of the said loan to the said Edward Burke White Venables had induced the plaintiff to overlook the

defendant's interests in entering into the said agreement with the said John Edward Redmond: and the defendant believed that, under the circumstances and for the reasons aforesaid, defendant was misled and deceived by the plaintiff, and that the defendant's interests were utterly lost sight of by the plaintiff: and the defendant says that the plaintiff, as solicitor for and on behalf of the defendant, also lent the said sum of three thousand pounds on mortgage to the said Maria Donnelly, (on insufficient security) whereby (and by reason of the mismanagement of the said loan) a heavy loss is likely to accrue to the defendant; and before the said writing and publishing, the defendant believed that considerations of personal profit to himself in the way of costs had induced the plaintiff to overlook the defendant's interests in entering into the said mortgage to the said Maria Donnelly: and the defendant says that, before and at the time of the said writing and publishing, he honestly believed that the several matters hereinbefore and in the said libel stated and in the plaint complained of were true, and the defendant thereupon ceased to employ the said plaintiff as his attorney and solicitor, and employed Messrs. Nunn and Jones as his attorneys and solicitors to transact all such business as the plaintiff had been theretofore engaged in for the defendant; and also to wind up and settle accounts between the plaintiff and the defendant, and to procure from the plaintiff all the defendant's deeds, papers, and documents, and thereupon and upon the occasion of his retaining the said Messrs. Nunn and Jones, and for the purpose of their receiving information as to how matters stood between the plaintiff and the defendant, and as part of their instructions to enable them to enter upon and discharge the duties incident to the said employment, and to enable them properly and duly to consider any claims for costs which the plaintiff might make upon the defendant, the defendant sent to the said Messrs. Nunn and Jones a copy of a letter which he had written to the plaintiff, being the libel in the plaint complained of; and also a like copy to the said Henry Ormsby, whom the defendant desired to be, and in fact, continued as his counsel in all the said several matters and proceedings, and as information and instructions to the said Henry Ormsby, the better to enable him to advise with and guide the said Messrs. Nunn and Jones in the discharge of their said duties, and particularly in settling any claim for costs which the plaintiff might have against the defendant in reference to or connection with the said loans and proceedings or any of them, which is the writing and publication by the said plaint complained of: and defendant says that, he so wrote and published the said libel *bona fide* and without malice, and in the honest belief that the several statements therein contained and by the plaint complained of were true: and the defendant further says that, it was the duty and interest of the defendant to inform the said several persons of the said several matters, and of the circumstances, under which, and the grounds on which he had ceased to employ the said plaintiff as his attorney and solicitor; and that the said information was and is necessary and beneficial for the conduct and management of the said proceedings so instituted and pending as aforesaid,

and in reference to any claim of the plaintiff for costs against the defendant in relation to the said loans and matters, and that the said Messrs. Nunn and Jones, as such attorneys and solicitors of the defendant, and the said Henry Ormsby as counsel for the defendant were and every of them was interested in receiving a copy of the said alleged libel; and that they and every of them were and are and was and is under the circumstances and for the reasons in this defence appearing interested in being informed of the several matters in the said alleged libel stated and set forth.

*Heron, Q.C. (with him Macmahon)* applied that this plea might be set aside or amended.—This plea does not state, as a fact, that the defendant had learned what is charged in the count to be in the libel: it only says that he had heard and believed it; it does not say from whom he heard it. The defendant must either state in the plea as he does in the letter, that he had learned it, or he must show that he had reasonable grounds for believing. *[Monahan, C.J.—If that be the only objection, it is ground of demurrer.]* We are prevented from demurring by an averment at the end of the plea. "The defendant says that he honestly believed that the several matters herein before and in the plaint complained of were true." This includes all. As regards a number of things stated in the letter, the defendant pleads that they did occur; but as regards some of them he does not state that they, in fact, occurred, and if the Court think he need not state that they did occur, then we submit that he ought to state the grounds from which he derived his information. In no instance does he state the nature of the information. As regards Donnelly, he does not state even information. In *Godfrey v. Cross* (12 Irish Common Law Reports, 333) it was held that the proper mode was to apply to set the plea aside. *Murphy v. Kellett* (13 Ir. C. L. 488) was subsequent in date to *Godfrey v. Cross*. It is the supplement to *Godfrey v. Cross*, and decides what are the three essential elements of a plea of privilege. The principle in *Godfrey v. Cross* ought to apply here more strongly. *[Monahan, C.J.—The only question is if Godfrey v. Cross be quite reconcilable with Murphy v. Kellett. We cannot overrule our own decision in Murphy v. Kellett except on demurrer.]* *Murphy v. Kellett* is reconcilable with *Godfrey v. Cross*. The occasion was clearly shown to exist in the former of those cases. Upon demurrer almost the only thing is to show that there is no occasion. The question whether the party should set out the grounds of his belief could not be argued on demurrer. Demurrer almost invariably fails because the question is if *prima facie* there be an occasion. The Court did not decide in *Godfrey v. Cross* that this was essential to the validity of the plea: but they said, where the defendant relied on information, the plaintiff was entitled to have the grounds.

*Dowse, Q.C. and Tandy, contra.—In Godfrey v. Cross* it was manifested that the defendant knew nothing personally of the facts. There was a motion to compel particulars to be given, and it was refused on the ground that the plea ought to be set aside as embarrassing. The reasons given in *Murphy v. Kellett* show that here the allegation is immaterial.

*Murphy v. Kellett* decides that the allegation is a matter of evidence. [Monahan, C.J.—You state more in your plea than was done in *Murphy v. Kellett*; how then are you the worse for telling the plaintiff from whom you got the information?] It might have been from some one whom the defendant does not recollect. This is only a part of the defence. In *Godfrey v. Cross*, *Hennessey v. Morgan* (8 Ir. C. L. R. App. 69) was cited, and the marginal note to *Fox v. Broderick* (8 Ir. Jur., N. S., 194) says that the authority of *Hennessey v. Morgan* is doubtful. This plea would have been good without the allegation of information; and the question is, having pleaded one part of the evidence, are we bound to go on and plead more of it? *Godfrey v. Cross* passed by the distinction between a plea of privilege and a plea of justification. The effect of doing what we are asked to do would be to give the evidence on which we rely to prove the absence of express malice.

*Macmahon* was not called on.

MONAHAN, C.J.—We will follow *Godfrey v. Cross*. If that case were not decided in the Court of Exchequer I should be very slow to hold that it was necessary for the defendant to set forth the grounds of his information. I still abide by the opinion expressed in *Murphy v. Kellett*; but inasmuch as this plea states that the defendant had information, in deference to the authority of the Court of Exchequer, I think it more convenient to follow it than to have two different decisions. Let the defendant amend that portion of his plea in which he states he had information.

*Motion granted.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-law

[BEFORE THE FULL COURT.]

KING v. POE.

*Demurrer—Forcible removal from church—Right of magistrate to arrest on view—6 Geo. 1, c. 5, s. 14.*

A. entered a church during the celebration of divine service, and though offered a seat by the churchwarden, went into another seat allocated to a parishioner, and refused to leave it notwithstanding the remonstrances of the churchwarden; and defendant, who was a J.P., and present at the time, thereupon took him into custody, and kept him in custody until the clergyman and churchwarden should swear informations against him, which they did; and on plaintiff's not getting two sureties, as provided by st. 6 G. 1, c. 5, defendant committed him to gaol. Plaintiff brought an action then against defendant for assault and false imprisonment, and defendant pleaded the above facts. Held, on demurrer to the defences that they must be set aside as not justifying the assault or

even the false imprisonment, as defendant had not brought the offence charged against plaintiff within the provisions of the Act.

Quære if a magistrate has a right to arrest a person guilty of a misdemeanor before his eyes, when there has not been any breach of the peace actual or apprehended.

THIS was a demurrer to defences. The first count of the summons and plaint was as follows:—Henry Harrington Poe, the defendant, is summoned to answer the complaint of William King, the plaintiff, who complains that defendant on the 8th day of January, 1865, assaulted and beat plaintiff. Second count—And also that defendant on the 8th day of January, 1865, assaulted plaintiff and gave him into the custody of a policeman, and caused him to be imprisoned in a police office. Third count—And also that defendant, on the 8th day of January, 1865, maliciously and without reasonable and probable cause, assaulted plaintiff and caused him to be imprisoned. Second defence to third count—And for a further defence to the third count, defendant says that he did the acts therein mentioned without malice, and with reasonable and probable cause. Third defence to first, second, and third counts—And for a further defence to said first, second, and third counts (save as to so much of the third count as charges the defendant with malice and want of probable cause), and which defence defendant prays may be taken as pleaded separately to each of said counts, defendant says that before and at the time of the committing of the grievances in said first, second, and third counts mentioned, the church of Nenagh was a parochial church of the parish of Nenagh, situated in the county of Tipperary, and one John Hamilton Dundas and one Jas. Jocelyn Poe were the churchwardens of said parish, and had duly allocated certain seats in said church to Stawell L. Heard, John J. C. Canning, Robert W. Exshaw, William Creed, Edward Fishbourne, Arthur F. Smith, and Alfred O. English, being parishioners of said parish, and entitled to be seated in said church; and that plaintiff, before the time of the committing of said trespasses (although the said James Jocelyn Poe, being one of such churchwardens as aforesaid, offered to procure for plaintiff a proper and convenient seat in said church), wilfully of purpose and contemptuously in said church on the Sabbath day, and during the time that divine service was being celebrated in said church, disturbed and disquieted same and the congregation therein by wilfully getting into said seats so allotted to the said Stawell L. Heard, John J. C. Canning, Robert W. Exshaw, William Creed, Edward Fishbourne, Arthur F. Smith, and Alfred C. English, and forcibly keeping possession thereof, and by making divers loud noises, and by otherwise conducting himself in an indecent, irreverent, and unbecoming manner; whereupon said James Jocelyn Poe, one of the churchwardens as aforesaid for the preserving of due decorum, reverence, and decency in said church, and for the removing of such interruption of divine service and disturbance of the congregation, requested plaintiff to leave said seat and to cease said disturbance and disquieting of divine service and of the congregation, and to cease such indecent and irreverent

conduct as aforesaid, which plaintiff wholly refused to do, and continued in said acts disturbing and disquieting divine service and the congregation in said church, whereupon defendant then and there, being a justice of the peace for the said county of Tipperary, and having himself seen and had view of all plaintiff's said acts and conduct, and of the offence so committed by him as aforesaid, and having also been requested by said James Jocelyn Poe to act as a justice of the peace in respect of said acts, and conduct, and offences of plaintiff, did then and there request of plaintiff to cease such indecent and unbecoming conduct, and to cease his interruption, disturbance, and disquieting of divine service and of said congregation, and from committing such offences as aforesaid, which plaintiff wholly refused to do, whereupon defendant, being such justice of the peace, and having said view and personal cognizance of such offences, then and there took plaintiff into custody, and detained and imprisoned him for a time only reasonably sufficient to examine into such offence as aforesaid, and to receive the informations of the Rev. Jonathan Christopher Head, who was one of the officiating clergymen, and of the said James Jocelyn Poe, touching said offence; and before such a reasonable time had elapsed the said Rev. Jonathan Christopher Head, who was one of the officiating clergymen in said church during the time aforesaid, and the said James Jocelyn Poe, came before defendant, then and there being such justice of the peace as aforesaid, and then and there duly made oath that plaintiff had on the Sabbath day, in the church of Nenagh, and during the time that divine service was being celebrated there, maliciously and contemptuously disquieted and disturbed same and the congregation therein assembled, and interrupted the celebration of divine service; whereupon defendant called upon plaintiff to be bound in sureties as required by the statute in such case made and provided; and because plaintiff could not procure such sureties but made default in that behalf, defendant duly made his warrant and committed plaintiff to gaol until plaintiff should find two sureties pursuant to the form of the statute in that case made and provided, which are the trespasses in the 1st, 2nd, and 3rd counts complained of and in the introductory part of this plea mentioned. 5th defence to first and second counts.—And for a further defence to said first and second counts, and which defence defendant prays may be taken as pleaded separately to each of said counts, defendant says that the trespasses therein complained of were committed prior to and subsequent to a certain committal hereinafter mentioned; and that before and at the time of the committing of the grievances in said 1st and 2nd counts mentioned the church of Nenagh was a parochial church, &c. [same as last plea] And defendant says, as to so much of said trespasses as were occasioned by said committal, that in making said committal defendant acted without jurisdiction, and that said committal has not been quashed. Plaintiff demurred to the above plea, and his grounds of demurrer were as follows:—As to second defence to third count.—(1.) That no ground of defence is disclosed, for defendant while admitting the assault and imprisonment does not justify either, or assign any legal excuse for committing the trespasses complained of. (2.) That de-

fendant does not take issue upon any material or traversable fact upon which an issue could be knit, but while confessing the trespasses complained of, only seeks to put in issue the motives by which he was influenced. (3.) That the defence pleaded is wholly irrelevant as regards the real cause of action stated in the third count of the summons and plaint. As to the third defence to the first, second, and third counts.—(1.) That the third defence, which is pleaded to the first, second, and third counts of the summons and plaint (save as to so much of the third count as charges defendant with malice and want of probable cause) professes to be an answer to the whole of the trespasses complained of, and to justify each and every of them, but does not disclose any legal excuse or justification for the commission of the trespasses complained of. (2.) That the 3rd defence does not show any offence committed by plaintiff for which he could be legally arrested without a warrant; and it is not averred in said defence that plaintiff had committed a breach of the peace, or that there was any reasonable ground for apprehending that any breach of the peace would be committed. (3.) That it is not shown that any person having a legal right to a seat in said church was prevented by plaintiff from occupying the same, or that the churchwardens of said church or any other person having lawful authority required defendant to take plaintiff into custody, or to detain or imprison him; and even if such matters were shown, still the alleged conduct of plaintiff in the church would not have justified defendant in arresting him, or committing the several trespasses complained of. (4.) That defendant had no authority or right to detain or imprison plaintiff until he should ascertain whether informations would be sworn against him. (5.) That the matters stated in the defence do not amount to an offence within the statute referred to in the defence or to any offence for which plaintiff could be legally imprisoned or committed as the defence admits he was. (6.) That defendant had not any authority or jurisdiction under the circumstances in defence set forth to call upon plaintiff to be bound in sureties, or to commit plaintiff to gaol, until he should find two sureties, especially without a previous summons. (7.) That the warrant of committal relied on in the defence is irrelevant and void on the face of it. As to the fifth defence to the first and second counts.—(1.) That the fifth defence which is pleaded to the first and second counts of the summons and plaint, so far as it professes to be an answer to the trespasses complained of prior to the committal to the gaol as in defence mentioned, professes to be an answer to the whole of the trespasses complained of, and to justify the commission of each and every of them, but does not disclose any legal ground of excuse or justification for the commission of the trespasses complained of. (2.) That it is not averred in said defence that plaintiff had, while in the church at Nenagh, committed any crime for which he should be arrested without a warrant, or that he had committed a breach of the peace, or that there was any reasonable ground for apprehending that a breach of the peace would be committed. (3.) That it is not averred in said defence that any person having a legal right to a seat in said church was pre-

vented by plaintiff from occupying the same, or that the churchwardens of said church or any other person having lawful authority required defendant to take plaintiff into custody, or to detain or imprison him; and even if such matter had been averred, the alleged acts of plaintiff in the church would not have warranted defendant in committing the several trespasses complained of. (4.) That defendant had no authority or right to detain or imprison plaintiff until he should ascertain whether informations would be sworn against him. (5.) That the matters stated in the plea do not amount to an offence within the statute therein referred to, or to any other offence for which plaintiff could be legally imprisoned or committed, as it is admitted he was. (6.) That the warrant relied on in the defence is void and invalid on the face of it. (7.) That the committal relied on in the fifth defence was not a conviction or order within the provisions of 12 Vict., cap 16; and there was no necessity to quash it before bringing the action. (8.) That the committal was not an act done under any warrant or process to compel appearance, nor was any summons served on plaintiff previous to such warrant, personally, or otherwise.

*Lover* (with him *J. E. Walshe*, Q.C.) for plaintiff, opened the demurrer. *Brandt v. Craddock* (27 L. J. N. S. Exch. 314); *Hall v. Fearnley* (3 Q. B. 919); *Basley v. Clarkson* (3 Lev. 37); *Tarlton v. Fisher* (2 Doug. 871); *Weaver v. Ward* (Hob. 134); 6 Geo. 1, c. 5, s. 14; 23 & 24 Vict. c. 32; *Mainwaring v. Giles* (5 B. & Al. 356); *Hawkins v. Compiegne* (3 Phil. 16); *Greaturchin v. Beardley* (2 Lev. 241); *Harris v. Drewe* (2 B. & Ad. 168); *Collet v. Bailiffs of Shrewsbury* (2 Leon. 34). As to authority to arrest without summons or charge made.—*Atkinson v. Carty* (1 Jebb. & Sym. 369); *Windham v. Clerc* (Cro. Eliz. 130, 1 Lev. 187); *Rex v. Birnie* (1 Moo. & Rob. 160, a. c. 5 Car. & Pay. 205); *Caudle v. Seymour* (1 Q. B. 889, 8 & 9 Vict., c. 87, secs. 58, 83). As to breach of peace actual or apprehended.—*King v. Wadley* (4 M. & S. 508); *Wheeler v. Whiting* (9 C. & P. 262); *Cooke v. Leonard* (4 B. & C. 351); *Timothy v. Simpson* (1 Cr. M. & R. 757); *Truscott v. Carpenter* (1 Raym. 219); *Williams v. Jones* (Cas. temp. Hardwicke, 284). As to warrant of committal, 12 Vict. c. 16.—*Lalor v. Bland* (8 Ir. C. L. R. 115); *M'Donald v. Bulwer* (13 Ir. C. L. R. 549). No name was inserted in the warrant of committal, consequently it was invalid.—*Armstrong v. Turquand* (9 Ir. C. L. R. 32); *Fuspatrick v. Pine* (13 Ir. C. L. R. 32); *Thompson v. Hakevill* (19 C. B. N. S. 713); *King v. Hood* (Moo. Cr. Cas. 281).

*Ryan*, contra, in support of the pleas.—The defendant is sued in the plaint as a Justice of the Peace, for in the margin there is the addition of "Justice of the Peace" to the name of defendant, though I admit he is not sued as such in the body of the plaint. Now, if those words are material in the plaint, defendant should plead to them, as he has done; if they are not, they are then a trap laid by plaintiff, a thing which he should not be allowed to do. As to the main point in the case.—*Fuller v. Lane* (2 Add. 425); 1 Russell on Crimes 415, 6 Geo. 1, c. 5, s. 14. A justice of the peace has authority to arrest a person

who has been guilty of a misdemeanour before his eyes. 1 Nunn & Walshe, Justice of Peace, 115, 118; *Holyday v. Ozenbridge* (Cro. Charl. 232, 2 Hawk Pleas. of Crown 128). As to whether defendant had a right to detain plaintiff until informations were sworn by the clergyman and churchwardens.—*M'Donald v. Bulwer* (13 Ir. C. L. R. 549); *Grady v. Hunt* (1 Ir. Jur. N. S. 10); *Williams v. Glenister* (2 B. & C. 699); *Brennan v. Williams* (9 Ir. C. L. R. Ap. 35); *Smith v. Whelan* (10 Ir. C. L. R. Ap. 17).

*Walshe*, Q.C. in reply.—Unless the offence charged against plaintiff in the defences comes under the provisions of the Toleration Act, 6 Geo. 1., c. 5, s. 14, there is no misdemeanour here. Now, there are two things mentioned in the Act, viz., that the person must come in contemptuously and disturb the congregation; the words are not in the alternative. These two circumstances did not occur in the present case; therefore, if the offence did not come within the Act referred to, the whole defence falls to the ground. But I say further, that there is no authority for a magistrate's right to arrest for a misdemeanour on view. Burns' Justice of the Peace—Arrest. No one can be arrested for a misdemeanour without a warrant, though he may be for treason or felony. *Martin Leeson's case*, (Cro. James 497). All the authorities cited on the other side are old ones, and do not apply to the law as at present.—*Burton v. Henson* (10 M. & W. 105); *Worth v. Terrington* (13 M. & W. 781); *Haw v. Planner* (1 Saund. 10). By the provisions of the statute there must be two or more witnesses to prove the disturbance, and a magistrate cannot constitute himself into two witnesses, merely because he has seen the offence.—*Jones v. Owen* (2 D. & R. 600). Unless there is a special authority given to a magistrate to arrest, his seeing a misdemeanour committed amounts only to a very strong case of suspicion. The plea does not justify the battery. The warrant is no justification, for there is a blank for the name of the offending party.

*Pigor*, C.B.—We are all of opinion that the demurrer must be allowed. If plaintiff wished to bring his action against defendant as a J. P., he should have alleged that defendant was a J. P., and it is not sufficient that these words occur in the margin. But plaintiff did not proceed against defendant as a J. P., and then defendant cannot rely on the fact of his being a J. P. as a material circumstance. With respect to the main point in the case, we are unanimous, that the demurrer must be allowed, because defendant has not brought the offence charged within the Act of Parliament. Defendant alleges the act of misconduct to have been as follows:—[Here his lordship referred to the pleas as given above.] Whereas the Act provides—"That if any person or persons do or shall willingly and of purpose maliciously or contemptuously come into any cathedral or parish-church, chapel, or other congregation permitted by this Act, and disquiet or disturb the same, or misuse any preacher or teacher, such person or persons upon proof thereof, before any Justice of the Peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal



sum of £50 to appear at the next general or quarter sessions to be held for the county wherein such offence shall be committed, and in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions, and upon conviction of the said offence at the said general or quarter sessions shall suffer the pain and penalty of £20." Now, there is no allegation that plaintiff, willingly and of purpose, came into the church, &c. Nor did defendant proceed as the Act provided. The Act was intended to provide a remedy against wilful misconduct. No authority was cited to shew that the offence of interrupting divine service is a misdemeanour at Common Law. Even if it were a misdemeanour at Common Law, there was no authority cited to shew that a magistrate has a right to arrest a person, guilty before his eyes, of a misdemeanour, where there is no breach of the peace, and where it is not necessary to arrest the offender to prevent the renewal of the act. Whether it would be lawful to remove a person guilty of such misconduct as plaintiff is charged with it is not necessary for us to decide; but I, for one, cannot allow such misconduct as is charged against plaintiff to pass without declaring my opinion—that such an offender might be removed and prevented from desecrating the House of God. But that was not what was done in this case; but a jurisdiction was assumed to make plaintiff amenable under the Act, and on the Act the plea was founded, and as the offence does not come within that provided against by the Act, this defence cannot be sustained. It is not necessary to say more than this:—The offence complained of was one of assault and battery and false imprisonment; and the first part of the summons and plaint remains unjustified, even if the second was justified, and as the defence is bad in part it is bad as to the whole. What was stated about the warrant is beside the question.

*Demurrer allowed.*

[BEFORE THE FULL COURT.]

RYAN v. PERRY.

*New trial motion—Malicious prosecution—Questions to be left to the jury.*

*Some stones of a peculiar nature, and capable of being identified, were stolen from A. His steward, after watching for some time, wrote to him that he knew who had stolen them, and that it was B., and that they were at B.'s house, whereupon A. directed him to go before a magistrate with this information. The magistrate then granted a search warrant to search B.'s house for the stones. Some stones were found there, which the steward swore to as being those belonging to A., upon which B. was taken into custody, and after being brought up several times before the magistrates, he was at last committed for trial at Quarter Sessions. The grand jury then ignored the bill. B. brought an action for malicious pro-*

*secution against A. The judge left these questions to the jury—1. Did A. believe that the stones found with B. were his property, and illegally taken from him? 2. If he did so believe, then had he reasonable grounds for such belief? 3. Did A. act from malicious motives in instituting proceedings against B.? Held, on motion for a new trial, that the judge was right in leaving these questions to the jury.*

MOTION to show cause against a conditional order for a new trial. This was an action for malicious prosecution, tried at Clonmel Summer Assizes, 1865, before Mr. Justice O'Hagan. The pleadings were as follows:—

Summons and plaint—"William Perry, the defendant, is summoned to answer the complaint of Patrick Ryan, the plaintiff, who complains that defendant, intending to injure plaintiff, heretofore, to wit, on the 23rd day of Nov. 1864, falsely and maliciously, and without any reasonable or probable cause, caused and procured one John Meagher, then being the steward or caretaker of defendant, and acting under his authority and by his directions, to go and appear before Edmund Mulcahy, Esq., then being one of the justices of our Lady the Queen, assigned to keep the peace in and for the counties of Tipperary and Waterford, and to hear and determine divers felonies, trespasses, and misdemeanors committed in the said counties, and to swear an information before the said Edmund Mulcahy, stating that a quantity of quoin stones, the property of defendant, had been feloniously taken and carried away from the house of defendant situate in the said county of Tipperary, and that he had reasonable cause to suspect, and did suspect, that the stones were then on the premises and in the possession of plaintiff in the County of Waterford. And the said plaintiff saith that thereupon on the application of the said John Meagher, acting under such authority of the said defendant, and by his directions, the said Edward Mulcahy granted a search-warrant under his hand and seal, authorizing the police to search the lands of plaintiff for the said quoin stones. That accordingly the said police, accompanied by the said John Meagher, acting under such authority of the defendant, and by his directions, in the execution of the said search-warrant, went upon the lands of plaintiff on the 24th day of November, 1864, and although upon the said occasion no stones were found upon the said lands or in the possession of plaintiff that had been stolen or carried away from the house of defendant, or that were the property of defendant, yet the said defendant afterwards, to wit, on the said 24th day of Nov. 1864, falsely, maliciously, and without any reasonable or probable cause, caused the said John Meagher to go before G. B. Poer, Esq., then being one of the justices of the peace for the County of Waterford, and to swear an information before the said G. B. Poer, stating that he had accompanied the said police to the lands of plaintiff in the execution of the said search warrants, and untruly stating that he had there found a quantity of quoin stones, the property of defendant, which had been stolen and carried away from the said house of the said defendant, and then and there falsely and maliciously, and without any reasonable or probable cause, caused plaintiff to be charged with

having feloniously stolen certain quoin stones alleged to be the property of defendant, and upon such charge he, the said defendant, by the said John Meagher, then falsely and maliciously, and without any reasonable or probable cause, caused and procured the said G. B. Poer to make and grant his warrant under his hand and seal for the apprehending and taking of the plaintiff, and for bringing him before the said G. B. Poer to be dealt with according to law for the said supposed offence, and defendant, under and by virtue of the said warrant, afterwards, to wit, on the 24th day of November, 1864, falsely and maliciously, and without any reasonable or probable cause, caused plaintiff to be arrested, and to be brought in custody before him, the said justice, who, having heard the said charge, caused plaintiff to be imprisoned, and kept and detained in prison for a long space of time, to wit, for the space of 8 hours then next following, and until the said plaintiff afterwards, to wit, on the said 24th day of November, 1864, was obliged by the said justice to find sureties, and with such sureties then and there to enter into a recognizance to our said Lady the Queen to stand his trial for said alleged offence at the then next ensuing Petty Sessions of Cappoquin, in the said County of Waterford on the 2nd day of December, 1864. That on the 2nd day of December, 1864, the said Petty Sessions of Cappoquin having been adjourned for want of attendance by the magistrates, the case was adjourned to the next ensuing court day, viz., the 16th December, 1864, upon which day, the said plaintiff having attended to stand his trial in pursuance of his said recognizance, the case was, on the application of one R. P. Vowell, who attended as the attorney for the said defendant, sent by the magistrates to the Petty Sessions of Ardinnan, in the County of Tipperary, being the County and Petty Sessions district where the said offence was alleged to have been committed, and the said plaintiff was then and there obliged to find sureties, and with sureties to enter into a recognizance to our Lady the Queen before William Fitzjames Barry, Esq., then being a justice of the peace for the counties of Waterford and Tipperary, to stand his trial for the said alleged offence at the said Petty Sessions of Ardinnan in the said County of Tipperary on 23rd of December, 1864. And plaintiff further saith that he, plaintiff, attended at the said Petty Sessions at Ardinnan on the day and year last aforesaid, and on the application of one R. P. Vowell, who then attended as the attorney for the said defendant on the said charge against plaintiff, the said informations were returned to the then next Quarter Sessions to be held at Cashel, in the said County of Tipperary, on 5th of Jan. 1865. And plaintiff further saith that defendant afterwards, to wit, on Thursday, 5th Jan. 1865, at the Quarter Sessions held at Cashel aforesaid, and in the county aforesaid, falsely and maliciously, and without any reasonable or probable cause, caused and procured a certain bill of indictment to be exhibited against said plaintiff for the said supposed offence unto the jurors of the Court of Quarter Sessions there, being good and lawful men of the jurisdiction aforesaid, qualified according to law, then and there sworn and charged to inquire for our Lady the Queen for the jurisdiction aforesaid, and

which indictment was in the words and figures following, that is to say—'The Queen at the prosecution of William Perry against Patrick Ryan, larceny, Cashel Sessions, 5th Jan. 1865, County of Tipperary, to wit: The jurors of our Lady the Queen upon their oath present that Patrick Ryan, on the 24th day of November, in the year of our Lord 1862, at Thonallire, in the County of Tipperary, feloniously did sever two quoin stones, the property of one William Perry, and then fixed to a certain dwelling-house of the said William Perry, situate in the parish of Newcastle in the County of Tipperary, with intent the said quoin stones then feloniously to steal, take, and carry away against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.' And plaintiff further saith that the jurors at the said sessions, being good and lawful men of the jurisdiction aforesaid, qualified according to law, then there sworn, did further present, in a second count, that the said Patrick Ryan (meaning thereby plaintiff) on the day and year aforesaid feloniously did steal, take, and carry away two quoin stones, the property of William Perry (meaning thereby defendant) against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And plaintiff further saith that said bill of indictment was then there returned to the said court by the said jurors aforesaid in form aforesaid—'No bill,—for self and fellow-jurors. (Signed) John White, Foreman'—and which said indictment had the name of the said John Meagher as a witness on the back thereof. And plaintiff further saith that the said prosecution was, to wit, on the day and year last aforesaid, being before the commencement of this suit, and now is ended and determined. And thereupon plaintiff afterwards, to wit, on the said day and year last aforesaid, was discharged from the said charge, by means of which said several premises plaintiff hath been and is injured in his good name, credit, and reputation, and brought into public scandal, and disgraced, and hath suffered great pain and anxiety of body and mind, and was prevented, during the time he was so imprisoned, from attending to and transacting his lawful and necessary affairs and business, and also by reason of the premises plaintiff necessarily incurred divers charges and expenses, to wit, to the amount of £20, in defending himself against the said prosecution and proceedings, and in relation to the premises, and in the manifestation of his innocence in that behalf, and was and is otherwise injured to the damage of plaintiff of £500.' The second count was in substance the same, but did not go so much into details. 3rd count—'And plaintiff, further complains that defendant assaulted and beat plaintiff, and gave him into custody to a policeman, and caused him to be imprisoned in a police office to the damage of the plaintiff of £500.'

Defence—'William Perry, defendant, appears and takes defence to the action of Patrick Ryan, plaintiff, and as to the first and second counts of the summons and plaint says that he did not commit the several grievances therein complained of, or any of them; and for a further defence to the said first and second counts, defendant says that in doing the acts therein complained of, he acted without malice, and with rea-

sonable and probable cause. And as to the third count, defendant says that he did not commit the several trespasses in the third count mentioned, or any of them; and therefore he defends the action."

The following is the material evidence given at the trial:—

**Plaintiff examined**—Is a farmer living near Cappoquin. The stones he was accused of taking were brought to his house from the mountain. On Nov. 24, Meagher, defendant's steward, came to his house with Sergeant Hely and other constables. Hely told Meagher to point out any of the stones which were Mr. Perry's. Meagher pointed out some stones which witness said were his own. Some of the stones were then put into a cart and taken away, and witness taken into custody. The rest of his examination referred to the proceedings before the magistrates, as set forth in the summons and plaint.

Plaintiff's brother swore he got the stones on the mountain, and dressed them and left them in the boreen near plaintiff's house, where they were found by Meagher. Mr. Barry, one of the attorneys who appeared against plaintiff, deposed that he did not ask the magistrates to adjourn, but that they did so of themselves. Mr. Vowell, the other attorney, deposed that he was paid by Meagher, but that he was instructed by Mr. Perry, the defendant.

At the close of plaintiff's case,

*J. E. Walsh*, Q.C. for defendant, called on Mr. Justice O'Hagan to non-suit plaintiff, or to direct a verdict for defendant, the acts complained of having been the acts of the magistrates, and there being no evidence of malice, and plaintiff's own case showing probable cause, and there being no evidence at all to support the third count.

His Lordship having refused so to do, defendant's case was stated, and defendant examined. He proved that some time previously he had seen a house erected on a mountain, not far from plaintiff's. That this house was unfinished. That the stones of which it was built were stolen, and that he had especially observed that certain quoin stones which remained standing were taken. That these quoin stones were a peculiar kind of sandstone found on that mountain, but not on the adjoining mountain, and were worked square by the masons. That after the stones were missed, Meagher, who had been in his employment for many years, and whom he had directed to watch and find out who was taking the stones, informed him that he had discovered who had taken them, and stated to him the facts which Meagher afterwards deposed to, and said that he could positively identify the stones which were at plaintiff's house, lying in a boreen. That Meagher said two other men—Beilby and Neille—could also identify the stones. That after consulting an attorney he, by his advice, directed Meagher to state what he knew to a magistrate. That Meagher went to a magistrate, who issued a search-warrant. That witness instructed Mr. Vowell to attend at the petty sessions, but gave no other directions than to have the case investigated, and that beyond this he took no part in what was done. As a corroboration of Meagher's identification of the stones, he stated that some contractors had some years before applied to him for leave to get stones of this particular quality on his

mountain, as none could be got elsewhere in the neighbourhood. Witness was a total stranger to plaintiff. On cross-examination he accounted for his not having taken proceedings before he did by the fact that Meagher had been ill in hospital for some time. Meagher deposed that when watching and trying to discover who had taken the stones, he observed cart tracks on a road leading towards plaintiff's, but was unable to trace them. That afterwards another man told him plaintiff had taken the stones; that he went to plaintiff's and found stones in the boreen leading to plaintiff's house, which, he was positive, had been taken from defendant's house. He had been at the building of defendant's house and the working of the stones, and knew them well. They had been built in with marl in defendant's house, and some marl was sticking to the stones though plaintiff was using red earth with some building he was erecting. That the worked surface of the stones had changed in colour, as would happen to stones built into a wall. That he had searched and could find no such stones in the neighbourhood except on defendant's mountain. That he wrote an account of what he had found to defendant; and having been some time after taken ill and gone to hospital, he did not see defendant for some time, but when he saw him he told him about the stones, and that he could identify them. That he afterwards had sworn informations before the magistrate who granted the search-warrant. That after he had identified some of the stones for Hely, and two in particular, plaintiff pointed to a third; and witness having said he thought that was another, plaintiff said, "You are wrong as to that," to which witness replied, "Then I am right as to the others." He and plaintiff were strangers to one another. Neille and Beilby were also examined, and asked if they had seen the stones at plaintiff's and could identify them; but as it appeared they had not communicated their information to defendant, these questions were objected to and disallowed by his Lordship. The learned judge in his charge left the following questions to the jury:—(1.) Did defendant believe that the stones found with plaintiff were his property, and illegally taken from him. If he did so believe them, then (2.) had defendant reasonable grounds for such belief. If they should find the negative on both questions, or either, (3.) Did defendant act from malicious motives in instituting proceedings against plaintiff. *Walsh*, Q.C., objected to his Lordship putting any question to the jury, and also to his putting any question to the jury save as to defendant's belief; and asked his Lordship to take a note of what he said to the jury as to inferring want of reasonable grounds for belief from defendant's recklessness, if they should believe him to have been reckless in not inquiring as to *Ryan's* (plaintiff's) character, inspecting the stones for himself or examining witnesses. The judge put the evidence as to those matters before the jury for their consideration with the rest of the case in determining on the question as to the reasonableness of defendant's belief and the question of malice. The jury found as to the 1st question, "We say he did." As to the 2nd, "We say he did not exercise due and proper caution, and that he had not sufficient grounds." Upon these

findings his Lordship told them that there was not probable cause, and sent them to consider the question as to defendant's malice. He read the definition of malice from 10 Exch. 366, and Addison on Wrongs, 523, and informed them that they might take into account on the question of malice the want of reasonable and probable cause, though not so much as if they had found that defendant did not believe the charge against plaintiff. The jury found that the prosecution was malicious, and gave plaintiff £50 damages. They found for defendant on the last issue (on the 3rd count of the summons and plaint).

*Harris*, Q.C. (with him *Tandy*) now showed cause against the conditional order obtained on motion by J. E. Walshe, Q.C., on behalf of defendant, that the verdict had for plaintiff be set aside and a new trial had, on the ground of improper rejection of evidence, misdirection of the learned judge, and because the verdict was against evidence and the weight of evidence. Counsel referred to the evidence given at the trial, and cited *Turner v. Ambler* (10 Q. B. 252); *Douglas v. Corbett* (6 E. & B. 511).

*Hemphill*, Q.C. (with him J. E. Walshe, Q.C., and *Ryan*) contra for defendant in support of the order.—*Heslop v. Chapman* (23 L. J., Q. B., 49) as to how the question was left to the jury. *Panton v. Williams* (2 A. & E., n.s., 192); *Mothersell v. Neale* (13 Ir. L. R. 182).

*Walshe*, Q.C., on same side.—The main point in the case is, did the defendant believe the stones were stolen from him and were his? Then did he do everything that he ought to find out the truth of the charge? The jury found as to this, but the judge ought to have decided it—*Melia v. Neale* (3 F. & F. 757). The judge was not right in rejecting *Beilby's* evidence.

*Tandy* in reply relied on the judgment of *Colebridge, J.*, in *Douglas v. Corbett* (6 E. & B. 511); *Davis v. Russell* (5 Bing. 354).

*Prior*, C.B.—We are all of opinion that on none of the grounds urged can we disturb the verdict. As to the 1st point, whether the judge should have left the question as to the reasonableness of defendant's belief to the jury, the way he left the question was this: "Did defendant believe that the stones found with plaintiff were his property, and illegally taken from him. If he did so believe then had he reasonable grounds for such belief." We think the judge was right in so leaving the question. In *Heslop v. Chapman*, and *Douglas v. Corbett*, it was held that the reasonableness of defendant's belief as to the charge brought against plaintiff was a proper question for the jury. It was argued by Mr. Walshe that this was leaving the question as to whether there was reasonable and probable cause to the jury, and if so that it was wrong so to do. But we think this was not leaving the question of reasonable and probable cause to the jury. Before *Panton v. Williams* was decided the law as to what questions should be left to the jury in cases like the present was uncertain. In some cases all the facts were left to the jury, in others the judges themselves decided them. In a great variety of cases the judges left to the jury the question as to whether there was reasonable and probable cause for defendant's prosecution of plaintiff.

*Panton v. Williams* corrected the application of the law as to the questions to be left to the jury in cases such as this. I would be most reluctant to disturb that decision in any way; I think it is of the utmost moment that the protection of a judge should be interposed in these cases, and that the mistakes likely to occur when the matter is left in the hands of the jury prevented. The judge is to determine whether there was reasonable and probable cause for the *bona fide* belief of defendant that plaintiff was guilty, and this question Mr. Justice O'Hagan did determine. Whether the defendant is or is not liable is a mixed question of law and fact. The judge is to determine what is malice, and how it has been defined in law, if there is any difficulty about it. He must then leave to the jury the question as to whether the facts deposited to occurred. The jury are not to determine what is an offence, but if the person is guilty or not of what the judge has defined to be an offence. The question is—whether the belief entertained by defendant ought to have been entertained by him, or could that belief be entertained by a reasoning man. If it would not then there was not reasonable and probable cause for defendant's belief. Does the judge then leave a question of law to the jury? He does not. The question is one of fact not of law. When the judge has eliminated the facts on belief of which, if reasonable, defendant would be exonerated, he leaves those facts to the jury. What is reasonable and probable cause is to be declared by the judge. The reasonableness of defendant's belief is a matter of fact unconnected with law, and rightly left to the jury. As to the stones being illegally taken from defendant, we must say that the judge left to the jury the question as to whether there was an illegal taking, telling them what amounted to an illegal taking. He left the question as to the identity of the stones and the reasonableness of defendant's belief to the jury; and in doing so he is directly within the authority of *Heslop v. Chapman*, and *Douglas v. Corbett*. As to whether the verdict was against the weight of evidence, the following facts must be borne in mind: one year and three months elapsed from the taking of the stones until the proceedings complained of. For a considerable time before their removal under the warrant they were in a breen immediately adjoining the public road, and very close to defendant's laid. According to *Meagher's* evidence they were only three quarters of a mile from the place from which they were alleged to have been taken. Then these stones with marl on them were lying in a public place, open to the inspection of everyone; and this is a very strong element for the jury to decide, if the person who thus publicly left them there was the one who stole them; and this question was rightly left to the jury. On the other portion of the case I had some hesitation, for it is difficult to say that there was sufficient evidence to warrant the finding of the jury that defendant had acted with malice. However, the jury found so, and the learned judge has not expressed himself as dissatisfied with their finding; and, no doubt, there was a great deal of unnecessary pressure in the proceedings adopted by defendant. I do not mean in his employing two attorneys; but *Ryan* was sent about from place to place, and probably that ex-

isted in the nature of the proceedings, which would make the jury think there was malice; and I cannot say there was no evidence of malice. As I understand the judge's notes, he did not address the jury on the question of malice till after they had found on the 1st and 2nd questions. He thus prevented the operation of the question of malice on their minds while deciding as to defendant's belief. It only remains for us now to consider the rejection of the evidence; and at first I was rather disposed to consider that the evidence which had been rejected ought to have been admitted as likely to establish plaintiff's guilt; but this objection cannot be taken to have been seriously made at the trial, and we cannot allow it to prevail now. For the above reasons we must allow the cause shown.

*Conditional order discharged.*

*Hemphill, Q.C.* asked leave to appeal.

*Prior, C.B.*—We will allow you to appeal on the grounds of misdirection of the judge at the trial in having left to the jury the question as to whether defendant had reasonable grounds for his belief of plaintiff's guilt, and the rejection of Beilby's evidence.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

GOODS OF REV. WILLIAM MURRAY.

*Scotch confirmation—Resealing.*

*Where by mistake a confirmation omitted to state that the inventory included in it, as it did, property in Ireland, the Court refused to permit it to be resealed in Ireland.*

*Dr. Miller* moved that the principal registrars be directed to reseat a Scotch confirmation, or *testament testamentar*, dated the 26th day of December, 1865. The application was made on behalf of the Rev. Adam Cunningham, the executor. The confirmation stated that the said executor had given upon oath an inventory of the personal estate and effects of the said William Murray situated in Scotland and England (and of money secured on heritage in Scotland), amounting in value to £1227 14s. 6d. The inventory was headed "Inventory of the personal estate wheresoever situated, and of money secured on heritable property in Scotland, of the Rev. William Murray, minister of the parish of Melrose, who died there on the 13th day of September, 1865." It then had a heading "Scotland," under which, in consecutive numbers, different properties were set out; and another heading, "England," under which in like manner the property there was enumerated. But No. 16, under the head Scotland, was "50 shares, numbered from 2143 to 2192 inclusive, of the Alliance Dublin Gas Co., £550:dividends £17 10s., total £567 10s." The inventory was dated the 26th December, 1865,

and was signed by the executor and commissary. The oath was headed "Oath to the inventory of personal estate of the deceased Rev. William Murray of Melrose." No doubt, the 21 & 22 Vic. c. 56, s. 10, requires the confirmation shall be in the form, or as nearly as may be in the form, of schedules D. and E. thereunto annexed; and in those schedules, in case of Irish assets, the word Ireland is specially mentioned; but as it refers to the inventory, and thus incorporates it, and the inventory expressly states the shares in the Alliance Dublin Gas Company, it may be taken as if it was expressed in the confirmation itself—*Goods of Hay* (3 S. & T. 279).

*KEATINGE, J.*—This I am sure was a mere slip, and is a perfectly *bona fide* case. But suppose the reverse. A grant might be resealed and thousands of pounds be fraudulently taken under it that never were returned in the inventory. The form is express, and the word Ireland must appear on its face; and I cannot depart from it. The confirmation may perhaps be amended, or a separate grant can be taken out here.

*No rule.*

HASLER v. SALMON.

*Executor according to the tenor.*

*A will did not name any executor, but the testator named A. & B. "trustees to carry out his will as named, with full power to take full charge of any property he left." Held—that they were executors according to the tenor.*

*Dr. Townsend, Q.C.*, for Dora Salmon, the widow of Francis Salmon, deceased, who died on the 31st March, 1866, applied for administration of his goods with his will annexed. The will bore date the 21st September, 1858, and did not in terms name any executors. The testator, however, left to his only son, described as in Australia, after his the testator's wife's death—she having a life estate in everything—half of his house and funded property; and the other half he gave to his only daughter, Mrs. Reilly, with a clause of survivorship. The wife was to pay an annuity of £52 a year to each of the children, and she was to hand over £200 to each of them when she should get possession of the property. The testator then appointed John Askin and George Hasler trustees to carry out his will as named, with full power to take charge of any property he might leave after him; but he directed that the funded property should not in any case be converted, but that the principal of it should remain for the children of his son and of his daughter. Mr. Askin had renounced, and the sole question was—whether Mr. Hasler, as executor according to the tenor, had a prior right to the widow to prove the will. The following cases were cited by Dr. Townsend: *Boddicote v. Dalzeel* (2 Lea, 294); *Goods of Toomey* (3 S. & T. 562, & 34 L. J. Pr. 3); *Goods of Jones* (2 S. & T. 155); *Goods of Heiton* (7 Jur., n. s., 882). In Miller's Probate Practice, 43, all the cases are cited. In *Toomey's case* the expression was stronger than here—to take control, yet it was held.

insufficient. In *Bayliss's case* there was a trust for conversion. None is contemplated here. Indeed the expression "as soon as my wife gets possession of my property," would seem to imply that she was to be executrix according to the tenor.

*S. Walker* for the plaintiff.—The definition given by Mr. Justice Williams of an executor according to the tenor is—that if by any word or circumlocution the testator recommends or commits to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (1 Wms. Ex. 196). The testator here says that his trustees are to take charge of his property. How can they do that without realizing the whole estate? As to the expression of the wife paying £200 a piece to the children when she gets possession, that means when the trustees put her into possession. Indeed she might possibly never be put in possession, there might be debts and legacies to be paid which would cover all the assets. The cases cited were gifts to divide, no duties to discharge. He cited *Goods of Saunders* (11 Jur., n.s., 1028); *Goods of Manly* (3 S. & T. 56.) *Cur. adv. vult.*

*May 7. KEATINGE, J.*—There is a case cited in Miller's Probate Practice, p. 43, that seems in point *Browne v. Maguire* (Beatt. 358), and I would wish counsel to refer to it and mention the case again tomorrow.

*May 8. Dr. Townsend.*—*Browne v. Maguire* appears rather in the defendant's favor, as Lord Manners did not approve of the grant that the Prerogative Court had made—*Goods of Stevenson* (16 Jur. 714); *Goods of Bray* (ib. 802) were also cited.

*Walker.*—Lord Manners only doubted if the trust in *Browne v. Maguire* extended beyond a part of the property.

*KEATINGE, J.*—I have very carefully considered this case, more especially as cases of this kind occur almost every day in the Registry. The impression that was made on my mind at the first argument does not now remain. The words of the will are extremely peculiar; but as they have been already fully stated by counsel, I will only mention the most important part, and on which I found my judgment. After the general introduction and giving his wife a life estate, with provisions for his children, he then proceeds—"I wish and appoint as my trustees Mr. John Askin, of Sandymount, and Mr. George Hasler, of Killiney, to carry out my will as named, with full power to them to take full charge of any property I may leave after me." These are extremely strong words, and they are the very words used in *Browne v. Maguire*; and they clearly show the intention of the deceased. The property is not vested in the trustees for their own benefit, but in order to enable them to carry out his will. There is a plain distinction in this respect between this case and the cases cited. If the duty of an executor is cast on a party by a will, though he is named a trustee, he is clearly executor according to the tenor where no executor is expressly named. Here there are duties which an executor ought to perform, and there is no executor named in terms. I cannot therefore avoid coming to the conclusion that these parties

are executors according to the tenor; but it was a very fair case in which to raise the question.

Order: No rule, the Court being of opinion that John Askin and George Hasler are executors according to the tenor, and according to the true construction of the will of the deceased, and with liberty to them or either of them to apply for probate; and let each party have his costs properly and necessarily incurred out of the assets.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

KING v. ACHESON O'BRIEN AND OTHERS.  
Dec. 12, 1865.

*Receiver—Purchase by of interest in lease of lands over which he was acting as such receiver.*

In 1820 R. I. being seised in fee of certain lands demised same to A. O'B. for three lives and thirty-one years. In 1834 said R. I. died, having devised his reversion in said lands to said A. O'B. for life, with remainder to his first and other sons in tail male. In 1854 a receiver was appointed over the said lands, which in 1858 were let by the Master to receiver's father for seven years pending the cause. In 1859 receiver's father died, and thereupon receiver entered into possession thereof, with the said Master's approval. In 1863 said A. O'B. conveyed to said receiver his (the said A. O'B.'s) interest in the lease of 1820. In 1865 A. O'B. died, and petitioner was discharged as such receiver, the suit having abated. Thereupon the Master of the Rolls made an order on said receiver to deliver up said lands to A. O'B.'s eldest son, same having been assigned without the leave of the Court. Held, that a receiver over the estate of a reversioner is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right.

THE appeal in this matter was taken by William O'Brien from an order of the Master of the Rolls made on the 1st day of July, in the year 1865. The facts are shortly these:—In the year 1820, one Richard Irwin being seised in fee or quasi fee of the lands of Drumsilla, in the county of Leitrim (subject to a rent-charge of £400 a-year, payable to one Edward Forch for his life) by indenture of lease of 21st of July in said year, demised to the respondent, Acheson O'Brien, the said lands of Drumsilla, containing 186 acres, for three lives and thirty-one years, subject to the yearly rent of £1 6s. per acre. Acheson O'Brien thereupon entered into possession of said lands, and being so possessed, the said Richard Irwin, by his will, dated the 13th of December, 1832,

devised the said several lands to said Acheson O'Brien for life, with remainder to his eldest son William Acheson O'Brien, in tail male. In 1864, said Richard Irwin died. In 1847, a suit was instituted by one John King against Acheson O'Brien and others to raise the amount of certain incumbrances affecting the said lands and premises for terms of years by way of mortgage, determinable with the life of Acheson O'Brien. On the 7th of June, 1854, appellant, William O'Brien was appointed receiver in the cause. On the 12th March, 1865, said respondent, Acheson O'Brien, died, and the suit having become abated by order of the Master of the Rolls, on the 11th May, 1865, petitioner was discharged as receiver over the said several lands. Previous to his discharge, viz.: on the 19th July, 1858, Jeremiah J. Murphy, Esq., the master in the cause, devised a portion of said lands, subject to the yearly rent of £40 to John O'Brien, (appellant's father), to hold to him, his executors, administrators, and assigns for seven years pending the cause. On the 28th, the said master devised another portion of said lands to said John O'Brien, his executors, administrators, and assigns, also for a term of years pending the cause. Said John O'Brien, on the execution of said leases entered into possession of said lands, and so continued in possession of same until the date of his death in September, 1859. And upon his death, appellant, said William O'Brien, as his father's representative, entered with the said master's approval into possession of the lands devised as aforesaid by said Master Murphy, and over which appellant was then acting as receiver in the said matter of *King v. Acheson O'Brien*. The appellant, previous to 16th Jan. 1863, had expended large sums in improving said premises, and had since he entered into possession farmed it in the most scientific manner. On the 16th of January, 1863, said Acheson O'Brien, having applied to appellant to purchase his the said Acheson's interest in the lease of 21st July, 1820, conveyed to appellant the lands comprised in said lease, to hold to the appellant, his heirs and assigns for the lives of the *cestui que vies* in the said lease named. On the 1st of July, 1865, the Master of the Rolls made the following order which was now being appealed from:—"It is ordered by the Right Honorable the Master of the Rolls, that William O'Brien, the receiver in this matter, do, on the 1st of November, 1865, deliver up to Mr. William Acheson O'Brien, the lands in the possession of the receiver, and claimed by the said receiver under the assignment of the 16th of January, 1863, without prejudice to the said receiver (if he shall be so advised) taking proceedings before the 1st September next, to establish his alleged title under assignment of the 16th of January, 1863, to the lands therein mentioned, and which assignment was made to him without the leave of the Court. And it is further ordered, in the event of such proceedings being taken by the said receiver before the 1st of September next, then shall he be at liberty to apply to the Court on the first day of next term to suspend the order for giving up the possession, on such terms as the Court shall think right. And it is further ordered, that if the receiver do not take such proceedings before the 1st of September next, he do

pay the costs of this motion and order when taxed and ascertained, and if the receiver shall take such proceedings before the 1st September, the Court then reserve the question of the costs of this motion and order."

*Brewster, Q.C. with Macmahon.*—This order of the Master of the Rolls is erroneous and must be reversed. By that order the Master of the Rolls condemns us to deliver up to William Acheson O'Brien the lease of 1820, which was assigned to us by the late Acheson O'Brien, and thereby treating as a nullity that assignment, which was valid both at law and equity, because it was made for good valuable consideration. But apart from this assignment we were under the 34th section of the Landlord and Tenant Act, entitled to hold the lands and premises comprised in the leases under the Court until the last gate day of the year, in which the tenancy determines by the death of the respondent, Acheson O'Brien, the tenant for life. On the first point, to use the expression of Mr. Platt in his book on leases, vol. i. p. 559:—"There is no rule of policy, even in equity, which absolutely prohibits an agent from being the lessee or assignee of his employer, principal or client." The assignment is not tinged with fraud, and is therefore good.—*Harris v. Tremblere* (16 Ves. 34). And this was the principle acted upon in *Oray v. Mansfield* (1 Ves. Sen. 379); *Othman v. Howard* (2 Ves. Jun. 259). A great deal of learning on sales by principal to agent and by *cestui que trust* to trustee is to be found in a note to *Bowen v. Keenan* (Lloyd & Gould, temp. Sugd. 79). The principle of all the decisions is, that if the agent or the receiver was not fraudulently taken advantage of his position to get thereby an advantage for himself the sale is good, but here there has been no allegation of fraud, and therefore the assignment to him was good; and we admit if there were a fraud in the transaction the transaction would be worthless.

*William Ryan, contra, cited Hatch v. Hatch* (9 Ves. 296). A receiver is actually incapacitated by his position from buying the property over which he is receiver. In the case of *Boddington v. Langford* (16 Ir. Ch. 558), this principle was carried out to its fullest extent. There a Mr. Boddington was a creditor on the Langford estate, over which a Mr. Guinness had been appointed receiver to collect the rents for the benefit of the general creditors. Lady Langford was entitled to a jointure, but as it was very irregularly paid she afterwards prevailed on Mr. Guinness to become the purchaser of it. Afterwards Mr. Guinness was bought before the Court by Mr. Boddington who prayed to set aside Mr. Guinness's purchase, and have him declared a trustee. Lady Langford appeared and stated that she was perfectly satisfied with the sale, and considered it a *bona fide* and fair transaction. And Sir Edward Sugden said he would support the arrangement as far as regarded her, but declared that the purchase by Mr. Guinness was a trust for the general creditors. The same doctrine is to be found in *Allen v. Bond* (Fl. & Kelly 196); *Atkins v. Delmege* (13 Ir. Eq. 1).

*THE LORD CHANCELLOR.*—I am of opinion that in this case there was nothing done in a secret or fraudulent manner, that being so, I cannot hold that this



transaction is void. I shall, therefore, reverse the order of the Master of the Rolls. A receiver over the estate of a reversioner is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right.

## Rolls Court.

Reported by H. W. B. Mackay, Esq. LL.B. Barrister-at-Law.

**SWEETMAN v. SWEETMAN.**—April 17.\*

*Practice—Receiver.*

*Although the petitioner does not dispute the respondent's right to one moiety of the rents of the property the subject of the suit, yet the Court in directing the appointment of a receiver pending the suit, will not direct that any part of them be paid over to the respondent.*

In this case there were a motion and cross-motion for the appointment of a receiver pending the suit, no person being now in receipt of the rents:—On the part of the petitioner, that the whole of the rents should be paid into Court to the credit of the cause without prejudice to the respondent's right to one moiety; and on the part of the respondent that one moiety should be paid over to him, and the other moiety into Court to the credit of the cause, without prejudice to the rights of the parties. The petitioner did not dispute the respondent's right to one moiety, though he guarded himself against admitting it.

*Lawless, Q.C.*, for the petitioner, cited *Robinson v. Hadley* (11 Beav. 614) that a defendant cannot move for the appointment of a receiver.

*Hemphill, Q.C.*, and *Litton*, for the respondent.

THE MASTER OF THE ROLLS said he would not make so unusual an order as that sought by the respondent. It was clearly for the benefit of both parties to have a receiver appointed to preserve the property, but he would give no directions about the rents. Perhaps a stranger might come in and make a claim with regard to them. He would reserve the question of costs.

His Honor then made the same order on both motions that it should be referred to the Receiver Master to appoint a proper person as receiver, and that the party whom the master should think fit should have the carriage of the order, reserving the question of costs.

**THOMPSON AND OTHERS v. THOMAS AND OTHERS.**—  
April 23.

*Practice—Reinstating petition—Costs.*

*A cause petition which stood dismissed under the 27th General Order of 1851, was reinstated upon the sole*

*ground (although some proceedings had been had upon it, and there had been some delay on the part of a respondent) that the petitioners were minors and only on the terms that the respondents' costs of the motion should be paid by the petitioners within ten days after taxation, and otherwise the motion to stand refused with costs without further order.*

THIS was a motion for an order that the proper officer might be at liberty to allow the petitioner to set down the cause petition in this matter, the time for doing so having expired, or in case the Court should be of opinion that the said cause petition stood dismissed by reason of its not having been set down within the time required by the 27th General Order of 1851, that said petition should be now reinstated, the petitioners undertaking forthwith to set down same, and thereupon to apply to the Lord Chancellor for liberty to have the said petition listed for hearing in this present term, notwithstanding the order served by the respondent, Francis Benthall. It appeared by the affidavit on which the petition was grounded that notice of filing the petition had been served on the respondent, Thomas, on the 20th March, 1865, on the respondent, Page, on 15th March, on the respondent, Thomas, (who was a minor) on 23rd June, and on the respondents, Benthall and Devine, who were out of the jurisdiction, on the 31st May. That the answering affidavit of Thomas had been filed on the 22nd November, and that that of Thomson was now ready to be filed; but that none had been filed by the respondent, Page, who had, however, appeared on the 21st March. That Benthall had, after obtaining an extension of time and after much delay, filed an answering affidavit on the 13th October, but that Devine had never appeared. That affidavits in reply had been prepared, but that on the 21st March, 1866, the respondent, Benthall had obtained the usual order as if the petition stood dismissed. A suit in the Probate Court had also become necessary, but no proceedings had been taken there until March last. The petitioners were all minors.

*Lawless, Q.C.* and *Harris* for the petitioners.

*F. W. Walshe, Q.C.* for the respondent, Thomas.

*Owen* for the respondent, Benthall.

*Richey* for the respondent, Page.

*O'Driscoll* for the respondent, Thompson.

THE MASTER OF THE ROLLS.—I would not have the slightest difficulty in refusing this motion with costs if the petitioners were not minors, in consequence of the disregard of the 27th General Order. I refused in two cases to reinstate petitions where there was nothing in the case but negligence. However, it is the course in England, and I sometimes adopt it here, that where minors are concerned, the Court will exercise a certain discretionary power, which does not apply in any other case, and solely on that ground I am disposed to reinstate the case on terms. As the record is now not in a state to be heard, I think it better not to set it down till the second day of next term; but the parties must understand that I will not then allow the case to stand over any further unless the time is accounted for in the most satisfactory manner; and I will provide for

the possibility of the next friend becoming insolvent, by making it a part of the order that the costs of the motion shall be paid within one week after taxation. If they are not then paid, this motion stands refused with costs.

His Honor made the following order:—It is ordered by the Right Honorable the Master of the Rolls (the petitioners being minors, and on that ground only, and subject to the provision hereinafter stated) that the costs of the motion be paid to the respondents who have appeared on this motion, or to their solicitors, within ten days after same shall be taxed, that the cause petition in the matter be reinstated, the said cause petition now standing dismissed by reason of its not having been set down within the time required by the 27th General Order of the 31st July, 1851; and it is further ordered that the said cause petition be set down for hearing on or before the second day of next Trinity Term, notwithstanding the order of the 21st day of March last obtained on behalf of the respondent, Francis Benthall; and it is further ordered that said order be and is hereby stayed until further order; and it is further ordered that William Robinson, the next friend of the said minors do pay to the said respondent, Francis Benthall, the sum of £10, and to the Rev. Joseph Neville Haughton Thomas the sum of £15, and to the respondent, the Rev. James Robert Page, the sum of £3 for their respective costs of this motion and order, within ten days from the date hereof, and in the event of the said several sums for costs not being paid within said period, it is further ordered that this motion do stand refused with costs without further order; and that the said respondent, Joseph Thomas, be entitled to his costs of appearing on this motion.

## Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

HODDER, APPELLANT; NO RESPONDENT.—April 27, 28, 1865.

*Fishery—Statute 26 & 27 Vic. c. 114, s. 3—Three mile limit—Power of commissioners to define.*

*The Special Commissioners of Irish Fisheries have not power to define and show by a map or plan the points of termination of the distance of three miles from the mouth of a river prescribed by s. 3 of statute 26 & 27 Vic. c. 114.*

THIS was an appeal from an order of the Special Commissioners of Irish Fisheries, brought by Mr. Samuel Hodder, the owner of "the Ringabella weir or fixed net," in Ringabella Bay, in the county of Cork. The facts material to this report as stated by the commissioners in their special case were as follows:—At a meeting of the commissioners held at Queenstown on the 4th August, 1864, the appellant being the party interested in and using the said weir or fixed net, ap-

peared, and no party appeared in opposition to him. He insisted on the right to maintain and use said fixed net under section 19 of statute 5 & 6 Vict. c. 106, by reason of same being attached to a part of the shore adjoining lands held and occupied by him as tenant in fee simple. It appeared in evidence that the said fixed net was what is commonly called a bag net, of which the appellant was the owner, and Charles Desmond the occupier, and the commissioners proceeded to inquire whether the said net was legal. It appeared by a map produced by the secretary of the commissioners that the said bag net was placed within three miles of the mouth of the Carrigaline River, as defined by the said commissioners, and was in contravention of s. 3 of the statute 26 & 27 Vic. c. 114. The said map purported to be a true copy of the original definition of the mouth of the said river, with the maps attached thereto in reference to which such definition had been made. After an objection which was overruled, and which is immaterial to this report, the said definition and map were given in evidence; and it was admitted that the position of the net was correctly shown on the said map by a cross and the word "bag net," and was shown to be within the space within which bag nets were prohibited. The appellant then went into a case, and independently of the 3rd section of the statute established a title to maintain and use said weir; and then, for the purpose of displacing the facts established by said map, a surveyor was called and sworn; and it was proposed by counsel to go into a case by means of his evidence to show that the mode of measurement adopted by the commissioners in defining the mouth of the Carrigaline River was erroneous, and that by another means of measurement said net would be more than three miles from the mouth of the Carrigaline River; and they proposed to examine said surveyor to prove said measurement and case, but the commissioners refused to allow said evidence to be given upon the ground that the definition and fixing by them under the 9th section of statute 8 & 9 Vic. c. 108, and the other Salmon Fishery Acts, of the mouth of said river and of the space within which bag nets were not to be placed, was final, and that it was not open to the said applicants to go into such evidence upon this inquiry, and without hearing it decided that said fixed net was illegal and should be abated. The question for the Court now was whether upon the above facts the decision of the commissioners was correct. The definition above mentioned began, "We, the special commissioners appointed under the 26 & 27 Vic. c. 114;" it was signed by two of the commissioners, and sealed with the common seal of the commissioners. The three mile limit was fixed in it by a line drawn straight from the mouth of the river across the land to the point on the sea-coast where the weir was. If the line had been drawn following the coast, the net would have been outside the limit.

W. Johnson (with him Brewster, Q.C.) for the appellant.—The commissioners have not power to define the *terminus ad quem*, the distance of three miles prescribed by the statute 26 & 27 Vic. c. 114 is to be measured; but we admit they have power to define the *terminus a quo*. Statute 5 & 6 Vic. c. 106, ss.

22 & 27, provide respectively for the cases of mouths of rivers being three quarters of a mile, and a quarter of a mile in breadth, give the commissioners power to define the mouths and prohibit nets being placed within a mile and half a mile respectively, seawards, coastwards, or inwards from such mouth so defined. Section 8 of statute 7 & 8 Vic. c. 108 provides for a copy of the definition of a mouth of a river being deposited with the clerk of the peace. Section 9 of statute 8 & 9 Vic. c. 108 gives the commissioners power to define points of termination of the mile and half mile distances established by ss. 22 & 27 of 5 & 6 Vic. c. 106; but this is the only section in all this code which gives the commissioners power to define a *terminus ad quem*. Section 21 of 13 & 14 Vic. c. 88 gives them power to define the mouths of tributary rivers. Section 44 of the same Act again enforces the half mile limit, but all these sections contemplate the measurement being made seaward, coastward, or inward. Section 3 of statute 26 & 27 Vic. c. 114 establishes a three mile limit; and section 17 at its close empowers the commissioners to define the points of mouths of rivers from which the distance is to be measured, but does not give them power to define the points of termination of the distance itself. The mode of measurement here was wrong. The only mode of measurement contemplated by the Acts is by a line drawn "seaward, coastward, or inward." It will be said that where jurisdiction within a particular limit is given to inferior courts the limit is to be ascertained by a line drawn as the crow flies; but the cases on that point have nothing to do with the present case.—*Jewel v. Stead* (6 E. & Bl. 350). By section 35 of 26 & 27 Vic. c. 114, all cases relating to the removal of weirs are to be heard by all the commissioners; but, practically, in this case the hearing was by two only, if the definition, signed by two only, is held to be conclusive. [*Fitzgerald, J.*—Although the definition is signed by two only, yet it purports to be the act of all.]

*Mills* for the Attorney-General, there being no respondent, to sustain the order of the commissioners.—The view taken by the commissioners was—that these acts being all one code, the power given by the earlier Act to define the mile and half mile distances extended to the three mile distance established by the last Act, and that the 9th section of statute 8 & 9 Vic. c. 108 is to be read as incorporated with the present Act.

*Brewster, Q.C.*, was not called on.

*LEFROY, C.J.*—The Court thinks that the case should go back to the commissioners. My brother O'Brien will give the reasons for the decision.

*O'BRIEN, J.*—I shall now state the grounds of our judgment. The matter appears to me to be as plain as can be. The 5 & 6 Vic. c. 106 provides in section 22 "that where the breadth of the mouth or entrance into the sea of any river, the inland portion of which is frequented by salmon, is less than half a mile statute measure at low water of spring tides, it shall not be lawful for any person whatsoever (save and except the proprietor of a several fishery within the limits thereof) to place or erect any such weir or net within one statute mile seawards, coastwards, or in-

wards from or on either side of the mouth or entrance of any such river into the sea, the mouth or entrance of such river to be defined and determined for such purpose by the said commissioners." Section 27 then enacts that "where the breadth of the mouth of the river does not exceed a quarter of a mile statute measure it shall not be lawful for any person except the proprietor of a several fishery to shoot, draw, or use any net for taking salmon within half a mile seaward, or along the coast from the mouth of any such river, such mouth to be defined and ascertained in case of dispute by the commissioners." Then, when the next Act, the 8 & 9 Vic. c. 108, was passed it was found necessary to have some mode of fixing the limits stated in the former Act, and accordingly by section 9 it is enacted "that in all cases where the said commissioners, under the provisions of the first recited Act" (the 5 & 6 Vic. c. 106) "have heretofore defined, or may hereafter define, the mouth or entrance into the sea of any river, it shall and may be lawful for the said commissioners, in addition to such definition and determination as aforesaid, to define and determine the points of termination of the respective distances prescribed by the said first recited Act, and to illustrate and show by a map or plan, or otherwise as they may consider best, the said points of termination and the space or spaces within which it is by the provisions of the said first recited Act prohibited to erect or use certain fishing weirs, nets, or engines, or to use or practise certain modes of fishing." There are no general words authorising them to define all distances under these Acts, but only those mentioned in the 22nd and 27th sections of the 5 & 6 Vic. c. 106. Then comes the present Fishery Act, 26 & 27 Vic. c. 114, which introduces the three mile limit, and says in section 3 that "after the passing of this Act no bag net shall be placed or allowed to continue in any river, or the estuary of any river, as such river or estuary has been defined by the Commissioners of Fisheries, or shall be defined by the Commissioners under this Act, or within a distance of less than three statute miles from the mouth of any river as defined as aforesaid." The 17th section then provides that "notwithstanding anything contained in the Salmon Fisheries Acts or any definition of the Commissioners acting in pursuance of those Acts, the commissioners under this Act shall mark out, by reference to maps or otherwise, what are to be the boundaries of mouths of rivers and estuaries, and the boundaries between the tidal and fresh water portions of every river, for the purposes of this Act and the said Salmon Fisheries Acts, with power where several streams flow into a common mouth or estuary to declare that the outlets of such streams form separate mouths or estuaries." That gives the commissioners in express terms the power of pointing out the mouths of rivers and estuaries, but says nothing about distances; but the concluding portion of the section says—"The commissioners may also define the point or points of mouths of rivers or estuaries from which distances are to be measured under this Act and the Salmon Fisheries Acts. There is the power which is given—a power to define the *terminus a quo*, omitting any power to define the *terminus ad quem*; and yet we are told that because the statute 8 & 9 Vic. c. 108 gave power

to determine two specific distances only, they have power to define all distances. It is said we are to read all these Acts together, and incorporate section 9 of statute 8 & 9 Vic. c. 108 with the present Act; but if we were to do so, and also introduce the two sections of 5 & 6 Vic. c. 106, that would leave the matter where it is, and still the only power of defining distances would be in the cases of the mile and half mile limits. It is clear to me that in this case the commissioners should not have held their map conclusive as they have done. They were right, and that is indeed not disputed, in holding it conclusive as to the mouth of the river and the points from which the distances are to be measured. We must therefore reverse the decision of the commissioners and send the case back to them, pronouncing no opinion as to the mode in which the measurement is to be made.

FITZGERALD, J.—Our sending this case back shows how wise it would have been if the Legislature had given the commissioners power to define the three mile limit, but they have not done so. The wisdom of giving the power is seen by this: the case will now go back to the commissioners for the purpose of receiving evidence, and we shall now have a scramble as to the mode of taking it.

THE EARL OF ANTRIM, APPELLANT; NO RESPONDENT.  
SIR EDWARD MAC NAGHTEN, APPELLANT; NO RESPONDENT.—April 27, 28.

*Fishery—Exclusive right of fishing in river and tributaries—Estuary—St. 26 & 27 Vict. c. 114, s. 3.*

*A person having the exclusive right of fishing in a river and its tributaries, so far as the same are frequented by salmon, is within the provisions in s. 3, of stat. 26 & 27 Vict. c. 114.*

*Therefore where a person had the exclusive right of fishing in a river up to a fall above which salmon could not get, a bag-net placed by him in the river was not affected by reason of his not having the exclusive right of fishing in the river and its tributaries above the fall.*

*The provision at the end of s. 3 of st. 26 & 27 Vict. c. 114 for the case of a person having the exclusive right of fishing, does not apply to or render legal a bag-net placed in the estuary of a river.*

THE first of these appeals was brought by the Earl of Antrim against a decision of the Special Commissioners of Irish Fisheries abating two fixed nets of the appellant, one called "the Glenarm fixed net," in the bay of Glenarm, and the other called "the Carnlough fixed net," in the bay of Carnlough, both in the county of Antrim. The second appeal was brought by Sir Edward Mac Naghten against a decision of the commissioners abating two fixed nets called "the Portballintrae and Blackrock fixed nets," also in the county of Antrim. The special case in the Earl of Antrim's appeal was as follows:—At a meeting of the said commissioners holden in Ballymoney, in said

county, on the 30th August, 1864, the appellant being the party interested in and using said weirs or fixed nets having been duly summoned by two several summonses to appear before the commissioners, "that there might be then and there enquiries touching the legality or illegality of said weirs or fixed nets, and that a decision might be made by the commissioners with respect to their abatement or removal," appeared personally and with counsel and solicitor, and no person appeared in opposition to the said appellant; and the appellant insisted on the right to maintain and use said fixed nets under the 18th section of the 5 & 6 Vic. c. 106, by reason of their being erected by him within the limits and bounds of a several fishery to which the appellant claimed to be entitled along the estuary and part of the sea-coast in and upon which said fixed nets were erected. The title to both the nets and the evidence connected with them being substantially the same, the two cases were tried together by consent, and a joint case for appeal is therefore stated. Both said nets were bag nets. The Glenarm net was situated in Glenarm bay, within the boundary of the estuary of the Glenarm river, as defined and marked out by the said commissioners for the purposes of the Salmon Fishery Acts, and within three miles of the mouth of said river as so defined. The Carnlough net was situate in Carnlough bay, outside the boundary of the said estuary of the Glenarm river as marked out as aforesaid, but within three miles of the mouth of said river as so marked out, and within the space shewn by said commissioners on a map, (with reference to which the boundaries were marked out and defined), as that within which it was prohibited to use or erect bag nets. The appellant proved a title to a several fishery in Glenarm bay and Carnlough bay respectively, and a right to use and erect said nets, under the 18th section of the 5th & 6th Vict., cap. 106; and the question as to their legality or illegality turned entirely upon the true construction of the 26 & 27 Vic. c. 114, s. 3, and the right of the appellant to maintain said net by virtue of his rights in the Glenarm river. It was proved that the Glenarm river was formed by the junction about five miles from its mouth of two rivers, one called on the ordnance map the Linford water or river, and called by one of the witnesses Mullaghsandal, and the other called the Owencloghy. Each of these rivers takes its rise about five miles higher up than the junction, and between it and the rise receives several tributaries, through one of which the waters of Lough Duff flow into the former river. Between the junction and the mouth of the Glenarm river the Altmore river falls into it, as shown on the ordnance map, but it was not referred to in the course of the inquiry. It appeared from the evidence that a short distance below the junction there is a waterfall of about fifteen feet high called "the Salmon Leap," above which at present salmon could not go; that a little higher up than the junction there was on the Linford water or river a fall called the "Bull's Eye," about forty feet high over which at present salmon could not pass up; and a gamekeeper of the appellant who knew the river for thirty-two years proved that on one occasion only had he seen a salmon above "the Salmon Leap," and that was some years since when

an alteration had been made in "the Salmon Leap" for the purpose of allowing the fish to ascend, but that some blasting afterwards took place at "the Salmon Leap" which injured it for the passage of salmon, and that they cannot now pass up. It was further proved that the Glenarm River, between its mouth and the junction, and from the junction for a part of the way to the source of the Owencloghy branch, runs through the demesne and grounds of the appellant, and that he exercised the sole right of fishing and giving permission to fish in that part; but that the upper part of that branch and its tributaries were the property of other persons, part of it having been sold to Sir E. Coey by the appellant and his family. It was also admitted that the Linford water or Mullaghsandal branch above the junction, which is about seven miles long, belongs to a gentleman of the name of Agnew. Upon the above facts it was contended, upon behalf of the appellant, that, inasmuch as he had the exclusive right of catching salmon in that portion of said Glenarm River and the Owencloghy branch of it as aforesaid, upon which alone salmon were now to be found, he had according to the true construction of the proviso in the 3rd section of 26 & 27 Vic. c. 114 the exclusive right of catching salmon in the whole of the River Glenarm, including all lakes and tributaries in its course, and that he was therefore entitled to maintain said nets by reason of said proviso, notwithstanding that same were within three miles of the mouth of the Glenarm River, as defined as aforesaid. It was further contended with respect to the Glenarm net that inasmuch as the said appellant had such exclusive right as aforesaid he had a right to maintain such Glenarm net by reason of said proviso, notwithstanding that same was situated in the estuary of said River Glenarm as marked out as aforesaid; but the commissioners held that the appellant had failed by proof of the facts above stated to establish such exclusive right of catching salmon as is required by said proviso; and even if he had, yet that the Glenarm bag net being within the estuary of said Glenarm River, as marked out as aforesaid, was illegal within the enactments of said 3rd section. The appellant then offered to give evidence to show that the Carnlough net was situated more than three miles from the mouth of said River Glenarm, as defined by the commissioners, and from the point fixed by them from which the distances for the purposes of the Salmon Fishery Acts were to be measured; but the commissioners held that the definitions and boundaries marked out by them, and the points from which distances were to be measured, as shown on the map referred to in their definition used by the appellant, and duly published as required by the statutes, was conclusive evidence upon said inquiry under the 9th section of the 8 & 9 Vic. c. 108, and the 33rd section of 26 & 27 Vic. c. 114, as to the said Carnlough net being within three miles of the mouth of said Glenarm River, and they refused to receive any evidence of the distance by measurement *dehors* said definition and map, or to show that the principle of measurement they had adopted was wrong; and they ordered both said nets to be abated and removed. The appellant being aggrieved by the said decision applied to the commissioners within the time required by and in ac-

cordance with the provisions of the Salmon Fishery (Ireland) Act, 1863, to settle a special case by way of appeal for the Court of Queen's Bench; and the commissioners in compliance with said application submit the above facts with the grounds of their decision for the consideration of said Court, the question being whether upon the above facts the decision of the commissioners was correct. If so, it is to stand; but if not, such order is to be made as the Court shall think right.

The special case in Sir Edward Mac Naghten's appeal was as follows:—At a meeting of the said commissioners holden at Ballymoney, in said county, the 30th day of August, 1864, the appellant being the party interested in the using said weir or fixed net having been duly summoned to appear before the commissioners "that there might then and there be an inquiry touching the legality or illegality of said weir or fixed net, and that a decision might be made by the commissioners with respect to its abatement or removal," appeared personally and with counsel and solicitor, and no person appeared to oppose said case. And the appellant insisted on the right to maintain and use said weir or fixed net under the 18th section of the 5 & 6 Vic. c. 106 by reason of its being erected by him within the limits and bounds of a several fishery to which the appellant claimed to be entitled along the estuary in which said nets were erected. In these cases the title and question being the same the cases were by consent heard together, and therefore a joint case for appeal is stated. It was proved, and the commissioners decided, that Sir E. Mac Naghten was entitled to a several fishery in the River Bush, and had the exclusive right of catching salmon in the whole of said river, including all tributary rivers and lakes upon its course; and that the said nets, which were bag nets, were situated within the estuary of the River Bush, as the same was duly fixed, marked out, and defined by the said commissioners pursuant to the statutes in that behalf, and also within three miles of the mouth of the said river, as so defined and marked out; and it was contended that upon that state of facts they were legal under the proviso at the end of the 3rd section of the 26 & 27 Vic. c. 114 (notwithstanding their being within the estuary as aforesaid, and therefore illegal within the enactment in the first part of the 3rd section); but the commissioners held and decided otherwise, and ordered that the nets should be abated and removed. The appellant feeling aggrieved by the said decision has applied to the commissioners within the time required by and in accordance with the provisions of the Salmon Fishery (Ireland) Act, 1863, to settle a special case by way of appeal for the Court of Queen's Bench; and the commissioners, in compliance with said application, submit the above facts with the grounds of their decision for the consideration of said Court, the question being—whether upon the above facts the decision of the commissioners was correct. If so, it is to stand; but if not, such order is to be made as the Court shall think right.

*Brewster, Q. C. and Harrison, Q. C.* for the appellants.—The Commissioners had no right to state anything in their special case about the Altmore River: neither it nor the ordnance map was referred to below. With respect to the Carnlough Net, the Commissioners

were wrong in holding their map conclusive as to the net being within three miles of the mouth of the river. At all events Lord Antrim must be taken as having the sole right of fishing in the river and its tributaries. The case shows that he has that sole right in as much of the river as salmon can get at, and it would be unreasonable to hold that he can be affected by the proprietorship of streams which are above an obstacle that salmon cannot get over. The word "tributary" in the third section must mean a tributary where salmon can go and breed. Supposing a gentleman had the sole right of fishing in the river up to the Powerscourt Waterfall, could that right be affected because he was not the owner of some of the little mountain streams which fall into the main river above the fall? The proprietors above such an insuperable obstacle could not be injured by any nets below. As to the Glenarm Net, there is no reason for abating a net in the estuary, when outside of the estuary, and even within the three mile limit, if we are right in our contention on the Carnlough Net, we could, as sole proprietors of the right of fishing, put as many nets as we like.

*Mills for the Attorney General.*—As to the Carnlough Net, the Court must decide upon the plain words of the Act, which exempt from illegality, only in the case of a river "in the whole of which, including all its tributary rivers and lakes upon its course, the proprietor of such bag-net has the exclusive right of catching salmon." The case shows that that state of facts does not exist here. The obstacle spoken of in the case may be removed. As to the Glenarm Net, it is expressly found to be within the estuary, and the exception at the end of the third section does not apply to nets so placed.

O'BRIEN, J.—In this case of Lord Antrim's there were two bag-nets, one the Glenarm bag-net, and the other the Carnlough bag-net. They were both declared illegal, but on different grounds. The Glenarm bag-net is found to be within the estuary. The Carnlough bag-net is found to be within three miles of the mouth of the river. As to the Carnlough bag-net, it is contended by Lord Antrim that as he is the owner within the third section, as he has the exclusive right of catching salmon in the whole of that river, therefore his net was saved by the exception in that section. Now, it is clear that he is the owner of the entire of the soil of the river, and has the exclusive right of fishing up to the "Salmon Leap," where there is a fall of fifteen feet. Beyond that, there is a junction of two streams, and the soil on one side of the river in each belongs to other proprietors, and of course if he cannot establish his right to the benefit of these sections by reason of having the sole right of fishing up to the "Salmon Leap," his case fails. Now, there would be a good deal of difficulty in getting over the objection relied upon by Mr. Mills. But having regard to the purpose for which this legislation was made, we cannot not give a technical construction to the Act. Cases were put yesterday of little dribblets of streams falling into the upper part of a river. There was a case put by Mr. Harrison, of Powerscourt Waterfall, where a stream above the fall is a tributary; but it would be absurd to say that a person having the exclusive right of fishing below the fall would be affected by not

having that right above it. Having regard to the rights of the parties, and that it was intended for the benefit and protection of the persons above that a bag-net should not be placed within three statute miles of the mouth, we do not think that parties above this fall can be injured in this instance. The case finds in express terms that no salmon can now pass up beyond that fall called the "Salmon Leap." It is true that on one occasion one salmon was seen above it during the time that some alterations were made in the passage, but afterwards the passage for salmon was broken up, and they now cannot pass. It has been suggested that at some time hereafter, by some act of Lord Antrim, which is not very likely, as it is against his own interest, or by some convulsion of nature, a gap might be made for the salmon. We are not to speculate on that, but to decide on the present state of affairs; and it being found by the case that no salmon can pass up, we think that for the purposes of this section we may hold Lord Antrim as having the exclusive right of catching salmon in the river, and such parts of the tributaries as the salmon can get at. There was a reference in the case, not very regular, perhaps, to another river which was not referred to on the hearing below. It is enough for us to say that the case must be considered on the evidence adduced before the Commissioners, and we should not, in justice to the parties decide on a matter which was not before the Commissioners. That decides as to both these weirs upon this point. As to the Carnlough weir, there is no other objection, except whether it is within three miles of the mouth of the river. The question on this was the same as that which we have just decided in *Hodder's case*. It is not necessary for us to decide that point as to either weir. If it was, we should follow the decision in *Hodder's case*. Therefore, so far as Carnlough bag-net goes, the order below must be reversed. With respect, however, to the Glenarm bag-net the case is different. That is expressly found to be within the estuary. The argument as to this did not occupy much time, and the grounds put by Mr. Mills were not answered. It is admitted that the 17th sec. of the last Act gave the Commissioners power of defining conclusively what was the estuary and the mouth of the river. It gave them that power. That being so, I believe there is no controversy on that part of the case. We have to consider whether there is anything in the case respecting this bag net to take it out of the third section. It is said that it is declared to be illegal as being within three statute miles of the mouth of the river, and therefore that Lord Antrim is entitled to be within the benefit of the third section; but it is declared illegal also by reason of its being within the estuary of the river; and the benefit of the proviso is expressly confined to cases where the only reason for the net being illegal is its being within three miles. It says that "after the passing of this Act no bag net shall be placed or allowed to continue in any river or the estuary of any river, as such river or estuary has been defined by the Commissioners of Fisheries, or shall be defined by the Commissioners under this Act, or within a distance of less than three statute miles from the mouth of any river as defined as aforesaid;" and then

it provides "that no bag-net now legally existing shall be liable to be abated or removed, or be deemed illegal under this Act, by reason of its being within three miles of the mouth of a river, in the whole of which, including all tributary lakes and rivers upon its course, the proprietor of such bag-net has the exclusive right of catching salmon." That leaves untouched the illegality by reason of being within the estuary. Therefore I think the decision of the Commissioners was right on that subject. As to Sir E. McNaghten's weirs we were told that both the nets were within the estuary, and therefore the observations I have made as to the Glenarm bag net in Lord Antrim's case apply, and the decision must be affirmed. In Lord Antrim's case, therefore, our ruling is to affirm the decision of the Commissioners, so far as it declares the Glenarm bag net illegal as being within the estuary, and to reverse it as to the other grounds, and as to McNaghten's case we affirm the decision.

FITZGERALD, J.—I concur with the judgment of the Court. The first question I should consider as one of considerable doubt; but the better opinion seems to be the one that has been arrived at. I may state that if it had not been for the finding of the Commissioners, in point of fact, I should doubt the existence of this insuperable obstacle. The name the place had in the country is "the Salmon Leap," which evidently points to the salmon getting over it. But the Commissioners have found that it is a difficulty over which salmon do not and cannot get. There is a finding that Lord Antrim has in these bays and in this river the sole and exclusive right of fishing for salmon. I think, though not without doubt, that we should not in a case of this kind involving private rights, adhere too strictly to the words of the Act. On the strict words of the Act the Commissioners were right. But having regard to the provisions of this Act, and the language of the 5 & 6 Vict., the words may mean "having an exclusive right of fishing on the river so far as it is frequented by salmon." On the other point I entertain no doubt. This bag net is a very destructive engine, and all the more so the closer it is to the mouth of the river, and I can understand how, for public purposes the party should be prevented from destroying the fish by catching them in the mouth of the river, or up from it or near it, and we must hold that catching them in the estuary, even though the party has there an exclusive right of fishing, is in contravention of the Act of Parliament. With respect to what has been said as to the Commissioners mentioning in their case a stream which was not mentioned below, I must say that I think they were right, as a description of the place, to refer to the Almore stream. It is their duty to give a description of the place where the weirs are situated, and in that view they were right.

ARKINS v. BRUNTON.—Jan. 24, April 19, 20.

*Trespass on dwelling-house—Bill of sale—Authority to enter and seize—Agent.*

*By a bill of sale of furniture in a dwelling-house power*

*was given to the grantees and their agent or agents in a certain event, at any time or times thereafter to enter in and upon the dwelling-house and seize and sell the furniture. The event having happened, the grantee's agent came to the dwelling-house and demanded admittance by the hall-door, and this having been refused, he effected an entrance by opening a window, and then made a seizure. Held, that this entry was illegal and not justified by the power of entry contained in the bill of sale, the agent not having disclosed his authority or stated the purpose for which he demanded admittance.*

*A bill of sale gave a power of entry on a dwelling-house to two grantees, A and B, "or their agent or agents." Quære, would this authorize an entry by an agent appointed by A alone "on behalf of himself and B."*

DEMURRER.—The summons and plaint complained that the defendants William Brunton and Thomas Studley broke and entered the dwelling house of the plaintiff, No 73 Lower Gardiner-street, in the city of Dublin, and remained therein for a long space of time, and broke open the door and windows thereof, whereby the plaintiff was greatly disturbed and annoyed, and prevented from carrying on his business, and had sustained damages to the extent of £200.

To this the defendant William Brunton pleaded, thirdly, to so much of the supposed trespasses in the plaint mentioned, as complained that the defendant broke and entered the dwelling house of the plaintiff, and remained therein for a long space of time, and made a great noise and disturbance therein, and broke open one door and one window thereof,—that before the committing of the alleged trespasses, the plaintiff being possessed of the dwelling house in the summons and plaint mentioned, and of certain goods and chattels, furniture and effects therein, by a deed bearing date, to wit, the 18th day of April, 1865, and duly registered pursuant to the statute in that behalf, assigned to the defendant, William Brunton, and one James Forbes, all the said goods, chattels, furniture and effects as specified in the schedule to the said deed annexed, to secure the said William Brunton and James Forbes a certain debt due from the plaintiff to the defendant, William Brunton, and the said James Forbes, together with interest thereon, and certain costs therein mentioned; and it was by the said deed among other things agreed between the plaintiff and the defendant, William Brunton, and the said James Forbes, that if default should be made by the plaintiff in payment of any of the monthly instalments thereby agreed to be paid the plaintiff on foot of said debt, interest and costs, it should be lawful for the said William Brunton and James Forbes, or their agent or agents, at any time or times thereafter whilst any money should remain due on the said security, to enter in and upon the said dwelling house in plaint mentioned, or any dwelling house messuage, or tenement for the time being occupied by the said plaintiff, in which any of the said goods and chattels so assigned should be, and to seize, and take and keep possession by his or their servant or servants of the same or any part thereof, either upon the said premises or elsewhere, at his or



their election, and immediately on entering into and taking such possession as aforesaid, or at any time or times thereafter, at his or their discretion, without any further consent on the part of the plaintiff, to sell and dispose of the said goods and chattels so thereby assigned, or any part thereof upon said premises or elsewhere at his or their election, by public auction or private contract, and in such manner as he or they should think fit; and the defendant, William Brunton, averred that before and at the said time when and so forth, he the plaintiff did make default in the payment of one of the said instalments as provided for by the said deed, and therefore and whilst said default so continued the defendant, William Brunton, on behalf of himself and the said James Forbes, instructed the defendant, Thomas Studley, as and being their servant, by virtue of the authority contained in the said deed, and whilst moneys still remained due on foot of said security, and whilst such default existed in the payment thereof as provided by the said deed, the said furniture, goods, and chattels so assigned by said deed being then in and upon said dwelling house, to enter into and upon the said dwelling house, and to seize and take and keep possession of same upon the said premises for and on behalf of him the said William Brunton and the said James Forbes, and to sell said goods and chattels on said premises by auction in manner provided for by said deed; and the said defendant, William Brunton, averred that under and by virtue of such authority, and as and being agent of the said defendant and the said James Forbes, the defendant, Thomas Studley did therefore proceed to the said dwelling house for the purpose of obeying said order so given to him by defendant, William Brunton; and he the said Thomas Studley as such agent as aforesaid knocked at the hall-door of the said dwelling house, the same being then securely fastened and closed from the inside; and said Thomas Studley then and there demanded to be admitted, and he the plaintiff who was then within the said house, and heard the said Thomas Studley then demand to be admitted, refused to admit him the said Thomas Studley to said house, and still kept said hall-door securely closed against him; whereupon, and there being no other door accessible to said Thomas Studley for the purpose of so entering said dwelling house for the purpose aforesaid, and he, the plaintiff, having still continued to refuse to allow said Thomas Studley to enter said house, he the said Thomas Studley as the agent of him the said William Brunton and James Forbes, and in their behalf, in a peaceable manner, and from the outside of said house, gently raised the parlour window of the said house, and having done so, he the said Thomas Studley entered said house through said parlour window, there being then in said parlour a portion of the goods so assigned by plaintiff to the defendant, William Brunton and the said James Forbes, under said deed as aforesaid; and he the said Thomas Studley, thereupon, seized said goods so then being in said room; and the said defendant averred that the plaintiff locked and kept locked and fastened the door of said parlour leading from the same into the hall of said house which communicated with the other apartments in said house,

wherein there were then contained divers other articles of said goods and chattels so assigned by said deed; and the said Thomas Studley being so locked in said parlour demanded of the plaintiff to unlock said parlour door, and to suffer him the said Thomas Studley to pass through same into said hall, so as to enable him the said Thomas Studley to complete said seizure as aforesaid, and he the plaintiff having declined to open said door, and same being still fastened by the lock thereof, and there being no other way in which said Thomas Studley could gain access from said room to said other rooms in said house, he the said Thomas Studley, so acting as aforesaid, peaceably and gently broke open said door, and passed through same into said other parts of said dwelling house wherein there were certain divers other portions of said goods and chattels so assigned by said deed; and he the said Thomas Studley seized said other goods and chattels then being in said dwelling house and so assigned by said deed; and he the said Thomas Studley, thereupon, continued to remain in and upon said dwelling house in possession of said goods and chattels so seized by him as aforesaid; and the said defendant averred that within a reasonable time after said entry into said house and said seizure of said goods, he the defendant caused said goods to be sold by public auction upon said premises in manner provided for by said deed, and same were thereupon and within a reasonable time after such sale removed from said house; and he the defendant and said Thomas Studley, thereupon, at once quitted said house; and the defendant averred that in so effecting an entrance into said house, and from said parlour to the other parts of said house, no more force or injury was done to said window or door or house than was necessary for such purpose; and he the defendant or said Studley did not remain in said house longer than was necessary for the purpose of doing the acts in this defence justified, and did not while in said house make more noise or disturbance than was actually necessary or consequent upon the doing of the acts in this defence justified and in said plaint complained of, and which were the said supposed trespasses in the introductory part of this defence mentioned and in said plaint complained of.

To this third defence of the defendant William Brunton the plaintiff demurred, saying that the same did not disclose sufficient ground of defence to the action, because, whilst it purported to justify the trespasses complained of, it admitted an unlawful breaking and entry of the plaintiff's house; and also because the said deed of the 18th April, 1865, or the authority therein contained and relied on by the said defendant did not authorise or justify the acts committed by the defendant as alleged in his defence; and also because the said defence purported to justify all such amount of force and injury as was or might be necessary for the purpose of violently forcing an entry into and through the dwelling house of the plaintiff under the authority or presumed authority of the said deed; and also because the said defence did not state any matter amounting to a legal justification of the trespasses complained of in the writ of summons and plaint, and was in various other ways insufficient in substance.

*P. F. White* for the plaintiff in support of the demurrer.—There is no averment in the defence that the bailiff when he came to the house informed the plaintiff of the cause on which he came, or the authority which he came to exercise. The defence contains a clear admission of an illegal entry and a breaking with force and injury. What the defence alleges would support an indictment for burglary. Unless there is something in the bill of sale to give a legal character to what was done by Studley, he did commit what we charge in the summons and plaint. *Wood v. Leadbitter* (13 M. & W. 840) will be cited on the other side, but that class of cases has nothing to do with the case before the Court. So with *Wood v. Manley* (11 Ad. & Ell. 34). For anything appearing on the defence Studley was an utter stranger to Arkins. Consistently with the defence he might have come to the house in the middle of the night. *Wood v. Manley* is not an authority against the demurrer here. The person who entered there made a formal and specific demand which was refused. This is simply a case of breaking into a dwelling house. The law as to entries by landlords is laid down in *Brown v. Glenn* (16 Q. B. 254). With reference to entries made by sheriffs, see *Semayne's case* (1 Sm. L. C. 85). It is to be presumed that if the plaintiff knew who was coming he would have obeyed the law. The fourth and fifth resolutions in *Semayne's case* are important. So too the case of *Burdett v. Abbott* (14 East. 1); especially the judgment of Lord Ellenborough, at pp. 154 and following. *Ancaster v. Milling* (2 Dowl. & Ry. 714); *Launock v. Brown* (2 B. & Ald. 592). Where a party covenants to pay money "immediately on demand," the word "immediately" must receive a reasonable construction, so as to allow the debtor time to procure the money; and if the demand is not made by the creditor himself, to inquire into the authority of the person making it to receive the money.—*Jones v. Wilson* (4 Best & Sm. 442). [*Fitzgerald, B.*—This point is also open to you that the authority on the face of the deed is to Brunton and Forbes to appoint an agent, and that here it appears that the agent was appointed by Brunton only.]

*James Wilson and Sidney, Q. C.* for the defendant to support the pleading.—This is the case of a licensee. A licensee has greater rights than a sheriff executing a writ.—*Wood v. Leadbitter*. A sheriff is bound to perform his duty in a particular way. The defendant here had liberty to enter at any time or times. In *Wood v. Leadbitter*, Alderson, B. reviews the authorities, and recognizes *Wood v. Manley*. In *Williams v. Morris* (8 M. & W. 488) the absence of the express agreement which we have here was the ground on which the motion for a new trial was refused, so that that case is impliedly an authority in our favour. By bill of sale the goods were ours, and we had a right to enter the plaintiff's house to take them.—*Patrick v. Colerick* (3 M. & W. 483); *Harvey v. Brydges* (14 M. & W. 437). A freeholder may commit a breach of the peace to get into possession of his own freehold; that is, though he is responsible criminally to the public, he is not so to the party. Most of the cases on the other side are clearly distinguishable from this. Brun-

ton and Forbes were in the position of joint tenants, and one joint tenant can appoint a bailiff on behalf of himself and the others.

*Palles, Q. C.* replied.—It must be remembered that this was a trespass to a dwelling house, which is very different from the case of a trespass upon land. A license to enter a dwelling house does not authorise a breaking.—*Rogers v. Spence* (13 M. & W. 581). The law gives its protection to a man's dwelling house as part of the protection thrown round the person of the man himself. A breaking is only justified in the case of the execution of the King's writ, by the sheriff, and then only after request. No man can be called upon to open his house to any person without being made acquainted with the reason why he should open it to him. This is not a case of joint tenancy. We are not dealing here with an estate in land, nor with the case of tenants in common of personal property; it is simply a power to enter granted to two, and can it be said that such a power without an estate, can be executed by one? Every authority must be most strictly pursued.—Comyn, Digest, l. 774.

*LEFROY, C. J.*—We are all of opinion that the party has not shown authority to justify his entry the way he exercised the authority or power that he claimed upon any of the facts disclosed by him. He has not shown an authority to break and enter the house, which he would be bound to show to support his case as stated on the pleading. Although there may not have been as perfect and full a specification on the record of the authority that was given, everything must be intended necessary to give a reasonable construction to the contract between the parties. I have stated in the course of the case the amount of what I could say now upon it, save only that I could not go through the long authorities that were necessary to explain the principle on which I decide, but the reason which I gave in the course of the case still strikes me as sufficient to authorise the judgment on my part, to which I adhere.

*O'BRIEN, J.*—When the case was argued last term, I had a strong impression as the Court has now decided, but it stood over because the point was that Studley was unknown to the plaintiff. It was only in the progress of the argument that the point was raised. I am glad it stood over, because it has been argued with great ability on both sides. The point suggested by my brother Fitzgerald—namely, that the bill of sale only authorised an appointment by two, that alone would throw great difficulty in the way of the defendant here. But independently of that, and taking the ground relied upon in the former argument, that if the act was authorised at all, it was only authorised after a demand made for admittance accompanied with a statement of the purposes for which the person came, and of the authority with which he was clothed, we are told that this case is distinguishable, because this is a case of express contract, and not of an authority given by law. But what is the authority? It is one to enter; and is it not reasonable in considering whether a certain act is justified by that authority to see what is the law laid down in cases of custom and contract and legal authority. It is a legitimate mode of construing what acts the party

was entitled to do under this bill of sale to see what similar authorities in other cases have authorised. Certainly the cases show that this act would not have been authorised by a sheriff in the execution of a writ. The distinction between this case and *Wood v. Manley* was lost sight of by the defendant—namely, that one was a case of entry on a field, and the other of entry on a dwelling-house; and the proposition contended for must be, that under this power a stranger, as the person here, would be entitled to come at any hour of the night, and effect an entry. It was upon that very ground that that it was resolved in *Seayne's case* that it is not lawful for the sheriff (on request made and denial) at the suit of a common person, to break the defendant's house, because the proposition would go the length that men's houses might be broken in the night as well as in the day; and for that reason the proposition was not affirmed. As to the case of *Ancaster v. Milling*, it says first that under a power to enter, the raising of a window was a breaking not authorised, though there the house was empty, and the party could not get the key. It is not necessary to go so far as that, but here, even if the opening of the window would be authorised after demand at the hall-door, that demand was not made here. It is necessary to shew that a previous demand was made by an authorised person, and that the authority was known by the party, and that he had a reasonable opportunity of seeing it. That is the case in *Best and Smith*. Here there was merely a demand of entry and a refusal to admit, and then a breaking.

FITZGERALD, J.—I concur with the decision of the Court. I do not offer any opinion upon two points—namely, whether the appointment of Studley as agent by Brunton alone was a sufficient one, and secondly, whether the position of the defendants here acting under a contract stands on higher ground than that of a sheriff executing a writ, or an officer of justice or a landlord making a distress. It seems to me clear that if Studley was justifying under this license as the agent of Brunton and Forbes, the license is to be reasonably construed, and it did not justify a breaking into the house without his showing or having disclosed his authority, and demanded access to the goods by the ordinary way, and being refused. Without showing this I think he was not justified in breaking, and on these grounds I think the plaintiff is entitled to our judgment.

*Demurrer allowed.*

## Court of Common Pleas

Reported by J. Field Johnston, Esq., Barrister-at-Law.

[CORAM MONAHAN, C. J., KEOGH, AND O'HAGAN, JJ.]

SCHRIEBER v. BRUNKER.—*May.*

*Demurrer—Slander.*

*In an action for slander, one of the counts in the summons and plaint complained that the plaintiff*

*being a jeweller, &c., and the defendant being a jeweller, &c., the defendant spoke of the plaintiff in relation to his trade and business the words following—"These (meaning thereby certain clocks, watches, articles of jewellery, and gold and silver plate of the defendant then exhibited by him for sale in the way of his said trade and business) are genuine good goods, not like them over there (meaning thereby certain clocks, watches, articles of jewellery, and gold and silver plate of the plaintiff then exhibited by him for sale in the way of his said trade and business), they (meaning thereby the said clocks, watches, articles of jewellery, and gold and silver plate of the plaintiff) are only composition, and no good." No special damage was alleged. Held, upon demurrer by the defendant, that these words were actionable per se.*

THE fourth count of the summons and plaint complained that before and at the time of the committing by the defendant of the grievances herein-after mentioned the plaintiff carried on the trade and business of a jeweller, clock and watchmaker, and gold and silversmith, and the defendant carried on the trade and business of a jeweller, gold and silversmith, and a vendor of clocks and watches; and the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said trade and business, and the carrying on and conducting thereof by him the words following, that is to say—"These (meaning thereby certain clocks, watches, articles of jewellery, and gold and silver plate of the defendant then exhibited by him for sale in the way of his said trade and business) are genuine good goods, not like them over there (meaning thereby certain clocks, watches, articles of jewellery, and gold and silver plate of the plaintiff then exhibited by him for sale in the way of his said trade and business), they (meaning thereby the said clocks, watches, articles of jewellery, and gold and silver plate of the plaintiff) are only composition, and no good," whereby the plaintiff was injured in his credit and reputation as a jeweller, clock and watchmaker, and gold and silversmith, to the plaintiff's damage of £5,000.

To this count the defendant demurred, on the grounds that the defamatory words therein complained of were alleged to have been spoken in reference to certain goods of the plaintiff specified in said paragraph, and were not alleged to have been spoken by way of slander of the plaintiff's title to said goods, and no special damage was alleged to have been incurred by the plaintiff, and because it was not alleged or shown by said paragraph that the said defamatory words therein complained of imputed to the plaintiff that he was in the habit as a trader of selling goods which were bad, and not genuine.

*S. Walker* (with him *Sidney*, Q.C.) in support of the demurrer.—If a person walked into a jeweller's shop, and showed his watch to the owner of it, and the jeweller said to him, "This watch is composition, and no good—where did you get it?" and the person replied, mentioning the name of a particular watchmaker, that watchmaker could not maintain an action for the words. The present action being for oral slander, the words cannot be prejudicial to the plain-

tiff unless spoken of him in relation to his trade. It would be actionable to say, "Schriber cannot make a good watch," or "Schriber has not a good watch in his shop," but it is not actionable to say, "That watch of Schriber's is no good."—1 Starkie on Slander, 141; *Ireland v. Lockwood* (Cro. Chas., 570); *Evans v. Harlow* (5 Q. B. 624). *Ingram v. Lawson* (6 Bingh. N. C. 212) may be distinguished from this case. It was an action for libel. The words were a disparagement of the plaintiff in society. In *Young v. Macrae* (3 Best & Smith, 268), Cockburn, C. J., asks, "In order to be actionable, must not the disparagement be of a man's character." Fraud cannot be said to be imputed here.

*Dowse, Q.C., and Curtis, for the plaintiff.*—These words are, by necessary intendment, a slander of the man himself in his trade. The Court will not be astute to see how they cannot be disparaging. To say of a man "he sold a copper chain for a gold one," would be actionable. "Gold and silver plate" has a Parliamentary meaning. A licence to sell it is required. "Jeweller's gold" is a different thing from "gold and silver plate."—Bacon's Ab., vol. 7, tit. Slander, p. 269; *Heriot v. Stuart* (1 Espinasse, 437); *Tabart v. Tipper* (1 Campb. 350); Cooke on Defamation, 20). [*Monahan, C. J.*—The question really is, is this not an imputation on the plaintiff himself?]

*Sidney, Q.C., in reply.*—The words do not apply to every one of the articles. A demurrer would test this, and show that the words are divisible.

*MONAHAN, C. J.*—We must overrule this demurrer on the ground that this is a slander on the man himself.

*Judgment for the plaintiff.*

**FITZGERALD v. CAMPBELL.**—*May.*

*Setting aside defences—Plea of privileged communication—Grounds of belief.*

*Where a plea of privileged communication to an action for libel contained an averment that the defendant had just and reasonable grounds for believing the charges against the plaintiff contained in the libel to be true, the Court, upon motion by the plaintiff, directed that the plea should be amended by either omitting the averment altogether, or setting forth what were the grounds of belief.*

THE first count of the summons and plaint complained that the defendant, being the owner of a certain ship or vessel, to wit, a ship or vessel called the "Maria," employed the plaintiff as master and commander of the said ship or vessel, and as such master and commander to go and proceed in said ship on certain voyages, to wit, from Liverpool in England to the port of Cete in the empire of France, and from thence to the port of Marseilles in said empire of France, and from thence to the port of Falmouth in England, that he did go and proceed on said voyages as such master and commander, yet the defendant falsely and mali-

ciously, and without reasonable or probable cause, charged the plaintiff before the Board of Trade with having been, while master and commander of said ship or vessel, in a state of intoxication on the said voyages, and upon such charge procured the Board of Trade to have said charge to be heard before the Dublin Local Marine Board, who, having heard said charge, dismissed the same; and by reason of the premises the plaintiff hath been injured in his reputation, and suffered pain of mind, and was prevented from attending to his business, and prevented from procuring employment as a master or commander of a ship or vessel, or other employment as a mariner, and has incurred expense in defending himself from said charge.

The second count complained that the defendant, being owner of said ship or vessel in first count mentioned, and the plaintiff being master and commander of said ship or vessel, as in said count also mentioned, and carrying on the business of master and commander, the defendant falsely and maliciously wrote and published of the plaintiff, and of and concerning him in the way of his said business and occupation, the words following, that is to say—

"6 & 7 Great Brunswick-street,  
"Dublin, 26th Jan. 1866.

"Captain Fitzgerald's (meaning the plaintiff's) certificate, No. 3,068, late master of the brigantine Maria, of Liverpool (meaning the ship or vessel Maria, of which the defendant was owner), now residing at Sir John Rogerson's Quay, Dublin.

"Sir (meaning the Secretary of the Board of Trade) I (meaning the defendant) beg to draw your attention to the following conduct on the part of above (meaning the plaintiff), and to ask you for an inquiry respecting same—1. For chartering the vessel (meaning said ship or vessel Maria) in August last against my orders. 2. For entering into law proceedings in a foreign port (Cete), (meaning the port of Cete in France) without my orders, and thereby incurring expense (meaning thereby that the plaintiff had taken legal proceedings whilst at the port of Cete without defendant's orders, and had thereby caused to the defendant improper expense). 3. For neglect of duty whilst loading at Marseilles, and for leaving that port without communicating with me, also for leaving private bills unpaid; this last item however is given only on hearsay. 4. For putting into Gibraltar 10 days after sailing from Marseilles, thereby incurring unnecessary expense to the ship, and at same time for buying a quantity of gin, brandy, tobacco, figs, &c., and pledging my credit for payment of same. 5. For telegraphing from Falmouth, on his arrival there, that the vessel had arrived 'all well,' whilst on the following day he telegraphed to me that sails had been blown away, cargo jettisoned, ship strained and leaking, &c., which statement was in direct opposition to the former one. 6. For receiving £70 odd in Cete in October; £110 in Marseilles in December; £10 in Falmouth in January, and totally refusing to account for same. 7. For detaining register of vessel in Falmouth, and for having at this time in his possession, without cause, the log book and bills of lading of cargo. 8. For leaving the vessel in Falmouth on evening of 12th inst. whilst blowing a gale, and not

returning to her until the following morning. 9. For refusing to settle his accounts for the voyages, and for attempting to purloin (and succeeding in doing so until arrested by a policeman) the charts and stores belonging to the vessel). 10. For general bad conduct on the voyages, Liverpool to Cetta, thence to Marseilles, and home to Falmouth. Trusting this matter will have early attention,

"I am, your obedient servant,

"J. SHAW CAMPBELL

(meaning the defendant).

"The Secretary of the Board of Trade, London."

Whereby the plaintiff was injured in his reputation as such master and commander, &c.

The defendant pleaded to the second count the following plea of privileged communication—And for a further defence to the said second count the defendant, by leave of the Court, says that before and at the time of the writing of the letter in the said second count of the said summons and plaint mentioned, the defendant was owner of a certain vessel called the "Maria," and that before the writing of the said letter the plaintiff had been employed by the defendant as master of his said vessel, and had the charge and management thereof as such master, and whilst he was so employed by defendant, and at the time of the writing of the said letter the plaintiff held from the said Board of Trade a certificate of competency as mate, and the defendant says that the several charges in the said letter contained were made in reference to the conduct of the plaintiff, while he was such master, and had charge of defendant's said vessel as aforesaid, and the defendant, before and at the time of the writing of the said letter in the said second count mentioned, had just and reasonable grounds for believing, and did then *bona fide* believe, that the several charges in the said letter in the said second count mentioned were true respectively, and that the plaintiff was guilty of such misconduct in respect of the matters in the said charges mentioned as rendered him unfit to discharge the duties of master of a vessel, or to hold such certificate, and the defendant says that under the circumstances aforesaid it became and was his duty to bring the conduct of the plaintiff under the notice of those having lawful power and authority to inquire into the matter of the said charges, and to adjudicate on the fitness of the plaintiff to discharge the duties of such master, or to hold such certificate, and that for the sole purpose of having such inquiry instituted, and not otherwise, the defendant wrote and published the letter in the said second count mentioned, to the Secretary of the said Board of Trade, the defendant then *bona fide* believing that said Board of Trade had such lawful power and authority, and that it was the duty of the said Board to make such inquiry as aforesaid, and the defendant wrote and published the said letter, being a privileged communication, and on a lawful occasion, and that he wrote and published the same in good faith, and without malice, *bona fide* believing the charges therein to be respectively true in substance and in fact.

Hemphill, Q.C. (with him Coates) applied that the plea might be set aside as embarrassing.—While the libel contains several charges, the defendant does not state any of the matters of fact on which he grounds

his suspicion—the whole plea is no more as to that than a plea of the general issue. If it be a plea of justification it should state the facts.—*Hickinbotham v. Leach* (10 M. & W. 361); *O'Brien v. Clement* (16 M. & W. 159); *Dixon v. Franks* (7 Ir. Jur. 239); *Carr v. Duckett* (5 H. & N. 783); *Owens v. Roberts* (6 Ir. C. L. 386); *Hennessy v. Morgan* (8 Ir. C. L. App. 69); *Fox v. Broderick* (8 Ir. Jur. N. S. 194); *Murphy v. Kellett* (13 Ir. C. L. 488); *Godfrey v. Cross* (12 Ir. C. L. 333). [*Monahan, C. J.*—We followed *Godfrey v. Cross* in *Armstrong v. Fortescue*,\* but it was on the ground that the defendant said, it was from information he received he published the libel. We thought he tied himself down to that at the trial. We followed *Godfrey v. Cross*, but we did not decide that we would hold so in a case where the plea did not state that the defendant had information.] *Halloran v. Thompson* (14 Ir. C. L. 334); *Ruckley v. Kiernan* (7 Ir. C. L. 76).

*Purcell, Q.C.* (with him *Todd*) contra.—Is there any difference between believing, and having just and reasonable grounds for believing. This case comes within the doctrine of *Murphy v. Kellett*. [*Monahan, C. J.*—Perhaps we were wrong in *Murphy v. Kellett*. *O'Hagan, J.*—People believe unreasonable things *bona fide*. You do not confine yourself to *bona fides*, but you say the defendant had reasonable grounds for believing. *Monahan, C. J.*—If the existence of reasonable grounds be a material averment in the plea, they must be set forth in order to enable the Court to judge of them. That is the decision in cases of arrest. In *Murphy v. Kellett* we thought that did not apply, and we would be inclined to follow that case till it is overruled, but it is a different thing if the plea states that there were grounds. *O'Hagan, J.*—It may be worth your while to consider whether there is not such a distinction between a plea to an action for malicious prosecution, and a plea of privileged communication in an action for libel as makes it necessary to set out the grounds in the one case, and not in the other.] *Murphy v. Kellett* is an authority against the plaintiff's application. This is not a plea of justification. We are not bound to repeat the libel. [*Monahan, C. J.*—You state you had reasonable grounds, and the question is if you must set out what these reasonable grounds are. *O'Hagan, J.*—*Murphy v. Kellett* is no precedent for this plea. You will relieve yourself from all difficulty by omitting those words, and you will take from the plaintiff any ground for objecting.]

*Coates* in reply.

*MONAHAN, C. J.*—We must set aside this plea unless the defendant will amend it either by striking out this averment altogether, or by setting forth what are the reasonable grounds of belief. Let the defendant be at liberty to amend the plea within a week.

*Rule accordingly.*

\* See *Armstrong v. Fortescue*, reported in the present vol. of the IRISH JURIST, p. 128.

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-law

[BEFORE THE LORD CHIEF BARON, FITZGERALD, B.,  
AND DEASY, B.]

GREEN v. LE CLERC AND OTHERS.—Nov. 16, 23, 1865;  
May, 1866.

*Motion to set aside judgment—Error in Fact—Parliamentary appearance of infant—Practice and Process Act, 1850.*

*A recovered in ejectment against thirteen defendants. Error, in fact, afterwards was assigned, that two of the defendants were infants and had appeared by attorney.—Held, on motion to set aside the judgment, that the proceedings in error must be set aside as null and void, the assignment of error not having stated that the other eleven defendants declined to join in the assignment of error, or that they had had an opportunity of electing whether they would join or not.*

*Byrne* (with him *Dowse*, Q.C.) for two of the defendants, John Andrew Le Clerc and Benjamin Le Clerc, applied to the Court to set aside a judgment by default in ejectment for non-payment of rent obtained by plaintiff, John Green, in the year 1851, on the grounds that these two defendants were then infants, and had appeared to take defence to the action by their attorney, and not as the statute required by guardian. Error in fact had been assigned. Counsel relied on the Process and Practice Act, 1850, s. 10, 13 & 14 Vict. c. 18. 12th General Rule. Chitty Archbold's Practice, 1,234.—*Leonard v. Annesley* (1 Smythe 96).

*Dames* (with him *M'Donogh*, Q.C. and *Chatterton*, Q.C.) for plaintiff, contra.—I don't dispute the question that an infant cannot appoint an attorney, nor should I contend that a parliamentary appearance was sufficient if this case were the same as *Leonard v. Annesley* cited on the other side, if, in fact, it were a personal action. But having regard to 13 & 14 Vict. c. 18, s. 10, which Act altered the procedure, I think it will be found that a parliamentary appearance in actions of ejectment is sufficient, ss. 10, 17. The Act did not import into ejectment procedure the former procedure in personal actions, which still exists.

*Chatterton*, Q.C. on same side, cited *Goodright v. Wright* (1 Strange 25, 32), and referred to the Act.

*Dowse*, Q.C. in reply, referred to the Act and General Rule 12, 264. Plaintiff's plea in joinder in error of *in nullo est erratum* admits the facts. An infant can sue only by *prochein ami*: can defend only by guardian duly appointed either by petition to the Court by himself or by his adversary. Before the Process and Practice Act this did not apply to ejectments; but that Act placed ejectments on the same footing as personal actions, ss. 7, 10. Furlong, Landlord and Tenant 1,163.—*Ivers v. Bainbridge* (8 Ir C. L. 150); *Jacques v. Caesar* (2 Wms. Saund. 71 a). Do costs follow a reversal of judgment in this case? Reg. Gen. (1853) 201.—*Marshall v. Jackson* (4 E.

& B. 669); *Fisher v. Bridges* (4 E. & B. 666) are cases on the subject. If this were error in law, and the Cam. Scac. reversed the judgment of the Court below, the party who got the reversal would not be entitled to costs. If this were error in law it would be governed by those cases; but this is error in fact, before the Court of Exchequer. With respect to the writ of execution, *Jacques v. Caesar* is also an authority. The parties are almost precluded from a cross-ejectment. [*Pigot*, C.B.—If the *habere* has been executed there can be no cross ejectment.] Yes.

At the conclusion of the argument the Court intimated that as this was rather a novel motion they would give further time to *Chatterton*, Q.C. to look into the matter, and it was ordered that the motion should stand over.

Nov. 23.—There was a re-argument of this case to-day.

*M'Donogh*, Q.C. for plaintiff, contended that the Court ought to do one of two things, either quash the proceedings in the writ of error or else reverse the judgment as against the two minors only, and not against the other defendants. This ejectment having been before the Common Law Procedure Act the law of that period becomes important. The law before the Common Law Procedure Act was as follows:—If there were several defendants in ejectment and they did not all agree to join in error, the parties who assigned error were obliged to issue a summons and severance to the other parties who were then severed, and the writ of error went on, and the persons bringing it were there alone liable for costs.—*Walter v. Stoks* (1 Raym. 71). If this course were not taken and error was brought by one or two defendants only, the other defendants not joining in error, and there being no summons and severance the proceedings in error were quashed by the Court. *Cooper v. Ginger* (1 Strange 606); *Frescobaldi v. Kinaston* (2 Strange 783); *Hackett v. Hearn* (Cathrew 7); *Knox v. Costello* (3 Burr. 1,793); *Beavan v. Turner* (2 Raym. 1,403); *Andrews v. Cromwell* (Cro. Eliz. 891). This *scire facias ad audiendum errores* alleges that there was "manifest error *ad grave damnum*" of one defendant only, and not "*ad grave damnum ipsorum*" as it should be; and on the authority of *Cooper v. Ginger*, supra, I rely on this irregularity. *Jacques v. Caesar* (2 Wms. Saund. 101 f. g.); *Andrews v. Cromwell*, supra, was conversant with error in law, and the decision in that case applies *a fortiori* to error in fact. If the Court think fit to amend the writ of "*sci. fa. ad audiendum errores*" and reverse the judgment, I then contend that the judgment ought to be reversed only as against the two minors. In 3 Bacon Abridg. K. Error 105, it is laid down that there can be no error in ejectment by an infant on the ground of his having appeared by attorney.—*Goodright v. Wright* (1 Strange 32). Wherever the judgment is not an entire thing, but affects only one or two persons out of several, it may be partially reversed.—*Vavasor v. Fauz* (1 Wils. 89); *Ratcliffe v. Burton* (Cases temp. Hardwicke, 128). The Court cannot reverse a judgment originally obtained against defendants who are not now before the Court.—*Green v. Waller* (2 Raym. 891).

Suppose an ejectment is brought for an estate where there is a castle, an acre of bog land, and other separate denominations, and one defendant appears for each, and judgment is given against the holder of the bog land and all the other defendants. If he appears afterwards to assign error on the ground that he was an infant and appeared by attorney, can it be said that the other judgment must be reversed along with that against him. [*Fitzgerald, B.*—The judgments there are several and separate.] Precisely, and that is my argument.—1 *Ferguson*, 190; *Bird v. Orms* (Cro. James 289; 2 Tidd. 1,179); *Lloyd v. Pearce* (Cro. James, 424); *Parker v. Lawrence* (Hobart 70). The *sci. fa. ad audiendum errores* is wrong, because it alleges that one defendant alone out of thirteen brings error. The memorandum of error is wrong for the same reason. The assignment of error is wrong, for it alleges that two defendants alone out of thirteen assign error. [*Pigot, C.B.*—Does not section 175 of the Common Law Procedure Act apply here?] Even assuming that it does, I contend that my view is correct. It must appear on the record that the parties have declined to join in error, and then the summons and severance would have issued. [*Pigot, C.B.*—Under the present law how can you bring the other defendants before the Court now?] In two ways, either by suggestion that they have declined to join in error or that they have elected to join. [*Pigot, C.B.*—That is keeping up the old summons and severance.]

*Doussé, Q.C.* (with him *Byrne*) contra, for defendants.—I don't dispute the law as laid down on the other side; I only dispute its application to the present case, Common Law Procedure Act (1853) ss. 169, 173, 179. We are not bound to show that the other defendants have declined to join in error.—2 Tidd. 1188, 1189. I admit the general rule that all the defendants must join in error, in order that plaintiff may not be harassed by several writs of error; but these are cases where all have a cause of error, and the same cause; here the case is different, and only two defendants (the minors) have any grounds of error. The question is if there are eleven adults and one infant, are the eleven adults who have no cause of error to join in error in the same way as twelve defendants who have all the same cause of error? 1 Rollo. Abridg. 748.—*Laroche v. Wasborough* (2 T. R. 737). There can be no grounds for saying that plaintiff here might be harassed by several writs of error.—*Macnamara v. Fisher* (8 T. R. 382). In *Cooper v. Ginger* (1 Str. 106); *Walter v. Stokes* (1 Ray. 71); and *Andrews v. Cromwell* (Cro. Eliz. 891), it does not appear that the other defendants had not grounds of error also, and hence these cases come under the general rule. Common Law Procedure Act, s. 166.—*Oliver v. Hunning* (1 Ray. 891); *Higgs v. Evans* (2 Strange 837); *Knox v. Costello* (3 Burr. 1,789); *Brewer v. Turner* (1 Strange 233). If the proceedings in error are bad, is there any power of amendment?—Common Law Procedure Act, section 243.

*Byrne* on same side.—I submit three propositions. (1) The objection to the proceeding in error is too late, there having been joinder in error and argument. (2) The objection is not found on the record, and

therefore, is not examinable before the Court. (3) There is no ground at all for the objection.—*Novel v. Roke* (5 B. & C. 735). With regard to the second point, Common Law Procedure Act, sections 175, 179, 169; Lush, Practice. As to third proposition, Common Law Procedure Act, section 166. The Court is disabled from reversing a judgment at the suit of one who is barred by the Statute of Limitations. *Castledine v. Monday* (4 B. & A. 90). As to the amendment, error is declared by section 169 of Common Law Procedure Act, to be a continuance of the old action; and section 231 gives the right to amend generally.—*Beralts v. Smith* (Cowp. 425). As to liberal construction of powers of amendment under the old Act; 2 Lush. Practice, 159. As to reversal of judgment *in toto*, *Castledine v. Monday*; *Beecher's case* (8 Coke, 58); *Simpson v. Juxton* (Cro. James, 699); 2 Wms. Saund. 101 b. b., 101 g. g. Tidd's Practice, 541-542, 560.

*McDonogh, Q.C.* in reply.—2 Tidd. 1,142. In *Ratcliffe v. Burton* (Cases temp. Hardwicke) it was held that there could not be any amendment.

*Cur. adv. vult.*

May 4, 1866.—The unanimous judgment of the Court was delivered by—

*FITZGERALD, B.*—This is a proceeding in error in fact. [His lordship then briefly adverted to the facts and proceeded.] The defendant in error who is the heir-at-law of the plaintiff in ejectment has pleaded in *nullo est erratum*, and contends that the assignments of error by two only of the defendants in ejectment who have no authority to proceed alone is a nullity, and therefore, that the error proceedings must be quashed. *Andrews v. Lord Cromwell* cited in the argument seems to be an authority for holding that previous to the Common Law Procedure Act, 1853, such an assignment in error would have been void. Previous to that Act, error was brought by suing out in Chancery an original writ directed to the Court where error was alleged to exist, and directing that that Court should examine the error, or else the record was ordered to be removed to some superior Court for examination. In the former case it was called *coram vobis* or *coram nobis*; in the latter a writ of error generally or in law. The writ was the authority to the Court in which it was returnable to examine the error, and therefore, it was not capable of amendment by the Court to which it gave authority. There is no doubt that in the case of a judgment against several defendants, error must have been brought in the names of all the defendants, unless some of them had died when their deaths ought to have been mentioned. When the writ was obtained in Chancery it was brought to the officer of the Court in which the judgment had been given, and a certificate of allowance of the writ of error was obtained from him and served on the opposite party. The assignment of error was the most important part of the error *coram vobis*. If the writ of error was sued out by some, only, of the defendants, though brought in the name of all on account of the others declining to join in it, then what was called summons and severance took place upon which those who desired to proceed in error were severed from the others and



proceeded by themselves. Therefore, previous to the Common Law Procedure Act, 1853, it would appear that in a case like the present error must have been brought in the names of all the defendants, otherwise it would have been quashed, and was not amendable. It would also appear that there must have been summons and severance where some, only, of the defendants joined in error. In *Andrews v. Lord Cromwell* the writ was in the name of all, and was, therefore, right in that respect; but it was held that though the writ was good, the assignment without summons and severance was void. The Common Law Procedure Act, 1853, section 169 abolished writs of error, and provided that a proceeding in error shall be a step in the cause in which error is alleged. Sec. 179, provides as follows:—[His lordship here read the section.] The first proceeding in error is the memorandum of error, and I confess it appears to me that it need not purport to be the memorandum of all the defendants, but only of those who intend to allege error. It must be entitled in the cause, and therefore must show who are all the defendants; but as it must be signed by those who allege error, or by their attorneys, I do not see how it can be the allegation of those who do not sign it, either themselves or by their attorneys. There is a great difference in this respect between the writ of error which was in the nature of a new action, and the memorandum of error which is held to be a step in the cause; and I do not think that the objection applicable to a writ of error, viz., that it was not brought in the names of all the defendants will have any force in the case of the memorandum of error. Now, as to the binding of the other defendants. Assuming the true meaning of the 179th section of the Common Law Procedure Act to be that all the proceedings in error in fact, after the service of the receipt of the memorandum in error are to be the same now as they were before the Common Law Procedure Act after service of the rule of allowance, I cannot see how the summons and severance can be dispensed with. The other defendants must have an opportunity of electing whether they will join in assigning error or not. Unless they were named in the writ of error, which was in the nature of a new action, they would not have been bound at all; but as the error is now a step in the cause, they will be bound, and therefore ought to have notice. If I be right in my construction of section 179, the memorandum of error in the present case is unobjectionable. The next proceeding is the assignment of error which does not say anything about the other eleven defendants, merely mentioning the two infants, and I think the assignment of error by two only of the defendants is wrong, and must be treated as nullity whether the 175th section applies to error in fact or not. I find great difficulty in applying that section to error in fact; but even if it is to be so applied, the only effect would be to render summons and severance unnecessary; but still it seems to me that the section requires that it be shown on the record by suggestion or otherwise, that the other defendants declined to join in the assignment of error or had an opportunity of electing whether they would or not. We must treat the assignment of error as null and void; but

having regard to the mode in which the objection was taken, we think there ought not to be costs, especially, as the Act is by no means clear, and this is the first case that has been brought before us.

It was agreed that the proceedings in error should be amended, and that the matter should be mentioned to the Court again on the second day of next term.

[BEFORE THE FULL COURT.]

IN RE MOWLDS.—April 28.

*Habeas Corpus—Committal of prisoner until further order—Jurisdiction in cases of contempt—Landed Estates Court.*

*A prisoner brought up by Habeas Corpus will not be discharged from custody for contempt, because the order under which he has been committed is in the words "that he be committed until further order," although the general rule is that the time should be specified, nor will the fact that there has been no warrant or examination of the prisoner entitle him to his discharge.*

*The Court will not give costs in a Habeas Corpus motion.*

THE prisoner here, George Frederick Mowlds, was committed by Judge Longfield for contempt of court in putting forward one Vivian O'Keefe to become the purchaser of certain lands which were being sold in the Landed Estates Court, whereby the sale of the said lands had been rendered abortive.

The following documents will more fully explain the nature of the case.

Order of her Majesty's Court of Exchequer, dated 26th April, 1866.

"Upon motion of Mr. M'Mahon of counsel on behalf of the said George Frederick Mowlds, and on reading an affidavit of the said George Frederick Mowlds this day filed. It is ordered by the Court that a Writ of *Habeas Corpus ad subjiciendum et recipiendum* do issue, directed to the Marshal of the Marshalsea of the Four Courts, commanding him to bring up the body of the said George Frederick Mowlds to the bar of this Court, on Saturday morning next, at eleven o'clock, serving this order forthwith on J. M. Williamson, gentleman, solicitor, for Mrs. Susan Keegan, the petitioner in the matter of the estate of Margaret Mowlds and others, owners, and Susan Keegan, petitioner, depending in the Landed Estates Court."

The affidavit referred to in the above order sworn by G. F. Mowlds was as follows:—

"I have been arrested under an alleged attachment from the Landed Estates Court. I say that an order was made by the Landed Estates Court, bearing date 26th day of March last as follows:—It is further ordered that an attachment do further issue against the said G. F. Mowlds for his contempt in inducing and putting forward the said Vivian O'Keefe, meaning thereby a person who had bid for the estate in the matter of the estate of Margaret Mowlds and

others, owners; Susan Keegan, petitioner, at a public sale thereof to become the purchaser of said lands on the 6th day of March, 1866, whereby the said sale had in this matter was rendered abortive, and that so soon as he be arrested pursuant to such attachment hereby directed he be brought before the Court on a day to be hereafter named for committal. I say that having been so committed on the 12th day of April, I was left in prison until the morning of the 19th April, when, at the instance of Mr. Williamson, the solicitor having the carriage of the proceedings in the Landed Estates Court, by order of 16th April, I was brought before Judge Longfield, one of the judges of said Court, when I was, again, by order of 19th April, committed to the custody of the marshal of the marshalsea and sent back in prison. I say that I am advised that my present custody is illegal, and I pray for a *habeas corpus* to be brought before this honorable Court to seek to be discharged."

Attachment bearing teste 5th April, in the twenty-ninth year of the reign of her Majesty, Queen Victoria. Landed Estates Court, Ireland.

"Victoria, &c., to the sheriff of the county of the city of Dublin, greeting. We command you that you attach George Frederick Mowlds, so that you have him before us in the Landed Estates Court, Ireland, on 17th day of April next coming to answer for several contempts of our said Court by the said G. F. Mowlds committed, and specially for a contempt committed against us in the matter of the estate of Margaret Mowlds and others, owners; Susan Keegan, widow, petitioner, in inducing and putting forward Vivian O'Keefe to become the purchaser of the lands sold in the matter on 6th March, 1866, whereby such sale was rendered abortive, and such other matters as shall be then and there objected against him. And herein fail not under the penalty of £100 sterling. Witness our Lieutenant-General and General Governor of that part of our United Kingdom called Ireland, at Dublin, the 5th day of April, in the twenty-ninth year of our reign."

Henry Carey, *Registrar*.

Landed Estates Court Order, dated 21st April, 1866.

"Whereas by an order bearing date 26th day of March, 1866, stating amongst other things that it appeared to the Court that the biddings at the sale had in this matter on the 6th day of March, 1866, above the sum of £1,000 were not *bona fide* so far as they were the biddings of Vivian O'Keefe, who was at that sale declared the purchaser. And it further appeared to the Court that the said Vivian O'Keefe had failed to complete his purchase. And whereas it further appeared that the said Vivian O'Keefe had been put forward and induced to bid for and become the purchaser of the said lands and premises on the said 6th day of March, 1866, by the said G. F. Mowlds, and that an attachment should forthwith issue against the said G. F. Mowlds for his contempt in so putting forward the said Vivian O'Keefe, and inducing him to become the purchaser of the said lands and premises, whereby the said sale was rendered abortive, and that the said G. F. Mowlds, when arrested, pursuant to the said attachment, should be brought before the Court for commit-

tal on a day to be named after such arrest. And whereas, pursuant to the said order an attachment bearing date the 5th day of April, in the twenty-ninth year of the reign of Queen Victoria against the said G. F. Mowlds, issued directed to the sheriff of the county of the city of Dublin. And whereas the said sheriff endorsed on the said writ of attachment a return that he had taken the said George F. Mowlds, and had his body ready as by said writ commanded. And whereas by an order bearing date the 16th day of April, 1866, the Court ordered the Marshal of the Four Courts Marshalsea, in whose custody the said G. F. Mowlds then was under the said attachment to bring up for committal pursuant to said order of the said 26th day of March, 1866, the body of the said G. F. Mowlds at the sitting of the Court, at the hour of eleven o'clock in the forenoon of the 19th day of April, 1866. And whereas in pursuance of said last-mentioned order the marshal of the marshalsea produced the body of the said G. F. Mowlds in Court on the day and at the hour commanded therein. And whereas the Court then in presence of the said E. H. Hunter, solicitor for the said G. F. Mowlds ordered that the said G. F. Mowlds should continue in the custody of the said marshal, and that the said marshal should produce the body of the said G. F. Mowlds in Court on 21st day of April, 1866, at the hour of eleven o'clock in the forenoon, then and there to abide such order as the Court should then make. And whereas the said marshal in pursuance of the said last-mentioned order on this day being the day appointed by the said last-mentioned order produced the body of the said G. F. Mowlds in Court at the hour therein named. Whereupon and upon hearing counsel for the petitioner in this matter and upon reading the certificate of sale, bearing date the 7th day of March, 1866, the affidavit of Vivian O'Keefe, filed on 23rd day of March, 1866, the affidavit of John Mallet Williamson, filed on 24th day of March, 1866, and the said hereinbefore recited orders, and this Court being of opinion upon consideration of the facts disclosed upon the said affidavits and orders that the said G. F. Mowlds has been guilty of a contempt of this Court by inducing and putting forward the said Vivian O'Keefe to become the purchaser of the said lands and premises sold at the said sale had, on the 6th day of March, 1866, whereby such sale was rendered abortive, doth order that the said G. F. Mowlds do stand committed to the Four Courts Marshalsea to the custody of the marshal thereof for the time being until further order. And it is further ordered that the solicitor for the petitioner do have the costs of the attachment proceedings and of this motion as costs in the matter."

*M'Mahon* (with him *Levy*) for the prisoner contended that the order of the Landed Estates Court was illegal and irregular as not specifying any fixed time for the completion of the imprisonment, but only mentioning "until further order." There was also no adjudication, and the prisoner was not asked to show cause against his committal or answer the charge. Again, there was no warrant only an order. 2 Hawk 207; *King v. Edwards* (4 Burr. 2,105); *Van Sandau's case* (1 Phillips 605); *Van Sandau*

*v. Turner* (6 Q. B. 773); 1 *Daniel's Practice* 350; *Cobbett's case* (7 Q. B. 187). Landed Estates Court Act, 21 & 22 Vict. c. 72, s. 8.—*King v. James* (5 B. & Al. 894); *Grady v. Hunt* (5 Ir. C. L. R. 443); *Re Crawford* (13 Q. B. 613); 1 *Instit.* 52; 3 *Bl. Com.* 133; *Hammond's case* (9 Q. B. 92); *Lindsay v. Leigh* (11 Q. B. 455); *Daniell v. Phillips* (1 Cr. M. & R. 562); *Coombe's case* (2 Roll. 396); *Gossel v. Howard* (10 Q. B. 411).

*Ferguson, Q.C.*, (with him *Gamble*), contra, on behalf of Mrs. Keegan.—The prisoner ought not to be discharged.—*Smith v. Lakeman* (2 Jur. N.S. 1,202); *Seton Decrees* 1,239; *Bacon's Abridgment*, *Habeas Corpus*, 133. Where the commitment is for contempt in Court no warrant is required. As to the words "till further order."—*Walsh v. Jordan* (Sm & Bat. 433); 5 & 6 W. 4. c. 16, s. 12 regulating committal for contempt. *Wilson v. O'Neill* (H. & J. 186); *Charlton's case* (2 M. & C. 316).

*Gamble* on same side.—*Re Risca Coal and Iron Company* (31 Law J. N.S. Chanc. 429); *Ex parte Higgins* (9 Ir. L. R. 414); Landed Estates Court Act s. 33. The attachment is itself the warrant.—*Ex parte Downing* (8 Ir. L. R. 494).

*Levy* in reply.

*Pigot, C.B.*—We are of opinion that we cannot discharge the prisoner. It has been argued that the order of committal is invalid as not specifying any time for the completion of the imprisonment. This argument fails in this respect. Even though the antecedent proceedings were void, yet it is not under them that the prisoner is now in custody, but under a subsequent valid proceeding. He was directed to be brought up on April 16th, and was so brought up before the Court, and then ordered to be kept in custody till the 19th. He was then brought up again, attended by his attorney, and in the presence of himself and his attorney an order was made that he should remain in custody until the 21st and be then brought up again. It evident that he was not called on expressly to answer the charge brought against him; but he was three times before the Court—on one occasion with his attorney—and I think on the face of the proceedings we must infer that he had an opportunity of knowing the charge brought against him, and of applying for his discharge. That view becomes stronger when we consider what was done on the 21st. It was argued that as the original committal was illegal, not specifying the time, the Landed Estates Court acted, during all this period to the 21st, illegally. But on the assumption that this argument is well founded, this fact is before us, that whether the proceedings were irregular or not the prisoner was repeatedly before the Court, and on the 21st, in presence of the prisoner and the marshal, the order was made, reciting that the affidavit which was read during the argument here was read and other documents also. The order does show contempt, or at all events, a case on which the Court had jurisdiction to proceed according to their discretion in contempt cases. A section of the Landed Estates Court Act confers on that Court, expressly, jurisdiction with regard to contempt, and even without this it might be a question if, as it is a Court of Equity, its general jurisdiction would not involve jurisdiction for con-

tempt. There is an omission in the order of some words which are usual; but this omission is immaterial when we look at the context—the words are "for his contempt," which ought to follow the words, "that G. F. Mowlds be committed." It was contended that the order gave no authority for the prisoner's committal, and that a warrant as well as an order was necessary, but no authority was cited in support of that proposition. It was suggested that this Court in *Daley's case* (3 Ir. Jur. N.S. 137) gave some foundation for this proposition; but the decision there was founded on this consideration that when a bankrupt was examined there ought to be a warrant for each time he is committed for the last committal as well as the first. We followed *Coombe's case*, not because on the general law a warrant is essential, but because by the Act of Parliament the Court had no power to commit unless by warrant; but this is not so in matters affecting their jurisdiction for contempt. In *Daley's case* the last committal was not under warrant, but there had been an examination. Then, the last examination may have been satisfactory, and then the Court ought to have adjudicated which they did not do, accordingly, we decided as we did; but no authority proves that it is the same here. No Act regulates the Landed Estates Court Procedure as to warrant. They commit under their contempt jurisdiction as any Court of Law or Equity might do. The next objection was that this is an order of committal "until further order," and as such, illegal, as not specifying the time, and no doubt such a committal in an inferior Court would be bad; but it is not in the case of a Court of Equity. I agree with the general rule as laid down by *Patterson, J.*, that the time should be specified; but sometimes this is inconvenient. Take the case of an obstinate owner of an estate which is to be sold. He keeps possession of some muniments of title, without which it is impossible for the Court to give a satisfactory title, that is, a title which would not be productive of injustice, for, of course, it might give a parliamentary title, the owner then won't give up those muniments. If then the Court were to imprison him for a time certain, say a year, as a punishment, and then discharge him, he might laugh at them and still keep the muniments; but if they commit him "until further order," that means till he purges his contempt by doing what is required of him—see the advantage gained. For the above reasons we cannot consent to the discharge of the prisoner.

*Ferguson, Q.C.* applied for costs for Mrs. Keegan.

*Pigot, C.B.*—We cannot give costs in a *habeas corpus* motion. We merely remand the prisoner now.

[BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.]

DONNELLY v. MURRAY.—Jan. 29.

*New trial motion—Right of way—Prescription Act.*

*The enjoyment of a right of way in an underground passage for twenty years, so as to give a title, must*

*be as open and notorious as the nature of the case will permit, not a stealthy enjoyment, but one as of right.*

THIS was an action of trespass *qu. cl. fr.* for an entry on plaintiff's close and building thereon a wall. The summons and plaint contained two counts, differing only as to the particularity with which plaintiff's property was described. There were six defences to each count, viz.:—(1). A traverse of the trespass. (2). A denial that the close was the close of the plaintiff. (3 & 4). Allegations that defendant was possessed of a messuage whereof the occupiers for forty years and twenty years before suit enjoyed as of right and without interruption a footway from said messuage of defendant along plaintiff's close to certain other premises of defendant and back; and also the shelter and protection of a wall standing on part of plaintiff's said close, and separating said close from other premises of plaintiff, and without which shelter and protection it would not be possible to enjoy the way as fully as defendant might; that plaintiff wrongfully pulled down the wall and thereby disturbed defendant's way; that defendant rebuilt it, which, and no other was the trespass complained of. (5). A claim by prescription to same way. (6). An allegation that plaintiff and defendant were tenants in common of the wall; that plaintiff pulled down the wall, and that defendant entered to rebuild it. The case was tried on October 31st, 1865, before Fitzgerald, B., sitting for the Lord Chief Baron. By consent there was a verdict for plaintiff on all the issues, except the 7th and 8th, which related to the enjoyment of the footway claimed for twenty years before the commencement of the suit. It appeared in evidence that plaintiff was a lessee of the house 18 Upper Temple-street, Dublin, and of certain premises adjoining the house, including an area and garden at the rear. His lease bears date in April, 1864, and is for a term of years, and about that time he obtained possession of the premises demised. The trespass complained of was alleged to have been committed by defendant, who is a lessee of the next house, No. 19, and of certain premises adjoining thereto, including also an area and garden at the rear. The earlier of two leases produced by defendant bears date October, 1852, and about that time he obtained possession of the premises demised. There is a wall which separates the premises at the rear of the respective houses of plaintiff and defendant as described on their leases, and which wall was, in the course of the case, known as the garden wall. The trespass complained of was an entry by defendant on a portion of plaintiff's premises at the rear of his house and the building of a wall thereon. It appeared that there is a vaulted underground passage of considerable length running nearly in a straight line, but in an oblique direction from defendant's stables at the extreme rear of his premises, quite up to the area at the rear of plaintiff's house. It was admitted that a small part of that vaulted passage next plaintiff's area is underground comprised in plaintiff's and not in defendant's close. The residue and far greater part of the passage is under premises comprised in defendant's close. At the time that plaintiff got pos-

session of the premises demised to him the arched mouth of the passage next his area was completely closed by a wall built across it and constituting a wall of plaintiff's area, and it so continued closed till August, 1864. In that month plaintiff removed part of this wall before the mouth of the vaulted passage, which would of course make the vault accessible from his area. In April, 1865, defendant rebuilt this portion of the wall as before entering, of course, on the part of the vaulted passage under plaintiff's ground for that purpose. This was the trespass complained of. The evidence which was very voluminous went to show that defendant and his predecessors had enjoyed a right of way for upwards of twenty years before the action was brought. His lordship in his charge told the jury that before finding for defendant on the two issues (7th and 8th) left to them, they must be satisfied as to three things. (1). That for twenty years before the commencement of this suit in 1865, the occupants of the premises No. 19 enjoyed not only, in fact but of right, a footway from part of those premises through that part of the vaulted passage which was in plaintiff's land to another part of defendant's premises and back. (2). That during the same period the aperture of the vaulted passage next plaintiff's area was closed by the wall in question. (3). That the existence of the wall in question was needful to the full enjoyment of that footway. That if not satisfied of these three matters they ought to find for plaintiff. His lordship then referred to the evidence and informed the jury that the question whether the right of way had been enjoyed "as of right" should be considered thus. The enjoyment should have been of that character and attended by the same circumstances as would exist supposing the party had a grant to entitle him to claim as of right. If the enjoyment be such as that it be by stealth, then no such right is acquired. But if the enjoyment was such as would naturally exist in the case of a similar subject matter which had passed by grant then the right might be acquired. Serjeant Armstrong for plaintiff called his lordship's attention to the fact that he had put the case to the jury as defendant would have been entitled to have it put in the case of an overground way used and enjoyed visibly to the owner or occupier of the servient tenement, and that in this case the passage was underground, and there was no evidence that the owner or occupier of the servient tenement ever knew of the passage or heard of it until the *lis mota*, and on the contrary it appeared they had not, and the learned serjeant submitted to his lordship that unless the owners or occupiers of the plaintiff's premises knew of the lateral entrance and use of the way, or had reasonable opportunity of knowing it, that is such opportunity as the neglect to avail themselves of it would amount to laches, the right could not be acquired under the circumstances of the case, and that the question of such knowledge or opportunity should be left to the jury, and if they negatived such knowledge or opportunity that the learned baron should direct a verdict for plaintiff on the 7th and 8th issues. His lordship declined to adopt the learned serjeant's view of the law or to leave such question to the jury, but reserved leave to plaintiff's

counsel to move for a new trial on the grounds of misdirection. The jury found for defendant on the above issues (7th and 8th).

*Sidney, Q.C.* (with him *Dowse, Q.C.* and *O'Driscoll*) for defendant, now showed cause against the conditional order obtained in pursuance of the leave reserved. Counsel referred at length to the evidence at the trial, and contended that the learned baron was right in his direction to the jury.

*Harris, Q.C.* (with him *Serjeant Armstrong* and *Harris*) for plaintiff, in support of the conditional order.—The learned judge was wrong in limiting his observations, thus—"If the enjoyment be by stealth no right is acquired." He should have said by stealth or secretly unknown to the owner or occupier. *Clam* and *furtivè* are the Latin words, and they express different things.—*Tickle v. Brown* (4 A. & E. 369); *Bright v. Walker* (1 Cr. M. & Rosc. 211). In the latter case Baron Parkes has limited his observations in the same way as his lordship in the present case.—*Solomon v. Vintners' Company* (4 H. & N. 585). See the judgment of Bramwell, B. in this case.—*Eaton v. Swansea Water Works* (17 Q. B. 267); *Winshup v. Hudspeth* (10 Exch. 7). The possession must be of right as against all parties, and this "of right" must be distinguished from that which is "clam."—*Beasley v. Clarke* (2 Bing. N. C. 705). It would be a hard case if a man might construct under another person's land without the knowledge of that person.

*Harris* on same side.—Shelford (Ed. 1856) 7 par. 2. The owner of the land should have had knowledge of the tunnel that he might stop it if he wished. The user must be open and notorious.—Prescription Act, ss. 7, 8. The words "capable of resisting the claim" in section 8 show that the owner or occupier must have a knowledge of the proceedings, else how could he be capable of resisting them.—*Daniel v. North* (11 East. 372); *Deeble v. Linehan* (12 Ir. C. L. Rep. 1). Judgment of Fitzgerald, B.

*Dowse, Q.C.* in reply.—From 1832 the occupier of No. 19 enjoyed this right of way, are we then to be deprived of our way because Donnelly did not know of it although his predecessors did. I admit the enjoyment must be open and notorious; but I say the enjoyment in this case was so. It was not possible to enjoy it in a more open way than Murray did. Gale Easements (Last Ed.) 179.—"Open and notorious user" does not mean that which is above ground, but is open and notorious as consistent with the nature of the subject matter.—*Partridge v. Scott* (3 M. & W. 220). We surely were not to knock at the door every time a new occupant of No. 18 came and give him notice of our right of way.

*Cur. adv. vult.*

*May 4th 1866.*—The unanimous judgment of the Court was now given by DEASY, B.—This was an action for trespass tried before Fitzgerald, B. [His lordship referred at length to the facts and proceeded.] We are all of opinion that the judge was right at the trial, and that he was not bound to give the direction to the jury which was contended for by Serjeant Armstrong. The use of the passage was as open and notorious on the part of the occupants of the do-

minant tenement as the nature of the case allowed. The jury found that it was used by them as of right and not stealthily, and that the owners of the servient tenement knew of the existence and use of the passage and acquiesced in it, and that plaintiff derived his title from them. Now; all this being so, can the incidents annexed to twenty years' enjoyment as of right be defeated by the omission of a preceding owner to communicate the fact that there was an underground passage to his successor? If so, a right to an underground passage would seldom be acquired by length of user, even though the user had been as open as possible. There is no such qualification as to the twenty years' enjoyment in the Prescription Act, and no authority was cited to justify us in so deciding. If the way had been enjoyed by the claimant stealthily as a trespasser, or if he had sometimes asked leave, he would have acquired no title, because he had not enjoyed it as of right. The claimant then must prove his open enjoyment of the way, and this corresponds with the view of the law taken by the judge at the trial, and the jury found that the enjoyment was of the nature which Parke, B. laid down as requisite in *Bright v. Walker* (1 Cr. M. & R. 229). If the claimant proves (as he did in the present case) that he actually enjoyed the way as of right for twenty years, the opposite party if he means to rely on his absence or ignorance of the user must show that such continued during the whole period of the enjoyment. On this branch of the case the judgment of Alderson, B. in *Partridge v. Scott* (3 M. & W. 229) is an authority. In the present case the owner of the house No. 18 had actual knowledge of the existence and the enjoyment of the passage, and what is contended for is that such knowledge or the possibility of acquiring it should have continued during the whole of the enjoyment, but no authority was cited in support of that proposition. Plaintiff's counsel chiefly relied on *Solomon v. Vintners' Company* (4 H. & N. 585) or rather a passage in the judgment of Bramwell, B. in that case; but it was quite different from the present case. The jury have found that the enjoyment here had all the qualities which make it an enjoyment of right, and we are of opinion that the judge gave the proper direction. For these reasons we must allow the cause shown.

*Rule discharged.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

DOCKRELL v. FINDLATER.—May 1.

*Ancient lights—Obstruction of—Notice—2 & 3 Wm. 4, c. 71, s. 4.*

*F., the proprietor of a house, No. 67 South George's-street, Dublin, had, during the entire of the years 1856, 1857, and 1858, obstructed the ancient*

*lights of the house No. 68, wherein G. G., though not residing, carried on his business, and of which he, during those years, was seized of an estate in quasi fee. On motion for an injunction by the present tenant in quasi fee of said No. 58, it was held that, although no written notice of the said obstruction had been served upon G. G., yet that under the circumstances of the case, the Court would presume that he had notice, and that notice, within the meaning of 4th section of the 2 & 3 Wm. 4, c. 71, need not be in writing.*

THIS was a cause petition presented by Thomas Dockrell against the respondents, Alexander Findlater, John Findlater, and Adam Findlater. The petition prayed that the said respondents, their servants, agents, and workmen may be restrained by the order and injunction of the Court with further proceeding with the construction and erection of a certain roof over and above a window in the wall of petitioner's warehouse, which wall divided the property of the petitioner's from that of the respondents, and from permitting the said roof to remain, inasmuch as said roof diminished the use of light and air. The facts of the case are few and are as follows:—The petitioner and the respondents were next door neighbours, the former residing at number 68, and the latter at number 67 South George's street, in the city of Dublin. The petition stated that to the rear of said house No. 68 there was a yard and out house extending backwards towards the west, and which said yard and out house were divided from the respondents' premises, known as No. 67, by a side wall, that said premises of No. 68 were conveyed by indenture of lease of the 25th of March, 1840, and made between John Barber of the one part and one George Corker of the other part, whereby the said John Barber for the consideration therein expressed, demised unto the said George Corker, his heirs and assigns all that and those that dwelling house and messuage together with the yard and warehouse at the rear, extending to the lane or carriage way at the rear of the premises thereby demised. To hold the said premises unto George Corker, his heirs and assigns for the lives therein named, with a covenant for perpetual renewal. The interest of said George Corker having become vested in the petitioner, Thomas Dockrell, the said John Barber, by indenture of renewal of 6th March, 1865, in pursuance of said covenant for renewal contained in said indenture of lease of 25th March, 1840, did demise unto petitioner for the lives in said lease mentioned the said premises now known as No. 68. The petitioner then stated that the said premises consisted at the time of granting of said lease of 25th March, 1840, of a yard and warehouse at the rear, and so continued up to the month of September, 1858. That said warehouse was all during that time, and is now three storeys in height. The lower story whereof is on a level with the shop, and it contains in the south wall thereof two windows from or admission of light, and air to the said lower story of said warehouse. The upper storey of said warehouse being also lighted with by the windows in the said south wall of said warehouse. That before petitioner had

so entered as aforesaid into the occupation of said No. 68, one of the windows of said warehouse was greatly darkened, and the radiation of light intercepted by reason of a building made up to and against the south wall of said warehouse at the instance of the respondents. That said Corker at said time expressly reserved to himself the right of having said building and obstruction removed if he should so desire, and offered to petitioner on his taking said premises to have such done; but that said petitioner did not then require to have same to be done, that said windows had been used and enjoyed for more than twenty years past.—That the said respondents, having thus darkened, by one building which they had constructed, the petitioner's windows, in or about the month of December last, commenced constructing a roof or covering over the yard at the rear of said respondents' premises, and leaving the timber of said roof against the said party wall between said premises 68 and 67, and over and above the only remaining window on the lower story of said warehouse, and which yard never was at any time heretofore roofed over, and which said roof over shadows and closes in said windows, and by so doing, the respondents have seriously obstructed the radiation of light and supply of air to and in the direction of the said remaining window or opening in the south wall of said petitioner's warehouse, and have thereby sensibly diminished the light and air which petitioner and his predecessor in title and their tenants have been accustomed, and are of right entitled to have, use and enjoy. That thereupon the petitioner called, by notice, upon the respondents to divert from proceeding any further with the said roofing in of said yard, but respondents declined to stop as required said erection or building. The petitioner in his affidavit swore that there was a serious diminution of light coming into his said premises which interferes with the ordinary occupations of life, which were the sale of oils and hardware in said premises in which it was now sought to deprive him of the use of said light. The petitioner's predecessor did not sleep in the house, but lived at Rathmines near Dublin, and used frequently be on the premises. No written notice of the obstruction was ever served upon him.

The respondents' case was that they held the premises under lease dated 4th of October, 1831, whereby said John Barber demised said premises now occupied by the respondents to respondent Alexander Findlater, and one William Douglass Kirkpatrick, who by deed of assignment of 1st April, 1849, released his interest therein to said respondent, Alexander Findlater. That during said Kirkpatrick's occupation, "the window in question was wholly unused and almost impervious to light and air, being covered in by a wire grating, and the panes which were very small, stopped by pieces of plank and bags . . . That upon the present occupier's first obtaining possession, the window in question consisted of an old window-sash fixed in the wall and not made to open, being in the said state aforesaid, covered by a wire grating on the side looking into respondents' concern No. 67, and of but little use for the transmission of light, and that by the direction of respondents' managing clerk, for the purpose of more effectually

closing it, covered up by placing bags and boards across it, in which state it continued for upwards of three years, until petitioner obtained possession of his present premises, when he requested some one of the respondents to permit the removal of the boards and bags closing up the said window, that he might fill the sash with one pane of glass, to which request of the petitioner the respondents acceded, but did so as a matter of courtesy and not acknowledging the existence of or concealing any right of the petitioner to compel us to do so, and the petitioner did thereupon glaze the said window with one pane in such a manner as to admit light into the premises occupied by him." The respondents then alleged that the light which the petitioner now enjoyed was not in the least diminished by the respondents' roof, inasmuch as said roof was composed for the most part of glass; and further, the respondents denied that petitioner or his predecessors had for twenty years previous to filing this petition enjoyed the use of the light through the said window without interruption, and alleged that the respondents had themselves interrupted the light in the time of the petitioner's predecessors, that within twenty years past said window was stopped with boards and bags, viz., during 1856, 1857, and 1858.

*Brewster, Q.C., Purcell, Q.C., and Kaye*, were in support of the petition.—The respondents here obstructed us in the use of our ancient light, and in doing so he so diminished the light as to interfere with us in our business and ordinary occupation of life.—*Clark v. Clark* (1 Law Rep. Ch. Ap. 16); and we are entitled not alone to sufficient light for the purpose of our business, but to all the light we enjoyed before the structure or roofing was commenced. *Yeates v. Jack* (1 L. R. Ch. Ap. 295). No doubt *Clark v. Clark* (1 L. Rep. Ch. Ap. 16) will be relied upon on the other side; but the later case of *Yeates v. Jack*, followed by the still later case of *Dent v. The Auction Mart Company* (Weekly Notes, March 31, 132) has removed all doubts. We are entitled to the use and access of the light for twenty years, and under the Prescription Act, 2 & 3 Wm. 4, ch. 71, ss. 3 & 4, extended to Ireland in 1858 by 21 & 22 Vict., ch. 42, it is "enacted that when the access and use of light to and for any dwelling-house, workshop, or other building should have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." By section 4 it is "further enacted that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."—

*Flight v. Thomas* (8 Cl. & Fin. 231). Now no notice has been proved here, and it does not appear that our predecessor, Corker, ever had notice of the stoppage of the light and air during 1856, 1857, and 1858. Under the 4th section of the Act just here cited, we must not only have acquiesced in the obstruction, but it must be proved that we had notice of such obstruction. If, then, we had no notice, we would ask the Court for a mandatory injunction to pull down the building. In an unreported case in this Court, *Carson v. M'Kenzie*, which was decided in the early part of 1865, your Lordship granted a mandatory injunction (instead of directing an inquiry) under Cairns's Act to pull down a building which had been erected in Belfast.

*Frederick Walshe, Q.C., Jellet, Q.C., and Richey*, contra.—The light here was interrupted for more than a year, and therefore the right thereto is gone, for the window was stopped up with boards in 1856, 1857, and 1858. We must take it then that the then proprietor of the premises, namely, the landlord, will be presumed to have notice of what was doing on the premises. If A remain twenty years in undisturbed possession of the estate of B, that will give A a title to B's estate, and it need not be proved that B had no notice thereof.

*Purcell, Q.C.*, cited *Tapling v. Jones* (11 H. L. Cases, 290) to show that the right to the light cannot be lost by a temporary intermission not amounting to an abandonment.

THE LORD CHANCELLOR [read the third and fourth sections of the Prescription Act as given above].—The petitioner here claims to be entitled to the use of the light coming in through a certain window to his premises, and he insists that he is entitled thereto by prescription, that he has enjoyed it uninterruptedly for twenty years. His title to the light then is under the lease of 1840. Well, if there was nothing else in the case, he would, beyond a doubt, have a right to the light coming in at the window, and so far as that goes, following the case which I decided of *Carson v. M'Kenzie*, I would have no hesitation in granting an injunction. But it seems established that this window was stopped during 1856, 1857, and 1858, and the question then is narrowed into one of notice. Now, no form of notice is specified in the Act, and the question is, was the notice of this interruption within the meaning of the Act. The predecessor of the petitioner lived in the neighbourhood of Dublin and not on the premises; but he used frequently to come in there and be on the premises. Well, there was certainly no written notice of the obstruction or interruption of this window ever served upon him, and I take it that there was interruption of this light of the most complete character. Access of light was stopped, and it is sworn that it continued for three years. It appears that the preceding tenant, George Corker, is dead. If he was now living there would not be much difficulty in getting at the truth here, whether he knew of the interruption of the light, and had acquiesced therein; but I am told that Corker did not live on the premises. Well, if this gentleman goes away, and if he chooses not to go near the premises for thirty or forty years, I cannot yield to the doctrine that such absence was



enough to oust the respondents of their right to use the premises in the way they have done. I think then, on the whole, that Mr. George Corker had notice, constructive notice of the interruption, and that that notice within the meaning of the Act need not be in writing at all. I then dismiss the petition but without costs.

MAGILL AND OTHERS v. GIBSON AND EWING.

*Inventions—English patent for—Subsequent Irish patent for same.*

*The prior publication of a patent in England does not render void an Irish patent afterwards granted for the same invention in Ireland. Where, therefore, one H. B. had on the 1st May, 1852, obtained letters patent in England for a certain invention, and afterwards on the 4th of January, 1853, obtained letters patent for the same invention in Ireland, it was held that the Irish patent was not rendered invalid by reason of the prior publication of the said invention in England.*

THE cause petition in this case was filed by Samuel Rankin Magill, Hugh Wallace, and Thomas Stephens, against William Gibson and Patrick Ewing, the respondents. The petition prayed that said William Gibson and Patrick Ewing, their workmen and servants, might be restrained by the injunction of the Court from using a certain machine erected by them at Lisnafillen, and from erecting any other machines of a like description for the purpose of stretching, drying, or finishing woven fabrics, same being an infringement of petitioners' rights, and that said respondents may be ordered to account with petitioners for the profits made by them by the use of the said machine erected by them, and pay the same to the petitioners, and for a reference to the Master to take an account of said profits, and that petitioners may be awarded damages for the infringement of certain letters patent and their rights thereunto; and further, that the respondents might be ordered to pay petitioners such damages as the Chancellor might deem meet.

The petition stated that Rankin Magill, in the county of Tyrone, farmer, and Hugh Wallace and Thomas Staples Magill, traded as bleachers and finishers of linen at Leghimnoher, in the county of Antrim, under the style and firm of Wallace Magill and Company. That her present Majesty gave her royal letters patent, under the great seal of Ireland, bearing date the 4th January, in the 16th year of her reign, reciting that Henry Bridson of Bolton, in the county of Lancaster, bleacher and finisher, had by his petition humbly represented that he the said Henry Bridson had obtained letters patent in England, dated 1st of May, 1852, for his invention of improvements in machinery for drying and refreshing woven fabrics. The following is extracted from the patent enrolled in the Rolls Office of the Court of Chancery, in Ireland, dated 29th January, 1853:—"Victoria, &c. To all whom these presents shall come. Whereas Henry Bridson of Bolton, in the

county of Lancaster, bleacher and finisher, hath by his petition humbly represented unto us that he obtained letters patent in England, bearing date the 1st day of May, 1852, for his invention of improvements in machinery for stretching, drying, and finishing woven fabrics, that he is the first and true inventor thereof, and that the same hath never been practised in Ireland by any other person or persons whomsoever to his knowledge and belief, as by a declaration annexed to the said petition may appear, and praying that we would graciously be pleased to grant unto petitioner, his executors, administrators, and assigns our royal letters patent, under the great seal of that part of our United Kingdom of Great Britain and Ireland, called Ireland, for the sole use, benefit, and advantage of said inventor, within Ireland aforesaid, for the term of fourteen years from the said 1st of May, 1852. . . . Know ye therefore that we . . . have given and granted, and by these presents for us, our heirs and successors we do give and grant unto the said Henry Bridson, his executors, administrators, and assigns, our special license, full power and privilege and authority that he the said Henry Bridson, his executors, administrators, and assigns by himself and themselves, and by his and their deputy and deputies, servants and agents, and such other as he the said Henry Bridson, his executors, &c. shall at any time agree with, and no other from time to time and at all times during the term of fourteen years to be computed from the said 1st of May, 1852, shall and may lawfully make use, exercise and vend said invention of improvements in machinery for stretching, drying, and finishing woven fabrics within Ireland aforesaid, and that the said Henry Bridson, his executors, administrators, and assigns shall and may lawfully have and enjoy the whole profit, commodity, and advantage from time to time growing, accruing, or arising by reason of the said invention. To have and to hold, &c. . . . for and during and until the full end and term of fourteen years to be computed from the said 1st day of May, 1852, and fully to be completed and ended and to the end that the said Henry Bridson, his executors, administrators, and assigns may have and enjoy the full benefit and the sole exercise of the said invention according to our gracious intention heretofore declared in by these presents for us, our heirs and successors require and strictly command all and every person and persons . . . within Ireland aforesaid, that neither they nor any of them at any time during the continuance of the said term hereby granted, either directly or indirectly do make, use of, or put in practice the said invention, or any part thereof as aforesaid, nor in any manner counterfeit or resemble the same. . . . Provided always that our letter patent shall be upon this condition, that if at any time during the said term hereby granted it shall appear to us, our heirs and successors . . . that the said invention is not a new invention as to public use or exercise thereof within Ireland aforesaid, or not invented or found out by the said Henry Bridson as aforesaid, that upon signification or declaration thereof to be made by us, our heirs or successor under our or their privy seal or by the lords or others of our or their privy council . . . then our

letters patent shall forthwith determine and be utterly void to all intents and purposes." The said patent contained among others a proviso—"That if the said Henry Bridson should not cause a true copy of the specification enrolled in England containing a particular and exact description of the said invention and of the manner of making and using the same, in writing under his hand and seal, to be enrolled in the High Court of Chancery in Ireland, within six calendar months next ensuing the date of said letters patent, then these letters patent to be void." The petition then stated that said letters patent were enrolled in the Rolls Office of her Majesty's Court of Chancery in Ireland, on the 29th of January, 1853. That on the 8th of June, 1853, said copy of specification which contained a particular and exact description of the invention and of the manner of making and using the same in writing was enrolled in the Court of Chancery in Ireland. The petition then stated that the petitioners are the assignees of said letters patent, and of the rights and liberties thereby granted. That said letters patent have from the date thereof remained and are now in full force and authority, that until the month of July, 1865, no person, save the patentees or their assignees can set up said patent machinery. That in said last-mentioned month the respondents caused to be constructed a machine similar to the said patent machine, and the petition complained that said erection of said machine by respondents was an infringement of the patent rights.

To this petition the respondents replied by their answering affidavit. They said that a specification containing a particular and exact description of said invention and of the manner of using the same was signed by said Henry Bridson on the 29th October, 1852, and the same was pursuant to the statute duly enrolled in the Court of Chancery in England on the 1st of November, 1852. Respondent denies that the letters patent were as in petition alleged in full force and effect in Ireland; but on the contrary that the said letters patent granted to the said Henry Bridson on the 4th of January, 1853, in Ireland as in petition stated are wholly invalid, inasmuch as the specification required in respect of the said invention was enrolled in England some months previous to the date of the letters patent in Ireland.

*Brewster, Q.C., Harrison, Q.C., and Jackson* were for the respondents.—It is submitted that the letters patent granted in Ireland to Henry Bridson are wholly invalid, that inasmuch as the specification was previously enrolled, and therefore published in England; the Irish letters patent are void. A patent will not be granted for any work unless the same is novel, and the prior user or publication is enough in itself to strip the work of novelty.—*Darcy v. Allen* (11 Co. 86 a.) And a prior user in England, or a prior taking out of a patent in England voids a patent subsequently taken out in Ireland. In *Brown v. Annandale* (8 Cl. & Fin. 437) it was held to be essential to the validity of a Scotch patent that the prior user of the invention in England invalidated letters patent in Scotland, and some of the dicta of the lords would seem to extend the same doctrine to prior publications without user. This point was de-

cided in *Re Robinson* (5 Moore's Priv. Coun. Cas. 65). The point distinctly arose in *Re Bovill* (1 Moore P. C. N. S. 348). If a party do not take out his patent in Ireland, but first publishes it in England, he cannot take out a patent here afterwards. The English patent was on the 1st May, 1852, and he might have taken out his Irish patent before enrolling it; but the enrolling in England voids the Irish patent. Hindmarsh on Patents 70 thus speaks, citing *Browne v. Annandale* (1 Webb's Pat. Cas. 433)—"The specification is also required to be enrolled within four months in ordinary cases, and in six months if the patentee declares that he intends to apply for a Scotch patent. This indulgence is granted on the ground that if the specification were to be enrolled before the date of the Scotch patent, the Scotch patent would be void." [*Lord Chancellor*.—Is there any authority stated for that?] The Irish patent is invalid on the ground that the invention was known in England. [*The Lord Chancellor* read the English and Irish patent in this case. His lordship observed that the words of the English patent are—"within these kingdoms"—while the words of the Irish patent are—"within Ireland." I am now called on to undo the practice of this country for many years.] On the novelty of an invention, see *Carpenter v. Smith* (9 M. & W. 300); *Stead v. Williams* (7 Man. & G. 818). But it is said on the other side that the publication in England is not publication in Ireland. There is a very late case on publication in foreign countries.—*Lang v. Osborne* (31 M. & W. 133). In that case "an invention was described in a book published in France, copies of which were sent to England to a bookseller for sale, and it was held that this was a publication of the invention, and that no valid patent could afterwards be taken out in England for the invention."

*Chatterton, Q.C., May, Q.C., and Dix* appeared for the petitioners.—The English letters patent were dated 1st May, 1852, and the Irish letters were dated the 4th January, 1853. And those latter letters recited that the invention had never been practised in Ireland by any other person. The previous letters patent obtained in England do not render invalid the Irish letters patent.—*Brown v. Annandale*, which is relied upon on the other side has nothing to say to the case now before the Court. All that was there decided was, that the invention must be new in England as well as in Scotland; but the question here is whether a previous English patent invalidates an Irish one. The case of *Huddleton v. Gresham* (Webst. Pat. case 85) applicable here. Neither is the prior use in England such a publication as will invalidate the patent here.—*Bentley v. Fleming* (1 C. & Kir. 387). In order that we should obtain one patent in England, it was absolutely necessary that we should make known one invention; and an unavoidable disclosure of the invention to others is not such a publication as will avoid the subsequent grant of a patent.—*In re Newall and Elliott* (4 C. B. N. S. 269). That portion of the respondents' argument that the previous publication in England invalidates the Irish patent is answered by the case of *Edgeberry v. Stephens* (2 Salk. 447).—"A grant of a monopoly may be to the first inventor by the 21 Jac. 1. And

if the invention be new in England, a patent may be granted, though the thing was practised beyond the sea before, for the statute speaks of new inventions within this realm."

**THE LORD CHANCELLOR.**—The case for the respondent here goes the length of propounding the doctrine that no letters patent can be granted in Ireland where letters patent for the same invention have been previously granted in England. Well, that is a very startling proposition indeed, and we are now called upon to declare that the practice of all my predecessors is utterly at variance and contrary to law. That is a proposition that would require to be supported by a most clear and distinct argument indeed. The law of patents in this country is different from what it is in England. The Act of Monopolies was never made the law of this land before the Union, and it was not made so by the Act of Union the 39 & 40 Geo. 3, ch. 67, sec. 3. By that section it was enacted "that the great seal of Ireland, may, if his Majesty shall so think fit, after the union, be used in like manner as before the union," so that whatever acts were lawful under the great seal of Ireland before the union will be and are lawful now. Well from the union down to the present time patents have continued pretty much in the same form as they were before the Union. And patents in this country stand upon the common law. And I find that the English patent is in form similar to that used in this country from time immemorial. It is said here that the prior publication of the patent in England is suicidal to the Irish patent, because you (the respondents) insist that the enrolment in England is such a publication as strips this invention of novelty, and therefore that the patent is void in Ireland. There is not a single case that I am aware of before the union, where it was decided that the use of an invention in Ireland could prevent a patent being granted for that invention in England, for, on the contrary, inventions might be patented in England, brought there from abroad. For the Act of 21 Jac. 1 intended to encourage new devices useful to the kingdom, whether learned by travel or by study. There is a difference between the wording of the English and Irish patent, that the English patent uses the expression "these kingdoms." I have examined the several cases that have been cited, and I do not see any strength in this monstrous proposition that there is no validity in Irish patents, for the question really comes round to that. I cannot hold then that this patent is void. The petitioner is entitled to a portion of the relief he prays; he cannot get an injunction, because the time the patent had to run expired on this very day. But he is entitled to an account of what sums the respondents made by his patent.

### Rolls Court.

Reported by H. W. B. Mackay, Esq. LL.B. Barrister-at-Law.

**REILLY v. REILLY.**—April 9, 24, 26.

*Estoppel—Production of documents.*

*The petitioners, after some proceedings in the Master's office, filed an affidavit stating that the matters in*

*issue would appear from the documents mentioned in schedule thereto; and on the case being referred again to the Master for re-consideration on this affidavit, he ordered them to produce all the documents in their power relating to the matter, and referred to the affidavit in his order. They never appealed from that order. Afterwards they refused to produce certain of the documents, and filed an affidavit denying that these related to the matter in issue. The Master ordered them to produce these documents, and they appealed from that order. Held—that they were concluded by the order not appealed from and by the affidavit, and were bound to produce the documents.*

THIS was a petition under the 15th section for the administration of the assets of the late Philip Reilly. The petition was presented by Laurence Reilly and Philip E. Reilly, the sons and administrators of the testator. The respondent was also a son of the testator. It appeared by the petition that the testator died intestate on the 9th June, 1847, and administration was taken out on the 10th December, 1864. That the petitioners, during their father's lifetime, had carried on the business of storekeepers and forwarding agents in partnership with him under the style of Philip Reilly & Sons, and still continued that business. It was suggested in the discharge of the respondent that the petitioners were partners with their father in other businesses; but by an affidavit of the petitioner filed on the 5th June, 1865, to support an appeal from an order of the Master, whereby it was ordered that the respondent's solicitor might attend, and take extracts from certain documents, it appeared that they had carried on the business of storekeepers and forwarding agents with their father from the 1st July, 1843, till the day of his death, and had carried on no other business with him. This affidavit likewise stated "that every account connected with the partnership, every debt received or paid, appears in the books which are set out in the schedule hereto; and that on reference to said books it will appear that there was no stock in trade or any capital of the firm, save some debts from time to time due to the partnership by their customers; and that no capital, stock, nor anything beyond the personal exertions of the partners were necessary to carry on the business." The schedule to this affidavit set out seventy books, as well as bills, vouchers, and other documents—Nos. 1 to 307. The Master of the Rolls referred the matter back to Master Litton to reconsider it upon this affidavit; and by an order of 6th November, 1865, it was ordered, having regard to the affidavit of the 5th June, 1865 &c., that there should be a *viva voce* examination, at which the petitioners and respondents respectively should attend for cross and re-examination, and should at the instance of each other produce each for the inspection of the other party all books of account, accounts, vouchers, and other documents in any way relating to the matter in their power, possession, custody, or procurement respectively. This order was never appealed from. The petitioners, however, were willing to produce only 19 of the books of account, and made an affidavit that the other documents contained nothing relating to the matter in question.

They were, however, directed by a further order of the Master to produce those which they had attempted to keep back. From this order they now appealed.

*F. W. Walsh*, Q.C., and *Richey*, for the appellants.

*Warren*, Q.C., and *Keogh*, for the respondent, insisted that the appellants were concluded by their own affidavit and the Master's order referring to it. The case was also argued at large on the law of partnership; but as the above point was the only one noticed in the judgment, it has been thought unnecessary to encumber the report with anything further.

**THE MASTER OF THE ROLLS.**—In this case I have a very clear opinion that the Master's order was in accordance with the justice of the case. I shall affirm the Master's order. I shall now explain the general nature of the facts before adverting to the law of the case. It appears that in 1843 a partnership was entered into with regard to the storage business between the petitioners and their father, the testator. This partnership was carried on from 1843 until the death of the latter in 1847. It also appears that the present petitioners are the personal representatives of their father. Now, the responsibility of the parties is exactly the same, whether petitioners or respondents. The respondent, as next of kin, has the right to compel the petitioners to account to some extent at least. This is clear. Previously to the case of *Newland v. Champion* (1 Ves. Sr. 104), it had been well established that if you sue the personal representative, you cannot make the next of kin parties unless you charge collusion. In *Newland v. Champion* Lord Hardwicke himself grafted an exception on that rule, and held that you may make the surviving partner of the testator a party to a suit for the administration of his assets. Afterwards in *Bowsher v. Watkins* (1 Russ. & Myl. 277), the whole question was argued over again. That was a decision of very high authority. It was decided by Sir John Leach. It was insisted that the surviving partner was only a debtor of the estate, and that where there was no collusion he should not be obliged to litigate the question with anyone but the executors. But Sir John Leach, acting on the principle of *Newland v. Champion*—a decision which is now an established principle of law—held that you may join the surviving partner of the testator; and although *prima facie* it seems to be a multifarious proceeding, it is not so. Many years ago I argued this question at the bar, and having referred to the authorities I succeeded in getting a decree, founded on the liability of surviving partners to account. Now, of course, it is a well-known principle of law, that if two rights are vested in the same person it is the same as if they were vested in different persons; and therefore if these parties combine the characters of personal representatives and surviving partners, the respondent, if he had been petitioner, would have been entitled against them beyond a doubt as if those characters had been sustained by different persons; and the decree would necessarily, and as a matter of course, have directed them to account not only as administrators but incidentally as partners also; and that it should be ascertained whether the deceased, whose assets are administered, was a creditor of the firm of which the petitioners were partners. As it is, they have framed

the petition very accurately to take no account of the assets; but they are bound by *Newland v. Champion*, and *Bowsher v. Watkins*, to account as surviving partners as well as in their character of personal representatives. That is right to be kept in mind in considering this case. When the case went before the Master (unfortunately such is the course of practice in the Master's office) there were no accounts directed. The English practice should be adopted. There when the Master of the Rolls, through the medium of his clerk, takes accounts, he directs the accounts to be referred to himself in chamber. If the Masters would bear in mind that they combine the character of Equity Judge and Master, half the difficulty would be got rid of. Strictly speaking, there are no accounts directed by the Master at all. I don't see why there should not. However, the Masters look upon it differently. But suppose the accounts had been directed; immediately after the direction there might have been a motion for the production of the fifty-one documents; and supposing the Court had made such an order, the petitioner, by his solicitor inspecting them, could have ascertained either that they contained information or that they did not. If the petitioner had admitted that must be this partnership account must be directed, I do not see how there could have been any reasonable dispute between the counsel on either side except as to whether there was a sum due to the father at the winding-up of the partnership. If there were, the respondent I suppose would have said he was entitled to the profits made by it. If the books contained nothing why this expense? if they did contain anything why not have them inspected? The previous order of the Master was—that the solicitor should be at liberty to attend and take extracts. If he had done so, and had found there was no sum due to the father at his death, this case would have been brought to a close. But instead of coming to the point the petitioners made this affidavit; and after the matter was referred back to the Master, he made the order now appealed from. [His Honor here read from the affidavit of which the essential passage has been given above, and continued:]—They are not to be permitted to swear, and then to be permitted to depart from their swearing. They cannot swear that the documents relate exclusively to the petitioner's case and do not relate to the case of their adversary. If parties choose to make an affidavit, considering that documents are now produced upon affidavits instead of upon pleadings, they must be bound by it. The Master has come to the conclusion that the books are to be produced. I do not think the appeal can be sustained having regard to the order of the 6th November not appealed from. That order, as it is binding on the Master, is equally binding on the Court, because not appealed against. [Here his Honor read the latter part of the order not appealed from and continued:]—That does not specify the documents to be produced, but it refers to the affidavit, and that does not specify the seventy. If they show they disregard the Master's order then made, they must abide by the consequence. But it would be much better that they should be inspected by the respondent's solicitor instead of going into a lengthened examination to ascertain whether there was

a balance due at the winding-up of the partnership; and if so, how it was disposed of. If in payment of debts there is an end of the question; but if it was kept in the partnership which was, I understand, carried on under the very same name, the name of the deceased father, the capital of the father was a debt due to him at the period of his death, or of the winding up; and these petitioners must be responsible for profits made with it. The order I will make is this:

It is ordered, having regard to the order of the Master dated the 6th day of November, 1865, which has not been appealed from, and having regard to the third paragraph of the petitioner's affidavit filed on the 5th day of June, 1865, and the schedule annexed to the said affidavit, that this motion be, and the same is hereby refused, with costs to be paid by the said petitioners, J. L. Reilly and Phillip E. Reilly to the said respondent, James Reilly, when the same shall have been taxed and ascertained. And it is further ordered that the deposit of £10 lodged with the registrar by the said petitioners be paid over to the said respondent in part payment of said costs.

*Keogh* intimated that that the parties would inspect the books as suggested by the Master of the Rolls.

O'SULLIVAN v. EDGEWORTH AND WIFE.  
May 9, 10.

*Practice—Viva voce examination.*

*A party who has filed no affidavit (other than her discharge) in the Master's office, and who has not presented herself for cross-examination, may nevertheless be examined viva voce at the hearing of the cause on exceptions, and on the merits.*

THE cause petition was filed by T. O'Sullivan as executor of the late T. M. Lyster, solicitor, against E. M. Edgeworth and L. M. Edgeworth, his wife, to charge the separate estate of the latter with a sum of £200 with interest advanced by Mr. Lyster to the respondent. The case was referred to the Master to take an account, and the petitioner, in his charge in the Master's office, stated *inter alia* "that the said Thomas M. Lyster, having made several further advances to said L. M. Edgeworth, amounting altogether, on the 14th September, 1860, to the sum of £140, the said L. M. Edgeworth, in consideration thereof, and acknowledging the correctness of said amount being so due by her to him, and for the purpose of providing for, and securing the repayment thereof to him, handed to said Thomas M. Lyster a letter addressed by her to Mr. Andrew Nolan, the receiver then over said respondent's estate, in the words and figures following:—

"69 Upper Gardiner-street,  
"14th September, 1860.

"Sir,—Mr. Lyster having advanced me £140 on account of my annuity and arrears, I have given him

a receipt and this letter as an order on you, and I hereby authorize and require you to pay him the sum of £140 on my account, for which he will hand you my receipt.

"I am, Sir, yours, &c.

"LETITIA M. EDGEWORTH."

Mrs. Edgeworth had filed an evidence affidavit at the hearing, in addition to her answering affidavit, but none (apart from her discharge) in the Master's office. In her discharge she stated that it was utterly untrue that Lyster made several other advances amounting to £140 to her; that she knew nothing of the account, if any, between her husband and Lyster, and did not, when she wrote or signed the letter of the 14th of September, 1860, know what amount was due to Lyster by her husband. That that letter had been signed by her from the dictation of Lyster or her husband to enable her husband to get from the receiver so much money of the arrears of her annuity for the use of her husband. That both her husband and Lyster were present at the time she wrote or signed it, and that she did not at that time receive any money from Lyster. She then went on to admit having signed a promissory note mentioned in the charge, and added, "Deponent then, from professions made by said Lyster, and placing implicit confidence in him, and not knowing or believing that any advantage would be taken of them as showing any admission of liability to the said Lyster of the amount therein stated." She also stated that the only sums Lyster had advanced to her on her own account were £15 and £2. The Master had made an order permitting the parties to present themselves for cross-examination. The petitioner had done so, but Mrs. Edgeworth had not. The Master made his report, and the case came before the Master of the Rolls on exceptions to the Master's report, and on the merits, and was adjourned by the Master of the Rolls, who directed the present motion to be made. The present was a motion for the *viva voce* examination of Mrs. Edgeworth at the further hearing for the purpose of giving evidence as to whether she received or was paid by Lyster any sum or sums of money at the time of giving him the order on the receiver bearing date the 14th September, 1860, and the receipt of said date, and how and under what circumstances, or on what account, was said order and receipt given, and whether she received or was paid by him any sum of money, except certain sums of £15 and £2.

*Jordan* moved on behalf of Mrs. Lyster, and cited 13 & 14 Vict. c. 89, s. 12; *Murphy v. Longfield* (6 Ir. Ch. 566); *Martin v. Pycroft* (2 De C. M. & G. 785); *Duke of Leeds v. Amherst* (16 Sim. 431); *Hope v. Threlfall* (23 L. J., n. s. Ch. 631); *James v. Grissell* (3 De G. & Sm. 290); *Herbert v. Greene* (3 Ir. Ch. 270, 277).

*Lawless, Q.C.*, and *Beytagh*, contra, insisted that the Master had fixed a time for giving evidence which had expired, and there was not only no special case made, but no affidavit at all in support of the present motion. They cited 2 Dan. Ch. Pr. 1st ed. 958; *Davis v. Davis* (2 Atk. 21); *Redifer v. O'Brien* (3 Madd. 44); *Rands v. Rishman* (6 Sim. 46); *Grylls v. Gundry* (2 Deac. & Chitty, 290); 2 Madd. Ch.

3rd ed. 684; 2 Sm. Ch. Pr. 3rd ed. 398; *Whitworth v. Whyddin* (2 M.N. & G. 56); *Glover v. Daubeny* (9 Jur. N. S. 90); *Longford v. May* (22 L. J. N. S. Ch. 978); *Williams v. Goodchild* (2 Russ. 91); *Nicholls v. Crooke* (2 Ir. Jur. 4, a); *Oliver v. Wright* (1 Sm. & Giff., App. xvi.)

*Brewster, Q.C.*, replied.

THE MASTER OF THE ROLLS, after expressing his opinion that Mrs. Edgeworth should have been examined on the question in the Master's office, continued—When this case came before me, I drew up the decree myself. It was sought to charge this lady's separate estate, her husband being also a debtor. The object was to ascertain what sum had been advanced, and how much to the husband, and how much to the wife, and I reserved to the hearing of the cause the question whether the estate of the husband in the Landed Estates Court was primarily liable for the sums advanced to the wife. When the case came before the Master, there was a document produced which creates all the difficulty in the case written by this lady herself, who wants to exonerate her separate estate. This is the letter which she says (it is not established by satisfactory evidence at all) she wrote at the dictation of her husband or his solicitor. [His Honor here read the letter.] Now, it is highly probable every word was dictated by the solicitor Lyster. But the Master, notwithstanding this letter, instead of examining this lady as to whether the letter was written at the dictation of Lyster, has passed over that question altogether. Supposing she had sworn to that, could the present petition have gone further? I am now placed in this difficulty—Am I now to allow a *viva voce* examination before myself? I am disposed to do so for the furtherance of justice. I also find in 1 Daniell Ch. Pr. 4th ed. 845, that "upon the hearing of any case the Court, if it sees fit, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties, or in such manner as it may think fit. This power is only to be exercised by the Court at the hearing." We have a different practice in this country, because in England they will not make an order for *viva voce* examination without first hearing the cause; but here I have been in the habit of making orders (subject to a reversal by the Court of Appeal) unless it is opposed on that ground. In England they require the cause to be heard first. That is the meaning of the passage in Daniell, that it is only made at the hearing. He continues in page 846—"The Court of Appeal may examine orally before it a witness who has not been orally examined before the Court below." The distinction between an oral examination and an examination by affidavit, is an obvious one. Now, of course I believe I could make an order now which could scarcely be complained of—"Refer this case back to the Master, that he may be at liberty to reconsider his report, and examine this lady *viva voce*," but I think it objectionable for the Court to adopt this round-about proceeding, and if I have a power to have the examination before myself, it would be less expensive, and more satisfactory.

His HONOR then made the following order:—

"It is ordered by the Right Hon. the Master of the Rolls, in order to prevent the expense of sending the case back to the Master for the *viva voce* examination of Letitia Maria Edgeworth in respect of the letter of the 14th September, 1860, signed by her, and addressed to Andrew Nolan, Esq., that the said respondent, Letitia Maria Edgeworth, be examined *viva voce* at the further hearing of this matter on her own behalf in respect of such letter; and accordingly it is further ordered that the further hearing of the cause do stand over until the first day for hearing causes next term; and the Court doth reserve further order, and the question of the costs of this motion; and it is further ordered that the petitioner be at liberty to be examined *viva voce* on his own behalf, or to examine any other witness whose name he shall furnish to the solicitor for Letitia Maria Edgeworth on or before Tuesday next."

His HONOR remarked, in answer to Mr. Lawless, that he did not at all mean to say he would not visit Mrs. Edgeworth with costs.

In pursuance of this order, Mrs. Edgeworth was examined *viva voce* on the 25th May.

## Court of Exchequer Chamber.

Reported by William Mulholland, Esq., Barrister-at-Law.

[BEFORE LEFROY, C.J., PIGOT, C.B., O'BRIEN AND FITZGERALD, JJ., FITZGERALD, HUGHES, AND DEASY, BB.]

MARSHALL v. WILSON.—April 26, May 3.

*Principal and Surety—Account stated.*

A verbally promised to guarantee to C payment for certain goods to be delivered by C to B. After delivery and default made by B, A promised a second time to pay C. Held—that such second promise would not support an action upon an account stated, the liability of A not being a direct debt, but a collateral liability.

ERROR from the Court of Common Pleas.—This was an action on a guaranty. The summons and plaint contained six counts; the first was a special count on the guaranty, the five others were the common *indebitatus* counts, the last being a count on an account stated. The defences were simple traverses and issues joined thereon. The case was tried before Mr. Justice Hayes, at the Londonderry Spring Assizes, 1864. The facts proved were these. Wilson, the plaintiff, in the Court below and the defendant in error was a sea-merchant in Derry. Marshall, the plaintiff in error, and a man called Browne, came to his stores, and Browne having selected some seed, Marshall promised Wilson to see

him paid. No writing passed. The seed was delivered to Browne in due course, but was never paid for, Browne leaving the country some time afterwards, Wilson thereupon applied to Marshall, who frequently acknowledged his liability and promised to pay. The defendant called no witnesses at the trial, relying on the fact that the guaranty was not in writing as required by the Statute of Frauds. Counsel for the plaintiff called on the learned judge to direct a verdict for him, on the issue upon an account stated on these grounds, that a verbal guaranty was given by the defendant to the plaintiff, that the goods had been delivered on the faith of that guaranty, and that after Browne had failed to pay the defendant, had admitted his liability and promised to pay. His lordship refused to do so, and left the following questions to the jury. 1st—Were the goods sold to the defendant or to Browne. 2nd—Was the defendant's liability primary or only secondary as surety for Browne. The jury replied.—First, that the goods were sold to Browne and not to the defendant; and second, that the defendant's liability was as surety for Browne. His lordship, thereupon, directed a verdict for the defendant on all the issues, but reserved leave for plaintiff to move to have the verdict set aside, and a verdict entered for him, if the Court should be of opinion that the subsequent admission and promise of the defendant were sufficient to sustain a count upon an account stated. In Trinity Term, 1865, the plaintiff moved, pursuant to leave reserved, and the Court of Common Pleas were unanimous in entering a verdict for the plaintiff, holding that the facts proved were sufficient to maintain an action upon an account stated. Leave was given to appeal.

*Butt, Q.C. and Carson* for the plaintiff in error.—It is true there were two promises here, but there is no difference in their character. If the character of the promise was altered on the second occasion, what was the consideration for such alteration. There cannot be two different promises out of the same consideration. *Marriott v. Lister* (2 Wilson 141); *Eastwood v. Kenyon* (11 Ad. & E. 438). Assumpsit would not lie on the first promise, even if it were enforceable, because it sounds in damages; neither will it on the second, which is the same. *Cocking v. Ward* (1 C. B. 858) is relied on by the other side; but this case is clearly distinguishable. In that case and others like it—*Knowles v. Mitchell* (13 East. 249); *Pinchon v. Chillott* (3 C. & P. 236)—the position of the parties had changed before the second promise was made. The contract had been executed, and a debt actually incurred (although not enforceable) by the defendant. Here there is no debt but only a collateral liability.—*Eastwood v. Kenyon*, supra. "An account must be stated in monies numbered," says Lord Ellenborough, in *Crawford v. Stirling* (4 Esp. 207). This could not be so, as it was only a liability for whatever the principal, Browne, did not pay, and he might come any time and pay a part or the whole. The surety is only bound to pay the principal's deficiency.—*Crawford v. Stirling*. If this is allowed, it will be a clear loophole for evading the Statute of Frauds.

*Dowse, Q.C. and J. P. Hamilton*, contra.—The other side is wrong in saying that the subject of an

account stated is what the law strictly calls a debt. A sum of money need only be admitted as due.—*Arthur v. Dartch* (8 E. Jurist, N. S. 118); *Laycock v. Pickles* (4 Best & Smith 497); *Newhall v. Holt* (6 M. & W. 662); *Foster v. Allanson* (2 T. R. 479). This was a collateral liability no longer. It was an acknowledgment of his own debt after default had been made by Browne. There was, therefore, a case for the jury, upon an account stated, if we can show any consideration for the second promise. The Statute of Frauds is only, so to speak, a Statute of Evidence, and the first contract was not void, but merely not enforceable.—*Sweet v. Lee* (3 M. & Gr. 452); *Crosby v. Wadsworth* (6 East 610). The liability, therefore, existing on the first promise, although not enforceable, will be held at Common Law a sufficient consideration for the second promise. *Lee v. Mugeridge* (5 Taunton 36); *O'Sullivan v. O'Callaghan* (2 Ir. Jur. O. S. 314). So a debt barred by Statute of Limitations is a good consideration for a subsequent promise to pay, because the remedy only is barred. So, also, a debt barred by the Tippling Acts. *Dawson v. Remnant* (4 Bingh. 459).

*Cur. adv. vult.*

**May 3.**—*PIGOT, C. B.* delivered the judgment of the Court.

In this case there were two express promises to answer for the debt of another, one before the debt was incurred, and another after the debt had been incurred, and default had been made. The first promise is clearly incapable of being enforced, not being evidenced by a writing as is required by the Statute of Frauds. And the second is equally so.—*Mulson v. Wharham* (2 T. R. 80); *Peckham v. Faria* (3 Douglas 13). But the promise declared upon here is the promise implied by law in stating an account; and the second promise was offered as evidence of the stating of an account. Now the Statute of Frauds is not violated by allowing the amount to be recovered upon an account stated, if the liability is one which the law allows to support an account stated. What that liability is, is fixed by a rule too firm to be shaken. It must be a debt due from the defendant to the plaintiff, being in arrear and unpaid at the time of the promise or stating of accounts. All the cases cited at the bar on behalf of the plaintiff were cases of a promise made by the defendant to pay his own debt, a debt due, although not enforceable. Provided the sum be ascertained, there need not be a strictly legal debt. But it must be a debt between the plaintiff and defendant, and cannot be founded on a collateral liability.—*French v. French* (2 M. & Gr. 644); *Lubbock v. Tribe* (3 M. & W. 607); *Lemere v. Elliott* (6 M. & W. 656); *Gough v. Findon* (1 Exch. 48). And the rule is also clearly shewn in cases of contract under seal; for debt will lie upon a covenant to pay absolutely.—*Evans v. Jones* (5 M. & W. 295). But where there is a collateral and independent covenant to pay the debt of another person on non-performance by him, the remedy is covenant and debt will not lie.—*Randall v. Rigby* (4 M. & W. 130). The right to recover on an account stated is wholly irrespective of the Statute of Frauds. It is based on the assumption of an original liability;



but it must be a direct liability and not collateral which sounds only in damages. The order of the Court of Common Pleas must be reversed and the cause shown allowed.

## Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

THE EARL OF DERBY v. SADLIER.—Jan. 12, 13;  
May 7.

*Landlord and Tenant Act, st. 23 & 24 Vict. c. 154, s. 34. Emblements*—"Last gale day of the current year in which such tenancy shall determine."

*The expression*—"Last gale day of the current year in which such tenancy shall determine" in section 34 of the *Landlord and Tenant Act*, means "last gale day of the current year of the tenancy," not of the calendar year.

*Quære*—Has the tenant under this section the option of exercising his common-law right to emblements instead of continuing to hold on under the section?

THIS was a motion on behalf of the plaintiff to shew cause against a conditional order obtained by the defendant that the verdict had for the plaintiff at the Summer Assizes of 1865, for the county of Tipperary, South Riding, before the Honourable Mr. Justice O'Brien, should be turned into a non-suit or verdict for the defendant, pursuant to leave reserved at the trial. The action was one of ejectment on the title brought to recover 67a. 2r. 15p. Irish plantation measure, of the lands of Barnaleen, in the barony of Clanwilliam and county of Tipperary. The title of the plaintiff was averred in the plaint to have accrued on the 1st November, 1864, and the summons and plaint bore date the 25th March, 1865. At the trial it appeared that the defendant's father the late Mr. James Sadlier, was in his lifetime in possession of the premises for which the ejectment was brought, under an agreement dated the 3rd August, 1858, and made between the plaintiff and the said Mr. James Sadlier. That agreement, so far as its terms are material for the present report, was as follows:—"It is hereby agreed by and between the Right Honourable the Earl of Derby and James Sadlier, Esq., of Brookville, that he the said James Sadlier shall take from the said Earl of Derby as tenant from year to year, determinable either by the usual six months notice to quit or by the death of the said James Sadlier whichever shall first take effect or happen, commencing the 1st May, 1858, that part of the lands of Barnaleen in the occupation of the said James Sadlier, situate in the barony of Clanwilliam and county of Tipperary, containing 67a. 2r. 15p. Irish plantation measure or thereabouts, more or less, excepting, &c., and shall pay for the same the yearly rent of £100, payable half-yearly in equal sums, on the 1st day of November and 1st day of May in every year above taxes (save landlord's

proportion of poor's rate), the first half-year's rent to be due and payable on the 1st day of November, 1858, and the last half-year's rent to be paid and payable in advance of the 1st day of February after notice to quit, and to be recoverable after that day in the same manner as rent in arrear."

It further appeared that the late Mr. James Sadlier had assigned his interest in said lands under said agreement to his son the defendant, and died on the 27th of May, 1864; that defendant had previously got possession of the lands and paid the rent for same, and had since continued in possession; and that on the 10th October, 1864, he paid the plaintiff's agent the half-year's rent due the 1st May previous; that on the 3rd March, 1865, the possession of the lands was duly demanded by plaintiff's agent, and refused. The defendant's counsel called upon the learned judge to non-suit the plaintiff, or direct a verdict for defendant upon the two following grounds:—1st. That in any view of the case the tenancy was not under the agreement determined till the 1st May, 1865. 2nd. That under the *Landlord and Tenant Act*, (1860) sec. 34, the tenancy continued till the 1st May, 1865. The learned judge declined to non-suit or direct for the defendant; but directed a verdict for the plaintiff, subject, by consent, to be turned into a non-suit or a verdict for the defendant, if the Court should be of opinion that the direction was wrong upon either of the two grounds relied upon by the defendant's counsel. A conditional order having been obtained, cause was now shewn against it. The case was twice argued: first, in Hilary Term, before Lefroy, C. J., O'Brien, J., and Hayes, J. upon both the points reserved; and subsequently, in Easter Term, before Lefroy, C. J., O'Brien, J., and Fitzgerald, J. upon the second point only. There was some question upon the first argument as to whether there was evidence that at the death of Mr. James Sadlier, on the 27th May, 1864, there were any crops in the ground, and whether therefore the right to emblements could be said to have existed as a fact at that date, but the point was withdrawn, and the second argument proceeded altogether upon the supposition of the evidence of the right.

*Serjeant Armstrong, J. E. Walsh, Q.C., and Ryan*, for the plaintiff.—With respect to the first objection, there can be no doubt on the construction of the agreement that the tenancy determined with the death of James Sadlier. The second point turns on the construction to be given to s. 43 of the *Landlord and Tenant Act*, st. 23 & 24 Vict. c. 154. By that section, where a tenancy determines as it has done in this case, "the tenant in occupation, in lieu of the right to emblements, where such right shall exist, shall, if he think proper so to do, continue to hold and occupy such farm or lands until the last gale day of the current year in which such tenancy shall determine." We say that the words "current year" mean "current calendar year," and James Sadlier having died on the 27th May, 1864, that the defendant was entitled to hold until the 1st November following and no longer, and therefore that the ejectment was not premature. This section is an extended substitute for s. 1 of the *Emblements Act*, st. 14 & 15 Vict. c.

5. By that Act the tenant is empowered to hold on "until the expiration of the then current year of his tenancy." Why was that form of words altered if it was intended that the term for which the tenant was to continue to occupy should be the same? The natural meaning of the words in the present Act is "the last gale day of the current calendar year." It is not obligatory on the tenant to take the option given him by the Act. He may leave and resort to his common law right to emblements if he pleases.—*Coltens v. Kingsbury* (4 Bingh. 202). It will be said that the latter part of the section is repugnant to our construction; but the rule is that if there is a provision in an Act of Parliament, and then afterwards repugnant words are used, the repugnant words are to be rejected.—*Dwarris on Statutes*, 591. The words "at the expiration of such current year" in the close of the section, may be read "on the last gale day of such current year." Our construction allows the tenant to hold on till November, which enables him to get his crop.

*Hemphill, Q.C., Shaw, Q.C., and Tandy* for the defendant.—As to the first point. This agreement created an absolute estate from year to year, which could only end on the 1st May, and the provision as to the death of James Sadlier could not make it end sooner. The only effect of that provision was that if James Sadlier were to have died within less than six months before the 1st May, the tenant would have to go out on that day without the usual six months notice to quit.—*Doe v. Green* (9 Ad. & Ell. 658); *Doe v. Donovan* (2 Campb. 78, and 1 Taunt. 555); *King v. Hurstmonceux* (7 B. & Cr. 551); *Stratton v. Petit* (24 L. J., n.s. C. P. 182). As to the second point. The words "current year" in the 34th section of the Landlord and Tenant Act mean "current year of the tenancy;" the tenant was therefore entitled to hold to the 1st May, 1865, and the ejectment was premature. The intention of the section was to give the tenant the same rights which he had under the Emblements Act, but in a more extended class of cases. If the plaintiff's construction is right, then under the first part of the section the tenant would hold till the 1st November, and would pay rent to the 31st December under the proviso at the end of the section, that the landlord and tenant are to be subject to the same terms, &c., as if "the lease or tenancy had determined in manner aforesaid at the expiration of such current year." "Current year" must have the same meaning in both parts of the section, and to make this latter part sensible the words in both places must mean "current calendar year." The policy of the law was to put uncertain tenancies on the same footing as certain ones in respect to emblements.—*Graves v. Weld* (5 B. & Ad. 105); *Hyde v. Roche* (5 Ir. C. R. 195); *Stradbrooks v. Mulcahy* (2 Ir. C. L. B. 400). When the Legislature in this Act of Parliament wanted to show that they meant "calendar year," they did so, as in the sixth section. The rules on this subject are to be found in *Hayden's case* (3 Rep. 7); *Powllen's case* (11 Rep. 34); *Dwarris on Statutes*, 577; *Edrick's case* (5 Rep. 119).

*LENNOR, C.J.*—We have expressed our opinion on the former occasion, and anything I have learned since has not changed my opinion. Everything we

have heard since has very much confirmed what I always heard was the true rule of construction in any case, and that rule is this, that every word as far as possible is to have an effect. Here there are words to which, if we adopt the plaintiff's construction, we don't give their effect. There is nothing in the words of the Act or the general provisions of it to shew that the Legislature meant to depart from that rule, and therefore we are bound to give every word its force. Every word must have its effect, and therefore our judgment should be for a non suit.

*O'BRIEN, J.*—In this case, as I was the judge who tried the case, I may make some observations, and I own that my opinion is as it was at the close of the former argument. At the trial I was under the impression that the construction of the section was as was contended for by Mr. Walshe and Serjeant Armstrong; and even if I had not been of that opinion on the case at the time, I think that ruling in favour of the plaintiff was the proper course for me to follow. But at the close of the last argument I felt the difficulty which I suggested as to the effect of the later proviso in the section, namely, that it appeared to me that in order to hold with the plaintiff we should either strike out altogether or else take another liberty with the Act by introducing several words by construing the words "expiration of such current year" as if they were "the last gale day of the current year." We are not warranted in doing that, unless our not doing it should cause a contradiction or repugnancy. There is this peculiarity in the case that putting aside all arguments *ab inconvenienti* there is no repugnancy or inconsistency caused by putting the defendant's construction on the statute; and on the other hand there is a considerable repugnancy caused by putting on it the construction contended for by the plaintiff. That does not rest altogether on the last proviso, because in the earlier part of the section we have this.—The section deals with the determination of the interest without any default on the part of the tenant. By adopting the plaintiff's construction we would exclude from the section and render the section inapplicable to cases in which this determination happened between the last gale day and the 31st December. Serjeant Armstrong says the Act would not apply at all to this case. It would be a strong measure to hold that, and the difficulty of doing it would be increased by what Mr. Shaw has pointed out, namely, that the words in the first part of the section are future, shewing that there was to be a last gale day in every case in which the tenancy determined. In the majority of cases where the gale day was in November or December, the operation of the Act would be altogether excluded by the construction contended for by the plaintiff: and then the last part of the section says that the rent shall be paid to the last gale day, that is, the first of November; and the Act goes on to say that the parties shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to all the restrictions to which they would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year. We are asked to do that in the construction of the Act, which I do not think we are

warranted in doing unless there is some repugnancy. Arguments *ab inconvenienti* may be useful where the policy of the Act is doubtful; but they do not warrant us in exercising such a jurisdiction as that ever an Act of Parliament. Then the view put forward by Serjeant Armstrong is well worth consideration. Supposing that the right to emblements was not abolished, but in lieu thereof there was given to the tenant the option to hold the premises till the expiration of the period mentioned, if Serjeant Armstrong be right in that view it would get rid of all the inconveniences suggested, as the one suggested in the course of the argument, namely, that of the tenancy determining on some day in April when all the crops are in the ground, and the tenant then being turned out in May. That would be got rid of if the tenant has the option, which Serjeant Armstrong suggests, of taking his emblements. At all events the option he has would get rid of the inconvenience. On these grounds I think that the point reserved should be ruled in favour of the defendant, and that this gentleman's tenancy should be considered as subsisting to the 1st May, 1865.

FITZGERALD, J.—There are other points in the case, but the only one I have heard argued was this on section 34. There is one thing I must say. This was supposed to be some blunder in the section, but the fact is that this section was submitted to a select committee of the House of Commons, and afterwards went before a committee of the Law Lords, and was subsequently adopted by the other lords. Putting the best construction I can on the Act, I think that on the canons of construction—and taking the language of the Act as we find it, we must put the best construction we can upon it—I confess there is a considerable difficulty in the plaintiff's way on the sixth section where the Legislature uses the expression "calendar year," because the subject of the section was such that if the word was omitted no other construction but that of "calendar year" could be put upon it. But the Legislature seeing, probably, that the word "year" applied to a tenancy might be taken to mean the year of the tenancy, to obviate that difficulty they used the word "calendar." We come to section 34, which, it is said, may have two meanings; but when you come to the subject-matter, and when you consider that in popular use "current year" means the current year of the tenancy, it is difficult to see why the plain and simple language of the 14 & 15 of the Queen should be departed from, and in place of it the words adopted which are here used. If it had said "end of such current year," it would have satisfied every purpose. Here we are met by the difficulty that "current year" in the whole section must mean the same thing; and at the end of the section we have a provision where it cannot mean calendar year unless you construe that provision by introducing the words "gale day." Upon the whole, though there are inconveniences, taking it altogether, the better opinion seems to me that current year means current year of the tenancy and not calendar year. I express no opinion upon the question whether the tenant has the option of taking the emblements.

O'BRIEN, J.—Upon the point as to the option of

taking the emblements, I only said that I am inclined to adopt Serjeant Armstrong's construction of the Act. Now, as to the construction and effect of the agreement itself, the point contended for by Mr. Hemphill was this,—that under it the parties were entitled to hold to the 1st May, 1865, but it is only necessary to read the agreement to see that that cannot be. It was contended by Mr. Hemphill that the agreement created an absolute yearly tenancy and provides for its determination. I agree with that; that is, by other means, by the death of the life. But he said that the effect of the reference to James Sadlier's death was, that if James Sadlier died between November and May, Lord Derby might put him out without notice at all. It is only necessary to allude to that view to see that it cannot be sustained. The tenancy here determined by the death of James Sadlier.

#### SYMES v. MAHON.—April 18, 19.

*Practice—Common Law Procedure Act, 1853, sec. 106—Default of plaintiff in not proceeding to trial. "Defence or other subsequent pleading."*

*A writ of summons and plaint was issued on the 7th of December, 1864. Defences were filed on the 20th of December, 1864. The plaintiff not having proceeded to trial for three terms, defendant, in Michaelmas Term, 1865, entered and served the rule under sec. 106 of the Common Law Procedure Act, 1853, to proceed to trial at the sittings next after twenty days from service. On the 20th of January, 1866, plaintiff served notice of trial, and with it notice of a demurrer that day filed to one of the defences. On the 27th of January he withdrew notice of trial. Held, that the demurrer was an "other subsequent pleading" within the section of the Act, that the plaintiff had three whole terms from its filing to proceed to trial, and therefore that the defendant was not entitled on the above state of facts to enter a peremptory order for the payment of his costs under the above section.*

THIS was a motion that the defendant might enter a peremptory order for the payment of his costs of suit pursuant to the statute, notwithstanding the demurrer which had been filed by the plaintiff. The summons and plaint, which contained the ordinary money counts, was issued and served on the 7th December, 1864. On the 20th December the defendant filed his defence, traversing the several counts of the summons and plaint, and also pleading special defences. No proceedings were taken by the plaintiff for three terms after that in which the defence was filed, and in Michaelmas Term, 1865, the defendant entered and served the rule under the 106th section of the Common Law Procedure Act, 1853, that the plaintiff should proceed to trial at the assizes or sittings next after the expiration of twenty days from the service of the rule, and that in default the defendant should be dismissed with his costs of suit. On the 20th of January, 1866, the plaintiff served notice of trial, and with it notice of a demurrer that day filed to the fourth

defence. On the 27th January he withdrew his notice of trial. Thereupon the defendant filed an affidavit of the service of the rule above mentioned, and that the plaintiff had failed to proceed to trial in pursuance thereof, and sought to enter his peremptory order for the payment of his costs of suit under the 106th section. The officer however declined to allow this to be done, feeling some difficulty on account of the demurrer which had been filed. In consequence of this refusal, the defendant now came to the Court. The defence which had been demurred to went to the whole action, and the demurrer was set down for argument this term.

*Ferguson, Q.C.*, (with him *Owen*) for the defendant.—The plaintiff here was in default, and the defendant rightly entered and served the rule to proceed to trial. The question then is whether a party so in default can, by a proceeding taken of his own mere motion, and without the leave of the Court, nullify the Act of Parliament, as it has been sought to do here by filing this demurrer. The plaintiff cannot in this way deprive the defendant of the right given to him by the Act of Parliament.

*Curtis* for the plaintiff.—Until the demurrer is disposed of, it would be illusory to force us to trial in this case. From a note in Mr. Ferguson's Common Law Procedure Act, upon this section, it appears that a plaintiff is not in default if there are issues in law and issues in fact, until the issues in law have been disposed of. [*Fitzgerald, J.*—It appears to me that there is a grave question on the section, as to when the plaintiff's default begins: the words are, "three terms from that in which, or the vacation of which the defence, or other subsequent pleading is filed." Here the last pleading is the demurrer. If it was a frivolous one we would know how to deal with it, but it does not appear that it was so, and the plaintiff had a perfect right to file it.]

*Owen* in reply.—It is plain upon the whole section that what is meant by the last pleading is the last pleading which appears when the defendant enters his rule to proceed. Once the rule is entered, the plaintiff has no right to make another "subsequent pleading" by demurring, as here. He must proceed to trial in pursuance of the rule, or pay the costs.

*Cur. adv. vult.*

*April 19.*—THE COURT held that the last pleading in this case was the demurrer, and that the plaintiff's default could only commence from its being filed, that the demurrer was evidently not a frivolous one, but substantial, and therefore that the motion should be refused, but without costs.

HENNESSY v. HOLLAND.—*April 26.*

*Demurrer—Award—Validity of.*

*A. and B. agreed to leave certain disputes between them in reference to the lands of X., and certain other disputes, to the arbitration of certain arbitrators. The arbitrators awarded that upon payment to B. of £86 B. should convey the lands of X. and Y. to*

*trustees for the wife of A. for her separate use, and should also hand over to the wife of A. certain articles enumerated. Held—a bad award.*

DEMURRER. The summons and plaint complained, that whereas heretofore, to wit, on the 15th October, 1864, it was agreed by and between the plaintiff and defendant to leave certain disputes between them relating to the lands of Berrings, situate in the barony of East Muskerry, and county of Cork, and certain other questions and disputes between them, to the arbitration of one Patrick Riordan of Macroom, one John Connolly of Cahir, and such third person as umpire as one John Hassett of Forrest, Esq., should name, that the decision of any two of said three should be final and conclusive, and their award should be made in writing within two months; and the said plaintiff and defendant further mutually agreed to abide by and perform the award so to be made under a penalty of £100; that the arbitrators should give three clear days notice of the time and place of entering upon such arbitration; that the said plaintiff and defendant should attend on getting such notice, and give all necessary information; and that the arbitrators should proceed in the absence of either party who did not attend on getting such notice; and whereas the said John Hassett duly appointed one Richard Harold of Rye Court umpire; and whereas the said plaintiff and defendant appeared before and were duly examined by the said Patrick Riordan, John Connolly, and Richard Harold; and the said Patrick Riordan, John Connolly, and Richard Harold having heard, considered, and examined the evidence of said plaintiff and defendant, did thereupon, and within two months from the said 15th November, 1864, make and publish their award in writing concerning the matter so referred to them as aforesaid in manner following, that is to say, upon payment of the sum of £86 to the defendant Holland, he, the said Denis Holland should forthwith convey and make over the farm and lands of Berrings and Dirreen unto Patrick Riordan, of Masseytown, and John Hennessy, of Killeagher, their executors, administrators, and assigns, upon trust, and for the use of Mrs. Mary Anne Hennessy, otherwise Holland, the wife of said Patrick Hennessy, for her separate use notwithstanding her coverture, and free from the debts of her said husband; and further, that the said Denis Holland should return to Mrs. Mary Anne Hennessy aforesaid her side-car, horses, cushions, and rug; and if same were not given in a working order before the 15th day of December, 1864, that the sum of £15 should be deducted from the sum of £86 payable as aforesaid. And the plaintiff averred that although he tendered and offered to pay to the defendant said sum of £86, and all conditions to be performed by the plaintiff were by him duly performed, yet the defendant would not convey and make over said farm of Berrings and Dirreen in trust as aforesaid; nor would he return to Mrs. Mary Anne Hennessy her side-car, harness, cushions, rug, or abide by said award; but, on the contrary, so to do, had wholly refused, whereby an action had accrued to the plaintiff to have and demand of and from the defendant said sum of £100. To this summons and plaint defendant demurred, say-

ing that it disclosed no cause of action good in substance, because said action, if at all maintainable, ought to have been brought by Mary Anne Hennessy or the trustees therein mentioned, and not by the plaintiff; and because it did not appear that the rights or claims of the said Mary Anne Hennessy were a matter in dispute between the plaintiff and defendant as parties to the submission; and because the rights or claims of said Mary Anne Hennessy were necessarily a matter not within the submission; and because an award of a conveyance to trustees for the sole and separate use of a married woman was an excess of authority by the arbitrators and umpire, and it was not shown that such conveyance was an act for the benefit of the plaintiff, or that such award was in any manner made in pursuance of the duty of the arbitrators to decide between the parties to the submission; and because the conveyance therein directed was conditional upon the voluntary performance of an act by some third party, namely—the payment of £86 to the defendant, and there was no direction to anyone to pay said sum, and it did not appear by whom same was to be paid; and because the payment of said sum of money being the condition of said conveyance, which was to be executed forthwith, was itself made to depend on another act of the defendant, namely—the return of the car and harness which was to be done at a future time; and because said award for those reasons was not final, and was altogether uncertain and repugnant.

*O'Brien and Heron, Q.C.*, for the demurrer.—The first objection is—that the award is wholly void. The conveyance directed in it is a conveyance to a person, the wife, who is not a party to the submission. The very point was decided in *Samon's case* (5 Co. Rep. 77 b, s. c. Moor, 359), where one of the points held was, that if an award be that husband and wife shall enjoy land, and the wife is a stranger to the submission, the award as to her is void. [*Lefroy, C.J.*—The wife here was, no doubt, a stranger to the submission, but she was not competent to enter into it; and it is not the privilege of the husband to enter into it for her?] The very same objection would apply to *Samon's case*. It might there have been even argued that the husband was to take some benefit under the award, but here the estate is directed to be conveyed as a separate estate for her. There are no recitals in the submission, as set out in the summons and plaint. Another objection to the award is, that although a conveyance is directed to be made of these premises, that conveyance is conditional and contingent upon a voluntary act to be done by a third party, and which that third party is not enjoined to make.—*Baillie v. The Edinburgh Oil Gas-Light Company* (3 Cl. & Fin. 639). Lord Brougham, in his judgment, at p. 655 speaks of the award as not being final, “and that it does not direct anything specific or positive to be done, but merely that upon one party doing something, something is also to be done by the other party.” Another objection here is, that no time is limited within which the act directed is to be done. The award is not for the benefit of any party to the submission. *In re Laing and Todd* (13 C. B. 276).

There was no appearance on the other side.

*LEFROY, C.J.*—The general objection seems to ap-

ply to this award, that there is neither finality in it nor anything which enables a party to have finality.

*FITZGERALD, J.*—I may observe also that the submission is as to disputes about the land of Berrings, and the award directs a conveyance of the lands of Berrings and Dirreen.

*Demurrer allowed.*

IN RE ARCHBOLD.—April 30; May, 1, 5.

*Habeas corpus—Discharge from custody for debt—Seamen on actual service—Statutes 11 Geo. 4, c. 20, s. 80—19 & 20 Vict., c. 83—20 & 21 Vict., c. 60, s. 213.*

*On habeas corpus obtained by the Crown, an order was made discharging from custody a seaman in actual service, who had filed a petition as an insolvent debtor, and had been remanded for five months at the suit of two of his creditors, the debts having been contracted by him while in actual service, and no cause having been shown to the creditors against the conditional order for the habeas corpus.*

THIS was a motion to make absolute a conditional order for a *habeas corpus ab subjiciendum* to bring up the body of John Archbold, upon certificate of no cause shewn. It appeared that Archbold was a seaman serving in the coast guard service, and stationed at Dundalk. He was borne on the books of H.M.S. Royal George, lying at Kingstown, as petty officer and commanding boatswain of that vessel, and was, it appeared, on full pay, serving on shore, one of the Naval Reserve liable to be called out. In February he was arrested at the suit of one Charles Johnson for a debt of £5 14s. 4d. incurred for goods sold, and being in custody, on the 8th February last filed his petition for his discharge as an insolvent debtor. The petition came on to be heard on the 5th April before the Chairman of Louth, who made an order remanding Archbold for five calendar months from the 8th February, at the suit of the said Charles Johnson and of John Hughes, another creditor, whose demand was £3 13s., and under that order he was now in custody. Both debts were incurred while Archbold was in actual service. On the 1st May, *Heron, Q.C.*, on the part of the Crown, had obtained a conditional order for a *habeas corpus*, directed to the governor of the gaol at Dundalk, to bring up Archbold with a view to having him discharged. No cause having been shewn.

*Heron, Q.C.*, now moved to make the order absolute.—This man is a seaman on actual service, and the debts were incurred by him while on service. Under the Naval Pay Act, st. 11 G. 4, c. 20, s. 80, the Crown is entitled to have him discharged. Under the Naval Reserve Act, st. 19 & 20 Vict. c. 83, men in the coast-guard service are borne on the books of the guardships of the stations to which they belong. [*Fitzgerald, J.*—It occurs to me that it may be said that this man is in custody, not for a debt, but under

the sentence of a competent Court, with which we would not interfere. Under s. 220 of the Bankruptcy and Insolvency Act, 20 & 21 Vict. c. 60, the Court has power to remand for two years in cases of fraud. [I apprehend that if we now discharge this man, the custody was illegal, and the whole of the proceedings in insolvency go to the ground.] If that was so, the grounds of remand would be stated on the order. The remand here was under s. 213, and the creditors at whose suit Archbold is remanded could discharge him.

A solicitor appeared for the creditors to submit to whatever order the Court should make.

PER CURIAM.—We make the order absolute, and the prisoner may be discharged from custody, as no one has shown cause against the conditional order, but we pronounce no opinion upon the case.

LORD LURGAN, PLAINTIFF; GEORGE DOUGLAS AND ROBERT DOUGLAS, DEFENDANTS.—May 4, 5.

*Civil Bill Act, s. 14 & 15 Vict. c. 57, s. 60—Process in ejectment—Signing by attorney.*

*It is not necessary that a civil bill process in ejectment should be signed by the plaintiff's attorney with his own hand. Where, therefore, the process was filled up by the clerk of the attorney by the attorney's directions, and the attorney's name was signed to it by the same clerk also by his master's directions, this was held to be a sufficient compliance with sec. 60 of 14 & 15 Vict., c. 57, though the attorney did not see the process after it had been filled up, and before his name was signed thereto.*

THIS was a special case stated by Fitzgerald, B. at the last Spring Assizes for the County of Armagh under st. 27 & 28 Vict. c. 99, s. 35. The case stated as follows:—

In this case there was an appeal from a civil bill ejectment in the Court of Quarter Sessions for the County of Armagh, held on the 2nd day of January, 1866, brought on the determination of a tenancy from year to year by a notice to quit, and a decree had been given for the plaintiff in the said Court of Quarter Sessions, from which the defendant, George Douglas, appealed. Upon hearing of the appeal before me, it appeared that the civil bill process, which was in the ordinary printed form, was filled up from instructions given by Mr. Hazlett, the attorney for Lord Lurgan, by a clerk of the said Mr. Hazlett in Mr. Hazlett's office, and by his directions. The name of Mr. Hazlett was signed thereto by the same clerk by direction of Mr. Hazlett, but Mr. Hazlett did not see the process after it had been filled up, and before his name was signed thereto. I affirmed the decree for the plaintiff subject to its being reversed and turned into a dismissal without prejudice, in case a superior Court of Common Law, upon the facts stated in this case, should be of opinion that there was not a sufficient compliance with the provisions of the statute 14 & 15 Vict. c. 57, which enacts that in

all ejectment cases the civil bill process should be signed by an attorney. Dated at Armagh this 9th day of March, 1866.—F. A. Fitzgerald.

A copy of the ejectment was annexed to the case.

*M. Mahon* for the appellant.—Under s. 60 of the Civil Bill Act, 14 & 15 Vict. c. 57, the civil bill process in ejectment cases should be signed by the attorney himself. Ordinary processes may be signed by "the plaintiff or any other person on behalf of the said plaintiff;" but in the case of ejectments the signature must be by the attorney only.—*Baird v. Kirk* (9 Irish Common Law Reports, App iv.) will be cited on the other side, but there it expressly appeared that the process had been filled up at the attorney's dictation, and signed by his clerk in his name under his immediate inspection. This case rather resembles *M. Auliffe v. Stock*, cited in *Baird v. Kirk*. Keogh, J. there held that an ejectment signed by a person who had a general authority from the attorney to fill up and sign ejectments, did not comply with section 60. There are several cases upon other statutes where a similar question has arisen. In *Hyde v. Johnson* (2 Bingham N. C. 776) it was held that under 9 G. 4, c. 14, s. 1, an acknowledgment signed by the agent of the debtor will not retrieve a debt barred by the Statute of Limitations, and that it must be signed by the debtor himself. The judgment of Tindal, C. J. at p. 778 is especially applicable in this case. He refers to the distinction between different sections of the Statute of Frauds as to signatures being by principals or agents. Here the distinction is drawn between ordinary processes and ejectment cases in the same section. Stat. 19 & 20 Vict. c. 97, s. 13, was passed in consequence of the decisions on the Statute of Frauds. On the words of the English Registry of Voters Act it has been held in *Toms v. Cumming* (8 Sc. N. R. 910) that a notice of objection must be signed by the party objecting himself, and not by a deputy. The question also arose on the Irish Registry Act.—*Conway v. Baxter* (7 Ir. L. R. 6). Other cases are *Eidsforth v. Farrer* (4 C. B. 9); *Trotter v. Walker* (13 C. B., N. S. 30); *Clarke v. Woods* (2 Exch. 404). The attorney has no power to delegate his duty.—*Combe's case* (9 Co. R. 75). The Legislature had in view the object of preventing any disclaimer when it enacted that the attorney should sign the process himself.

*Monroe and Harrison*, Q.C., for the plaintiff.—All that the Act intended was that in ejectments, as distinguished from ordinary cases, there should be the protection of the name of a professional man to the process. When an Act of Parliament intends that an attorney should sign a document with his own hand, it says so expressly. Thus in stat. 6 & 7 Vict. c. 67. As to *Hyde v. Johnson*, there is a policy to be observed in the Statute of Frauds and Lord Tennerden's Act, as they rendered the person signing liable to be charged. They create a personal liability in the party, and the statutes may not have contemplated a personal liability created merely by the signature of an agent. *Toms v. Cumming* was decided altogether on the policy of the Act in question there. It was a case, too, of taking away a common law right, and therefore the document should be authenticated in the best possible manner. Even those cases

have, however been doubted.—*Davies v. Hopkins* (3 C. B., N. S., 376). Is there any policy to be served by requiring this strictness in the present case? There might have been some such policy formerly, but if it existed, it has been abolished by st. 27 & 28 Vict. c. 99, s. 56. If the Court holds that a signature by the very hand of the attorney, the decision must be pushed to this, that under the 33rd General Order counsel in the Superior Courts must themselves sign the actual pleadings which are put upon the file, and not merely the drafts. Must the residence of the attorney, which under the section must be set forth upon the process, be put there also by the attorney himself? The words in the act as to bills of costs are, "which bill is to be signed by the attorney in his own hand."

*M. Mahon*, in reply, referred to the note to *Whitcombe v. Whiting* (1 Sm. L. C. 318); and *O'Donnell and Brady's Civil Bill Practice*, p. 178.

*Cur. adv. vult.*

*May 5.*—*LEFFROY, C. J.*, held that the decision below should be affirmed.

*O'BRIEN, J.*—I confess I should have some difficulty in concurring with the judgment of the Court from the words of the statute. With respect to the decision of *Fitzgerald, B.* I concur as to the great weight and respect to be attached to any decision of his; but on looking to the report of that case, I do not find that the authorities were much discussed in it, or that any authority was cited, and therefore, sitting now in a court of appeal from the decision of which there is no farther appeal, I should find myself at liberty to question that case. The 60th section of the Civil Bill Act re-enacts the former sections of the old Civil Bill Acts, so far as they require that ordinary civil bill processes should be signed by the plaintiff, "or any other person on his behalf," using those words expressly, and it does not require the signature of an attorney to these ordinary processes; but it goes on to provide that in all cases of ejectment processes, the process shall be signed by the attorney. Now, it has been truly said that the primary object of that was, that whereas in the old civil bills no attorney's name was necessary in any process, it was, by the present Act, made necessary in these processes on ejectments. I must own I should be disposed to concur with the view put forward by Mr. *M. Mahon*, that when the Act of Parliament required in one case only the signature of the plaintiff, or anyone on his behalf, and in another the signature of the attorney, that was as plain an indication of the intention of the Legislature that a different rule was to prevail in the two cases as could possibly be. Now, the authority of *Hyde v. Johnson*, and the very elaborate judgment of *Tindal, C. J.*, there seems to go for nothing if the provision as to the signature of the attorney was to be regarded in the same light as the signature of the parties generally. Because I think *Johnson v. Hyde* established this. The 9 Geo. 4, c. 14, s. 16, required the document used as an acknowledgment of a debt to be signed by the party chargeable thereby. It was held in that case that though it was admitted and proved that the signature there was by the authority of the party, that was not sufficient. *Tindal, C. J.*'s

judgment goes on this basis:—The Act of Parliament refers to the Statute of Frauds. The Legislature had the Statute of Frauds before it when it passed the 9 G. 4, and in the Statute of Frauds a clear distinction is drawn between the form of signature that was sufficient to comply with the several sections. In some of the sections the provision was for the signature by the party, in others by the party or his agent duly authorised in writing, and thus, as *Tindal, C. J.*, says, the Legislature shows that it had present to its mind the different forms of signature, whether by the party himself, or his agent. We may apply that to this case. We have a provision in the first part of the section, that processes may be signed by the plaintiff, or anyone on his behalf; and then we find in the latter part the other provision, that all ejectment processes are to be signed by the attorney. If the case rested on that, and if there was nothing in the character of the person, in the manifest view in which that was introduced, to vary the rule in *Hyde v. Johnson*, I would concur with Mr. *M. Mahon*, but I think that the distinction taken by Mr. *Monroe* and Mr. *Harrison* does warrant a different construction, and that whatever doubt I should entertain on the subject, it is not sufficient to make me dissent from the judgment of the Court. Besides, having regard to the consequences likely to arise from our judgment if it was different, I am well pleased that the other members of the Court have been able to come to their decision. The signature is the signature of the attorney, and it was well put that in the other statutes the reason for requiring the signature of the party was, that thereby the party would be made chargeable for something, so that the object of requiring the actual signature was that you should have nothing to do but to prove the signature, and then the party would not have the trouble and difficulty of giving any parol proof of the authority. Well, then again there is this to be borne in mind, that the signature of the attorney must be considered with a view to what the signature of a professional man generally is. Now, though the 33rd General Order speaks of counsel, yet unquestionably the actual signature of counsel is not necessary to the very pleading which is on the file. Besides, we know that all the business of this Court is done in the name of attorneys, and it has never been held that the name of the attorney should be put to affidavits, and other matters, by himself, in order to make documents admissible. Well, having regard to this, I think there is sufficient distinction, especially having regard to this, that in the Bill of Costs Act the Legislature uses the words "in his own proper hand." Then with regard to the consequences of our decision, I own I should be very reluctant to come to a conclusion that would throw the established practice into confusion. On these grounds, whatever doubts I may have had, I do not feel sufficient doubt to induce me to dissent from the other members of the Court.

*FITZGERALD, J.*—I concur with my Lord Chief Justice *in omnibus*; and I confess we allowed the case to stand over last night, not from any doubt that we entertained, but with a view to give more time for the examination of the statute, which such a question renders necessary. The case before *Fitzgerald, B.*, cannot be distinguished from the present. It was at-



tempted to be distinguished on the ground that there it appeared that the attorney was actually looking on while his name was being put to the process, but there was no distinction at all in the circumstances; and we have now before us a case which for seven years has regulated the practice of the country. It is one consistent with justice, causing no inconvenience, and carrying out at least the spirit, if not the letter, of the Act of Parliament. We are asked to overrule that decision, and in such a case the argument to induce us to do so should be very clear. So far from thinking that any argument has been brought forward to make us overrule that case, we think it was well decided. I confess the 60th section of the Act of Parliament creates no difficulty in my mind. The statute contemplates this. In ordinary cases it wished to make these civil bill proceedings as easy as possible; and accordingly it enacts that in all processes *ave ejectiones* "it shall be sufficient if the same be signed by the plaintiff or any one or more of the plaintiffs therein mentioned, or any other person on behalf of the said plaintiff or plaintiffs;" but when the Legislature came to deal with the enlarged jurisdiction as to ejectiones, what took place was this: that in proceedings like ejectiones, where very often the plaintiffs are not resident in the county, and which affect the tenure of land, and very often the peace of the community, it was thought right that there should be an officer of the Court through whom these proceedings should be taken. So the statute makes it necessary that in all ejection cases the Civil Bill process should be signed by an attorney, adding the words "who shall set forth his place of residence thereon." What the statute intended was, that there should be an officer of the Court responsible, that the process should be signed by him or some one authorized for him, and that the residence should appear. Even Mr. Mahon did not argue that the residence should be put on the process by the attorney himself. Looking at the further sections, we see the policy more clearly. The tenant may come and tender his rent to the plaintiff or the plaintiff's attorney. He may lodge a sum of money for rent with the clerk of the peace, and get from him a certificate and duplicate, which duplicate he is to give to the plaintiff or the plaintiff's attorney. There are a number of other sections showing that it was thought necessary to have an officer of the Court in reference to ejection proceedings. Looking to the process of ejection for non-payment of rent, and the proceedings for redemption, it will be shown further. Then is it necessary that the process should be signed by the attorney with his own hand? The statute does not require the copy served to be so signed; and it was not suggested in argument why the statute should impose a binding mandatory obligation on the attorney to sign with his own hand the original, which did not see the light till the trial, while the copy which comes to the hands of the party should not be so signed. Then I may refer to the Landlord and Tenant Act; and for ejectiones, both in the superior and inferior Courts, it provides they should be in the forms given. There is no direction given in the Act itself that they should be signed, but the form has this at foot—"Signed on behalf of the plaintiff, E. F. attorney," and then in brackets "*[Residence of attorney]*."

There is no statutable provision that it should be signed by the hand of the attorney; and it is this statute, and not the other, which now regulates the form of process. We were very much pressed with *Hyde v. Johnson* and other cases. I could not see their application. *Hyde v. Johnson* is in principle very obvious. It is the case of a statute imposing a personal obligation, and carrying out a policy which was to prevent the doubt arising on parol evidence; and therefore it requires that the promise shall be in writing, signed by the party to be charged. The policy of the Act was to put an end to acknowledgments proved by parol, and all the doubt which parol evidence creates. Accordingly, if you were to admit that in carrying out that Act of Parliament the acknowledgment might be signed by agents, you would have to admit the very matter which it was sought to prevent, as you would have to admit parol evidence to prove the authority. The other cases were cases depending on Acts with a particular scope and policy. So *Toms v. Cuming*, where the intention was to have a party who should be liable to costs. I quite concur with the Lord Chief Justice that it was needless to encumber us with these authorities. We are to look to the Act of Parliament. The Act speaks of signing by an attorney, but it does not say that it is to be signed by him with his own hand. We therefore think the decision of Fitzgerald, B. correct, and we affirm that decision.

*Decision affirmed, with costs.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IRWIN v. BLAKELEY.—May 9.

*Costs—Pleas withdrawn.*

*Where a defendant, as next of kin, has pleaded undue influence with other pleas, and promptly withdraws them, on finding that they could not be sustained, the Court will not impose costs on him.*

*Exham*, Q.C. (with him *Shogog*) moved, for the plaintiff, to vacate an order made on the 26th April, fixing a day for trial of the cause by a special jury. The plaintiff was an executor in a will dated the 12th February, 1866. The testator died on the 14th of the same month. On the 24th February a caveat was lodged by the defendant, who appeared on the 7th March. The declaration was filed on the 12th, and on the 22nd the pleas of undue execution, want of capacity, and undue influence, exercised by the plaintiff, and others, were filed; and on the 26th it was ordered that the cause should be tried in the ensuing Trinity Term by a special jury. On the 1st May a notice and consent were given by the defendant offering to withdraw the pleas, and allow probate to be given in solemn form. It was now necessary to vacate the former order, and take another for a trial without a jury. The defendant having pleaded undue

influence on the part of the plaintiff, and now abandoning it, should pay the costs in the cause occasioned by those pleas, and the costs of this motion.

*S. Walker* for the defendant.—No objection was made to our consent, and we withdrew our pleas as soon as we were satisfied of the validity of the will.

*KEATINGE, J.*—Where a next of kin withdraws from litigation promptly on discovering the facts, I am very unwilling to order costs. Besides, the plaintiff is really gaining an advantage, viz., an earlier trial, without any opposition. I will, therefore, vacate the former order, and direct the case to be tried before myself, without a jury, on Saturday next, and I say nothing as to costs.

*TIERNY v. BYRNE.*—*May.*

*Commission—Affidavit.*

*An affidavit made by one of the parties in the cause, stating that an intended witness was suffering from rheumatic pains, and had lost the use of his limbs, and had refused to see a doctor, alleging that he could be of no use to him, and averring that there was no chance of his being able to attend at the trial. Held insufficient to get a commission.*

*Dr. Ball, Q.C.,* for the defendant moved for a commission to examine John Byrne, who was intended to be examined by the defendant as a witness. The defendant had, in his declaration, alleged a will made by Denis Byrne on the 28th Nov. 1868, in which the defendant was named sole executor, and also legatee. The plaintiff in his plea, besides impeaching such will for want of capacity, and on the ground of undue influence, also alleged a prior will, dated 22nd Nov., 1865, in which the plaintiff and the defendant were named executors; but a legacy given to the defendant in the last will was not in the first. The affidavit of the defendant stated that John Byrne was an important and necessary witness for the defendant, and was for some time labouring under rheumatic pains, and had lost the use of his limbs, and had refused to see a doctor, and that there was no chance of his being able to attend the trial.

*Dr. Miller*, for the plaintiff, opposed the motion, and objected that the affidavit was quite insufficient. There should be a satisfactory affidavit or certificate of some medical man explaining clearly the state of the witness, and that his examination in Court would endanger his life.—*Pond v. Dines* (3 Moo. & Sc. 161).

*KEATINGE, J.*—The affidavit is quite defective; but if the defendant is able to get a proper affidavit, I will give him leave to do so, and will let the motion stand over.

*Motion to stand over.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

*RE LEFROY, STEIN & Co.—May.*

*Agreement to assign property to secure payment of bills—Fraudulent preference—Transfer of whiskey in bond—Delivery order.*

*Where distillers procure acceptances for their accommodation upon a general agreement that the party so accommodating them shall be secured by a transfer of whiskey in bond, and the distillers afterwards, when in a state of insolvency, transfer the whiskey, and a delivery order and invoice are made out in May, which it was alleged were in pursuance of the general agreement to secure the payment of the bills, which was made in March and April previous, this will not prevent the operation of law with regard to a fraudulent preference, and the assignees in bankruptcy will be declared entitled to the whiskey.*

This case came before the Court upon a charge filed by the assignees, claiming certain whiskey which had been assigned to a creditor to secure liabilities which he incurred on account of the bankrupts, and the discharge filed by the creditor.

*Hernan, Q.C.,* and *George Perry* were in support of the charge.—Suppose the Court to be of opinion that there was an agreement at all, the questions then will be, first, whether it was the mixed motive of fulfilling the agreement, and preferring his brother-in-law, or simply the intention fraudulently to prefer him, which influenced the bankrupts. 2nd.—Whether under the circumstances, that no specific whiskey was assigned, this was an agreement that could give the claimant priority over other creditors.

*Heron, Q.C.,* and *James Wilson*, in support of the discharge.—This was an agreement within the meaning of *Hutton v. Crutwell*. A fraudulent preference must be a payment or assignment made pursuant to no contract or original obligation entered into in the course of their dealing.

The following cases were cited—*Brown v. Kempston* (19 L. J., C. P., 169); *Harman v. Fisher* (Cowper, 117); *Simmond v. Hibbert* (1 Russ. & Myln. 719); *Re Thornton* (11 Ir. Jur. 16); *Hutton v. Crutwell* (1 Ellis & Blk. 296); *Hunt v. Mortimer* (10 B. & Oreswell, 47).

The facts are fully stated in the judgment.

*LYNCH, J.*—This case is now before me on the charge of the assignees, and the discharge of Mr. Roger Shine. The assignees by their charge claim to be entitled to certain whiskey of the value of about £600 or £700, now standing in the King's Stores in Limerick in the name of Mr. Roger Shine, the transfer to him of the said whiskey being void, same having been made as a fraudulent preference, by Mr. Lefroy in contemplation of bankruptcy. The discharge of Mr. Roger Shine relies on the fact that the delivery order for this whiskey, and the invoice note of the sale, were made out on the 7th April pursuant to a previous contract for security, and that in com-

pletion of that contract the whiskey was actually transferred to his name on the 22nd May. It appears upon the evidence that Mr. Roger Shine is the brother-in-law of Mr. Lefroy, and that he had accommodated the firm with his name on acceptance previously to the 21st February without security. It is then alleged, that with respect to two accommodation acceptances, dated 21st February and 4th May respectively, and for the sums of £300 and £550 a different dealing took place with regard to them; that Mr. Lefroy promised him, upon his giving these acceptances (in the words of the discharge), "that the bankrupts should execute to dischargeant a transfer of whiskey to an amount sufficient to cover the said bill (and similarly as to second bill), and it is said then that the transfer and sale of the whiskey on 8th and 10th April were the acts of Lefroy, done in pursuance of that contract, and that having been done in pursuance of that contract, it was not voluntarily done within the rule of law regulating this matter. Now, the sole question argued on which I have to decide is this—was there, as a fact, a voluntary preference by Mr. Lefroy in this dealing?—that is, was he insolvent? and did he, in contemplation of bankruptcy, voluntarily make this transfer to his brother-in-law? This is a mixed question of law and fact, on which I have the double duty of expounding the law applicable to the case, and finding the facts that may be necessary to be found to raise the legal questions. It is, I think, most convenient first to discuss the facts, and state my conclusion as to them. It appears that Mr. Lefroy was, in March and April, in tightened circumstances in his trade. This is a part of Mr. Shine's own case, giving a reason for the alleged contracts in March and February. It appears that to extricate himself from difficulties he projected the plan of arranging a company to work the distillery concerns, and he hoped thereby to clear off the charges created on the distillery, and to liquidate the claims of all the general creditors. It seems to me quite clear that unless the distillery could yield to the firm its purchase value, that the firm was insolvent, and that Mr. Lefroy knew it, and must have known that bankruptcy was inevitable, unless his creditors agreed to take a small sum as a dividend by arrangement in this Court. It further appears that sometime about the 5th or 7th April, Mr. Lefroy, then in London, where the treaty for the company was depending, learned the hopelessness of carrying out the treaty, and then this matter being broken off, on some day before the 7th, or on the 7th, he wrote from London to his clerk in Limerick to transfer to Mr. Shine the whiskey in question. That letter is a most material document in this case, and that letter is not produced. I have heard all that is stated regarding its loss, and still I cannot help stating my great regret that it has not been possible to produce it, and further stating that I cannot help being affected by the fact that a document of so much consequence in a dealing of this sort, and so recently written before the petition in this matter, should have gone astray. There is no doubt that a letter was written and acted upon—its date I have not; but Mr. Lefroy came home himself on the 7th or 8th April. Why was it necessary for Mr. Lefroy, intending to return to Limerick immediately, to write

off to his clerk to complete this agreement made in March? Why was it necessary to anticipate his own arrival by that letter? I wish we had that letter—saw its exact date, its actual statement, for then there would not be so much speculation as to what was done, and as to why that transfer was made. The acts then done on the 8th and 10th April are now alleged to have been a fraudulent preferring by the bankrupt of Mr. Shine, his brother-in-law. To be such, of course it must have been voluntary on the part of the bankrupt. The letter directing the act is not produced, and the thing done purported to be an absolute sale and a delivery order given. That this was a voluntary act by Mr. Lefroy, there is no question—that it was his own sole act, without request from Shine, without the knowledge of Shine, is quite clear. It was purely a voluntary preference of Shine by the bankrupt when he was insolvent, and to save him from the loss his bankruptcy would entail. All this is clear enough, but it still remains for me to consider the law, and also the facts respecting the further question—namely, whether, although they were voluntary, and these acts the sole acts of Mr. Lefroy, yet that if they were done in pursuance of the contract stated, and only gave him the rights he was so given by contract, that these acts are not purely voluntary within the rule of law as to fraudulent preference. I cannot avoid here noticing another feature in this case—disagreeable to find in a case of a person in such a position in society as Mr. Lefroy filled. The transaction of the 8th April is carried out, not in simplicity and truth, as it was in reality; a false date was put on the invoice to correspond with the giving of the acceptance, a matter not unimportant to observe when we regard the evidence first given by Mr. Lefroy in this Court. The questions of fact which here arise to be decided by me are these—Was there a contract for the delivery of the whiskey? and if so, what was the nature of that contract, and was the act of Lefroy in pursuance of that contract? No writing, lost or otherwise, exists, or ever existed, to show this contract—it merely rests in parol. The discharge states it to have been a contract that bankrupts should execute to Mr. Shine a transfer of the whiskey to an amount sufficient to cover the said bill," that is, the first bill, and as to second bill, it states the contract. That in consideration of the acceptance of the said bill by Mr. Shine, the bankrupts should transfer whiskey to Mr. Shine to an amount equal to the amount of said bill. Said two contracts verbally, at all events, are different. But chargeant refers for proof of that contract to [the sworn evidence of Henry Maunsell Lefroy, given on the 25th June, 1865, in this matter. Now, no doubt, Mr. Lefroy then, in answer to Question 23, says, "There was a distinct promise from me to him that we would give him value in whiskey when he was giving us these two last bills." But Mr. Lefroy had been examined in this Court on the 13th June respecting this very transaction, and his evidence then is very material to regard. On that day the case was adjourned into bankruptcy; the transfer had been completed on the 24th May, and I confess myself unable to reconcile the evidence that day with the evidence given on the 29th June. On the 13th June, in answer to Question 7, he says,

"We sold him spirits last March for money which he gave us." To Question 8—"We have a record in our books of that transaction. To Question 11—"As to the amount of money between £600 and £700, we sold him the spirits at the same time time." Question 12—"He had not lent us that money." Question 17—"I will answer you this, that I have not the control over one puncheon of whiskey in the Henry-street warehouse at this moment, or since we became bankrupt." Question 20—"There is an entry in my cash-book of the £600 or £700 I got from Mr. Shine." Question 21—"We sold him the spirits as we would sell it to anyone else for the money we got from him." Question 26—"Was this the transaction, that he lent you his acceptance for £600 or £700, and to secure him you gave him the whiskey? We gave him the whiskey when we got the acceptance." Question 27—"Did you make an absolute sale? We made as absolute a sale as we ever made of spirits." Question 28—"Was it so much a puncheon? *So much a gallon*, and Mr. Shine holds the documents, invoices, &c., and everything connected with the spirits, the same as anyone else." This evidence is very distinct. An absolute sale in March is stated at a fixed price per gallon, and the invoices made out as on other sales, and negatively also in answer to Question 26. The absolute sale is affirmed in contradistinction to the merely giving security. At this time there existed the document, the invoice, ante-dated to the 4th March to bear out this version of the transaction. No attempt has been made to explain this matter to me; it stands nakedly before me in its full force as a misstatement of the dealings between these parties respecting this property. On the 22nd June Mr. Harris was examined, and after his evidence the simple, plain statement of a sale as in ordinary course, with delivery of invoice, &c., as deposed to on the 13th June, was untenable, and on that day Mr. Lefroy also was examined. Question 229—"You told me on a former day that you entered a transaction of Shine's in the cash-book, and that on the day you entered it you made a regular sale to him of forty puncheons that were in Henry street? I recollect telling you there was an entry made of his acceptance in the cash book as having been received." Question 230—"Did you say on the same day that was done, that you made a regular sale to him of 40 puncheons of whiskey? No doubt. He was sold whiskey to cover his amount." Question 231—"Was that on the day he gave that bill? In or about that day, I presume." Question 232—"I am not speaking of presumption. I am speaking of the practice of the house." Question 233—"Do you swear there was a sale made to Shine on the day he gave his acceptance to you? No." The particulars of the transfers 8th and 10th April were then inquired into, and then—Question 240—"Do you swear there was a sale of all the goods marked there to Shine? Say yes or no. Do you mean to say that the goods marked there R. S., with the dates of their going out, were sold by you to Shine? No, I won't swear it." Question 241—"What do you mean? I swear that Shine guaranteed and arranged to be given spirits to cover his acceptance at the time he gave the acceptance." Question 242—"Is that in writing? It is not in writ-

ing; it was verbal between him and me." Question 243—"Was any person present? No." On the 29th June, in answer to Question 243, Mr. Lefroy states, "There was a distinct provision from me to him that we would give him value in whiskey when he was giving us these two last bills"—and this is the only evidence referred to in the discharge. Now, before I refer to Mr. Shine's evidence, let me here consider the question I have to try—substantially this—Did Mr. Lefroy intend of his own motion to secure Mr. Shine in making the transfer to him, or was he then acting also in pursuance of a contract to give him security. In my opinion it is hard indeed to call on the Court to find that he was acting in pursuance of a contract, the existence of which he utterly denied when first examined, and the contract then insisted on, namely, an absolute sale, was bolstered up to pass as a genuine sale, by mis-dating a document to tally with it. What excuse is to be alleged for Mr. Lefroy respecting his evidence on the 13th June. What excuse can be alleged except that he forgot this contract of security at that time, if such ever existed, and if he did not remember it on 13th June, what evidence have I that he knew it in April, and acted in pursuance of it then. The act done was not in pursuance of it; it was an act in furtherance of the statement made on the 13th June, and therefore, if ever such an agreement existed it was not in his mind at all, and cannot therefore take away the voluntariness of the act done on the day the transfer was directed. But was there any such real contract or agreement, at all? If this stood on Mr. Lefroy's evidence alone, I would unhesitatingly reply that none such is proved. It is by him first disproved, and I could not allow him to come forward then to prove it under the circumstances detailed in the evidence; but Mr. Shine swears somewhat loosely to it in answer to Question 154—"Having done a couple of bills, I objected to doing any more, and he said he would give a transfer of whiskey to secure me for the amount." At 224, where Mr. Lefroy gave his last version of the transaction, Mr. Shine adds, "I was distinctly promised whiskey when I gave the bill." Now I do not say that I intend to cast any doubt upon Mr. Shine's veracity. No reason is stated why I should cast on him any stigma; he is meritoriously before the Court as one deriving no personal profit from the transaction; but Mr. Shine is clearly not a man of business, and may very easily confound mere representation with contract and agreement, and may honestly and conscientiously, though inaccurately, now depose as he has done. And does nothing exist to confirm this view? No act in furtherance of any such agreement was ever done by any of the parties. Mr. Shine never sought to have the security promised. Mr. Lefroy did no act to give it, but Mr. Shine agrees with Lefroy afterwards to accept the version of the transaction given by Mr. Lefroy, viz., that it was a *bona fide* sale of whiskey to him completed on the 4th March. But lastly let me consider the question, supposing such an agreement had been made, and supposing that Mr. Lefroy had not precluded himself from alleging that he acted in pursuance of it. The whole agreement, as alleged by Mr. Shine, is, on accepting the bills, "He said he would give a transfer

of whiskey to secure me the amount." No lien is, thereby created—no specific equity arises out of such a promise; it is too vague and general. No time is fixed—is it to be done on request?—that seems perhaps the more natural construction of it. But does the existence of such a vague, indefinite arrangement as that, put it into the power of the bankrupt voluntarily to prefer this creditor above all his other creditors? The cases on this subject as to voluntariness and mixed motives are very numerous; and it is not agreeable on such a subject to find the judges obliged to say, as Justice Kila and Justice Crompton say in *Edwards v. Glyn*, that the decisions on it have been subject to the ebb and flow of a judicial tide—sometimes flowing in favor of the assignees, sometimes of the particular creditor; at present it seems that the tide is in favor of the particular creditor. Mr. Heron, on this point very properly insisted on Lord Mansfield's definition of fraudulent preference in *Harman v. Fisher*. The branch he insisted on was "done in pursuance of no contract;" and he then alleged there was a contract in this case. But in every case there must be a contract; that is, every debt infers a contract to pay it; and therefore there must be some limitation to the nature of the contract then fulfilled. Would a contract to pay in money or goods when a bill falls due be such a contract as would protect the voluntary handing over the property of the bankrupt in contemplation of bankruptcy? If the true construction of any agreement was to hand over whiskey as security on demand, would that authorize the party without any demand to prefer the particular creditor? Before I attempt giving any definition of the nature of the contract required, I will shortly refer to the cases on this matter of a contract fulfilled by the dealings. In *Hunt v. Mortimer* (10 B. & C. 44) the contract was one binding specific property, and, as Parke, J., says, "creating an equitable assignment of that particular fund;" and every case cited here showed a contract as to particular property, and some of them turned not on the question of the avoidance of a voluntary gift, but on the question as to the rights of the parties out of the contract itself. The latest case I have seen on the subject is *Edwards v. Glyn* (2 Ell. & Ell. 29); in that, a fund was raised, through friends going security, to meet a run on the bankrupt's bank, with the understanding that unless it enabled the run to be met that the money would be returned. The money came to the bankrupt's hands; but the run not being met, the sureties asked for the return of the money, and it was returned. I refer to the judgments in this case as not countenancing the wide generality here contended for. Lord Campbell and Wightman, J. put their judgment on the ground of the demand made by the sureties; Erle, J., and Crompton, J., on the further ground that the contract gave an equitable title binding this fund. In my judgment the contract within this rule is not answered by a wide, open, general provision to give security, but must be so far specific in its nature as to designate the very act to be done in pursuance of it. Here Mr. Lefroy had the power to select any goods of the class designated; to give away to his favored creditor the best circumstanced portion of his stock from his general creditors.

I see no mischief that could arise by simply voluntarily paying him in money that would not equally arise by leaving him at large to deal with his stock in making the payments; and in all the tidal movement of the cases no case at all bearing out the proposition here contended for has been cited to me. On all these views, and each one of them, I rule that this was a fraudulent preference. I hold it was an act done by the bankrupt when in a state of insolvency, voluntarily, on no request, and in pursuance of no contract. I find that in my opinion no such contract really existed. I find that Mr. Lefroy was not influenced by the existence of any such contract, if it did in fact exist. And I decide further, though not necessary for my judgment if the other grounds are sustainable, that the contract here alleged is not such a contract as prevents the act voluntarily done, without pressure or request, from being a fraudulent preference. I therefore decide that the assignees are entitled to this whiskey, and I give them, of course, the costs against Mr. Shine.

Attorney for the assignees—Mr. J. Perry.  
Attorney for the claimant—Mr. H. Oldham.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

### DE BURGH v. CHESTER.

*Evidence—Solicitor and client—Privileged communication—Fraud.*

*W. H. B. being seized of an estate in fee in the lands of D., conveyed same in consideration of a sum of £27,800 to P. B. Previous to said sale the petition alleged that said W. H. B. fraudulently induced two of his children, then aged 21 years, to acknowledge, by a certain deed of release, that they had been paid (which was not the fact) a sum of £4,005, same being a portion of £5000 charged upon said lands, and they accordingly, by indenture of 2nd December, 1845, released said lands from said sum of £4,005, without any consideration whatsoever. The solicitor who prepared said deed, seeing that said children had not been paid and that a gross fraud had been perpetrated upon them, called upon W. H. B. to repair, as petition alleged, the injury he had so done by charging other lands, of which he was seized, with a sum of £4,005. The said W. H. B. soon after died without repairing said injury. On the hearing of the cause petition, disclosing the above facts, the said solicitor was orally examined and was asked about certain conversations he had with his client, W. H. B., in relation to this deed. On objection being made that the communication was privileged, and that the solicitor was not charged with fraud in the pleadings, it was held that the question was a legal one and that the witness was bound to answer same.*

In this case an important question was raised in reference to the privilege of a solicitor as to confidential

communications passing between him and his client. The petition was presented by Elizabeth J. Hussey De Burgh, Louisa Hussey De Burgh, Flora Hussey De Burgh, William L. Ker, and Anne Maria Ker, otherwise Hussey De Burgh, his wife, against the respondents, Mary Chichester, Charles R. Chichester, Walter Balfe, and several others; the prayer was—that two certain deeds of appointment and release, bearing date the 2nd December, 1814, might be declared fraudulent and void, and might be set aside; and also that a certain charge of £5000, late Irish currency, created by articles of agreement of the 28th of July, 1820, and a certain settlement executed in pursuance of said articles might be declared a subsisting charge (notwithstanding said deed of release) on the lands of Drumkeen, comprised in a term of 500 years. The petition stated certain articles of agreement of 28th of July, 1820, between the Rev. John H. De Burgh, of the first part; Mary De Burgh, his wife, of the second part; Charles Fitzgerald, of the third part; Walter H. De Burgh, of the fourth part; Elizabeth Jane De Burgh, of the fifth part; and Walter H. Griffith and Charles Studdert (trustees), of the sixth part; reciting, as was the case, that a marriage had been solemnized between Walter H. De Burgh and Elizabeth Jane, his then wife; and also reciting the seisin in fee of said John H. De Burgh. It was witnessed that said John H. De Burgh covenanted with said trustees after said Walter H. De Burgh (then nineteen years of age) should attain twenty one years, he would convey the lands of Drumkeen, save that part called Mock, containing 425 acres, in the County Limerick, to the use of trustees to be named, for 500 years upon the trusts therein declared; and after the expiration of said term, and subject thereto, in case Walter H. De Burgh should die under twenty-five, leaving a son who shall attain 12 months, then to the use of the said Walter H. De Burgh, his heirs, and assigns, for ever. That in said settlement said term of 500 years should be upon trust for raising out of said lands a sum of £5000 for the portions of all and every, or such one or more exclusively of the other or others of the child or children of the said Walter H. De Burgh by said Elizabeth Jane, or the issue born in the lifetime of said Walter H. De Burgh of such child or children, and the same to be an interest or interests vested in and paid or assigned to the said children or remoter issue of said Walter H. De Burgh by said Elizabeth Jane, at such times and in such shares with such right as they, the said Walter H. De Burgh and Elizabeth Jane, should during their joint lives appoint; and in default of joint appointment, then as survivor should by any deeds, with or without power of revocation, &c.; and in default of such appointment, then said sum of £5000 should be in trust for all and every the said children and child of said Walter H. De Burgh by the said Elizabeth Jane, who, being a son, should attain twenty-one, or a daughter should attain twenty-one or marriage, to be divided in equal shares and proportions amongst them; and said settlement was also to contain a power enabling the trustees to advance sums not exceeding one-half portion to any child; and also an agreement to insert in settlement a clause for bringing the appointed advanced por-

tions into hotchpot. The petition then stated that said Walter H. De Burgh attained his age of twenty-one on the 28th of June, 1822, and that said articles were carried into execution by subsequent settlement by an indenture of 20th December, 1826, which was executed in pursuance of said articles, wherein the trusts of said term of 500 years were declared, amongst others, by sale or mortgage to raise £5000 for the portion or portions of all and every such one or more of the other or others of the child or children, &c., so far carrying out the said articles, with the exception of the omission by mistake of the hotchpot clause, which omission did not affect the petition here. The petition then stated that Walter H. De Burgh became owner in fee of the lands subject to said term of 500 years. That there was issue of said marriage, ten children, of whom John Hamilton was the eldest son; that the surviving children of the marriage who had attained twenty-one—seven in number—were entitled to said sum of £5000 charged as aforesaid by said settlement on said lands, in equal shares, in the event of there being no valid appointment of said sum. That petitioner's mother, Elizabeth Jane, died on the 7th March, 1834, without any joint appointment having been made; that John H. De Burgh is long since dead; that in 1844 said John Hamilton De Burgh intermarried with Louisa Jane Townsend; that on such marriage his father made provision for him by settling certain parts of the lands which were comprised in the term of 5000 years. The petition then stated that in the year 1844 Walter H. De Burgh, the father of said John Hamilton De Burgh, was desirous of selling the lands of Drumkeen, comprised in said term, and that he was in treaty for the sale thereof to one Patrick Balfe for £27,800; that on investigation of title objections were made by Patrick Balfe respecting said charge for £5000, and said term for securing same, who, in order to remove such objection had, as petition charged, recourse to the contrivance hereinafter expressed. That the deeds following were executed not only with the concurrence, but at the suggestion, of Patrick Balfe, the purchaser of said lands, that two of the children of said marriage, viz., John Hamilton De Burgh and Mary Adelaide H. De Burgh having first attained their age of twenty-one at the time of the treaty of said purchase, it was proposed by the said Patrick Balfe, and acceded to by said Walter H. De Burgh, that an appointment should be executed of £4005, part of said £5000, to said John Hamilton De Burgh and Mary Adelaide De Burgh, not with the *bona fide* purpose of exercising said power for the benefit of said two children, but for the fraudulent object of enabling said Walter H. De Burgh to procure a release of £4005 of said charge. And it was further proposed by the said Patrick Balfe, and acceded to by said Walter H. De Burgh, that the said Walter H. De Burgh should execute a deed of indemnity of other lands, viz., the lands of Donore, &c., to indemnify the said Patrick Balfe against the said sum of £5000. That accordingly by deed-poll, dated 2nd December, 1814, executed by Walter H. De Burgh, after reciting settlement of 20th December, 1826, and trust for term for 500 years, and joint power of appointment, and death of said Elizabeth Jane De Burgh; and that said

John Hamilton H. De Burgh and Mary Adelaide H. De Burgh had attained their age of twenty-one; and that no joint power of appointment had been made during the life of said Elizabeth Jane H. De Burgh; that said Walter H. De Burgh was now anxious to appoint said sum of £4005; that accordingly said Walter H. De Burgh appointed £4000 to Mary Adelaide De Burgh, and £5 to John Hamilton De Burgh, both of whose interests were to vest on the execution of said deed. That on the same day, 2nd December, 1844, said Mary Adelaide De Burgh and Walter Hamilton H. De Burgh released said lands of Drumkeen of and from said respective sums of £4000 and £5. The petition then charged that no sum whatever was paid to said Mary Adelaide De Burgh on the execution of that deed; and that the recital of said payment and the receipt of the sum endorsed was false, and a fraud upon the said Mary Adelaide De Burgh and petitioners; that the execution of said deed of appointment of the 2nd December, 1844, was not a *bona fide* exercise of the power of appointment or distribution reserved to the said Walter H. De Burgh by said settlement, but a contrivance planned and carried out for the purpose of procuring a release from the said Mary Adelaide De Burgh and John Hamilton H. De Burgh of the said portions of £5000 to enable the said Walter H. De Burgh to make title for his own benefit to the lands of Drumkeen, and convey them to said Patrick Balfe discharged therefrom. And petitioner believes and charges that Patrick Balfe had not only notice of the said fraud, but originally suggested and was a party in carrying out same for his own purposes, and to enable him to hold said lands as a purchaser thereby, duly discharged from said portions of said charge under said deed. That accordingly, by a certain other deed dated December, 1844, and made between said Walter H. De Burgh of the first part, Patrick Balfe of the second part, and Christopher Balfe of the third part, it was witnessed that the said Walter H. De Burgh did grant and confirm unto the said Christopher Balfe and A. H. Griffith, the castle, town, and lands of Dorone, with its subdenominations in the County of Kildare, upon trust, for saving harmless and keeping indemnified the said Patrick Balfe, his heirs and assigns, and the lands and hereditaments so purchased by him off, from, and against the said charge or said sum of £5,000 late currency, charged upon said lands by the said indenture of 1826, and said Walter H. De Burgh thereby covenanted with said Patrick Balfe forthwith to procure effectual releases, when and so soon as all his minor children, issue of said marriage therein named, should attain their respective ages of 21 years, or the survivor or survivors of them, in case any should die, cause and procure them, and each and every of the survivors to execute same. The petition then stated that Patrick Balfe continued in possession of said lands until his death in 1852, he first having made his will devising said lands as in said will is mentioned. The petition then stated that in the year 1851, when the other surviving children of the said marriage had attained their respective ages of 21 years; Alexander E. M'Clintock, a friend of the family, who was acquainted with all the circumstances connected with the said appointment, applied to Walter H. De Burgh to repair the injury

done to petitioners, and the other children of said marriage, and to charge his estates with a sum of £5,000 for petitioners and their sisters, and to reserve to himself a similar power of appointment to that contained in said settlement. That said Walter H. De Burgh at once agreed so to do, and then instructed the said Alexander E. M'Clintock, who is a solicitor, to prepare the necessary deed to carry out said agreement, and thereupon a draft deed was accordingly prepared, but family differences having arisen between the said father and his children, he declined to execute said deed, but he assured said Alexander M'Clintock, the said attorney, that he would carry out the arrangement by his will. That on the 19th of October, 1862, Walter H. De Burgh departed this life, and did not, as he promised, carry out the agreement aforesaid by his will, which was made on the 28th November, 1861. The petition then charged that all parties now in possession of said lands had notice of such fraudulent appointment and release. It was now submitted by the petitioner that the children were entitled to a distributive share of the £5,000.

*Brewster, Q.C.*, (with whom were *O'Hagan, Q.C.*, *Jackson*, and *Reeves*), then in support of the above charges of fraud, called Mr. Alexander M'Clintock, the solicitor who had prepared the above deeds of 2nd December, 1844, and amongst others asked him the following questions:—

Q. Mr. M'Clintock, were you a witness to that deed? [handing witness said conveyance from Walter H. De Burgh to Balfe.] A. Yes.

Q. Do you see anything in the recital of that deed about releasing the estate from the charge of £5,000? Yes [witness read the recital as given above].

Q. I believe Walter H. De Burgh is a party to that deed? Yes.

Q. Were you acquainted with Walter H. De Burgh? Yes, after his first wife's death he was married to my sister.

Q. Do you remember before the execution of that deed having any conversation with Mr. Balfe about this transaction? Yes. [*J. E. Walsh, Q.C.*—Was this conversation you say you had with Mr. Balfe in the course of your business as solicitor for Mr. Walter H. De Burgh? Yes; the conversation I had was entirely relative to Mr. De Burgh's, my client's business.]

Q. Did Mr. Balfe speak to you about this sale of those lands? Yes, mostly every day in the week about this business.

Q. Did Balfe make any suggestion about getting rid of this charge of £5,000 from the lands which he was then about purchasing? [*J. E. Walsh, Q.C.* objects to this question. *The Lord Chancellor.*—Had Mr. Balfe a solicitor of his own, or were you acting in this transaction as solicitor for both parties, De Burgh and Balfe? Mr. Balfe had a solicitor of his own, but he was out of town. I acted in a manner as solicitor for both parties.

*Sherlock, Q.C.*, (with whom were for the several respondents *Lawless, Q.C.*, *J. E. Walsh, Q.C.*, *Flanagan, Q.C.*, *Fallon, Harkan, P. White, F. White*, and *O'Flaherty*), objected to any question put to the witness as to what he had done or said in any portion whatever of those transactions between De Burgh and



Balfe, he being at that time the solicitor of Mr. De Burgh. The rule is well settled that when an attorney is professionally employed all communications which pass between him and his client in the course of that employment are privileged communications, and that the attorney cannot even on a bill of discovery be compelled to disclose his client's business.—*Greenhough v. Gaskill* (1 Mylne & K. 101). There is an exception, however to this rule, namely, where the attorney was questioned as to the mode of perpetrating a fraud, and if the solicitor be a party to a fraud, no privilege attaches. In the case now before the Court there is a charge of fraud against Walter Hussey De Burgh, but there is no such charge against Mr. M'Clintock, the attorney; he is not in any way on the face of the pleadings connected with the fraud. That being so, he is not taken out of the privilege, and consequently cannot be asked what communications his clients had with him.—*Charlton v. Coombe* (32 L. J. Ch. n. s. 284). The marginal note in that case is just applicable—It says that "Where relief is sought in respect of a fraud, there must, in order to take the case out of the rule of privilege, be at least a specific allegation in the bill connecting with the fraud the solicitor of the person who was a party thereto, although such person be now deceased. Where, therefore a bill alleged that a person now deceased had been a party to a fraud, and prayed relief in respect thereof, and the solicitor of such person being called as a witness, demurred to certain questions put to him before the examiner upon the ground of privilege, the Court allowed the demurrer, there being no specific allegation in the bill connecting the solicitor with the fraud complained of. *Semble*, a mere allegation in the bill connecting the solicitor with the fraud where he is not made a co-defendant, and the issue of privilege is not distinctly raised is insufficient."

*Brewster, Q.C.*—The communications here between Mr. M'Clintock and Mr. De Burgh, or Mr. Balfe, are proper questions, and the answers are admissible in evidence. This was as outrageous a fraud on the petitioner as ever was perpetrated, and the solicitor who prepared that deed we are now told is not to be allowed to declare what he knows about the fraud; a case almost in point is reported, *Gore v. Bowser* (5 De Gex & Sm. Rep. in Ch. 30). There "the plaintiff sought to have a deed set aside on the ground of the fraudulent insertion of a particular clause therein. One of the defendants by answer insisted that the plaintiff had notice of the clause in question at a specified time, and examined the plaintiff's solicitor in support of this issue, and enquires what passed at an alleged interview between the solicitor and the defendant at the time specified. This interrogatory the solicitor declined to answer, on the ground that it enquired respecting matters about which he had obtained information by means of confidential communication made to him in the course of his agency as solicitor from his client the plaintiff. *Held*, that the solicitor was bound to answer the interrogatory." Now the object of this suit is to set aside a deed on the ground of fraud. If the case of *Charlton v. Coombe*, relied upon on the other side, be applied here, it will not deprive us of the witness's testimony; in that case the evidence of the attorney

was rejected, because the solicitor was not alleged in the pleadings to be cognizant of the fraud. The cause petition in the case now under consideration states that when the witness became cognizant of the fraud, he called upon Walter Henry De Burgh to repair the damage he had done.—*Ford v. Fennant* (32 Beav. 162); *Spenceley v. Schulenburg* (7 East, 357); *Kelly v. Jackson* (13 Ir. Eq. 129).

May 15th.—The LORD CHANCELLOR said that the petition did not attribute a fraud to Mr. M'Clintock; it was he that prepared the deed, and it was he that called upon De Burgh to repair the fraud; his Lordship said that he had considered the cases cited yesterday to the Court, and he was clearly of opinion that the questions proposed were legal questions, and that the witness was bound to answer them.

## Rolls Court.

Reported by H. W. B. Mackay, Esq. LL.B. Barrister-at-Law.

ERRATUM.—In *O'Sullivan v. Edgeworth A.*, ante p. 168, for "testator" read "deceased."

MULLOY v. ARMSTRONG.—April 27, 28; May 24.

*Will—Construction—"Or"—"Family"—Vesting.*  
A testatrix bequeathed the residue of her money, after payment of one legacy, to her sisters J. and E. so long as they continued unmarried, but when they married or died unmarried to each of their five sisters or their families, £200 each." Two of the sisters died without issue before the period of distribution, and the death of a third (who had not been married) constituted that period. The other two died before the period of distribution, but left issue who survived it. One sister was married and had issue at the death of the testatrix, and as it seems at the date of the will. Held, that the bequests over vested in each of the sisters severally at the death of the testatrix, subject to be divested as to the legacy of each sister respectively by her death before the period of distribution leaving issue in favor of such of those issue as should be alive at that period, and that the legacies to those who died without issue before or at that period did not divest in the events which happened.

THE question in this case arose upon the construction of the following passage in the will of the late Susanna Lloyd—"The interest of the remainder [i.e. residue after one prior legacy] of any money I give my sisters Jane and Emily as long as they continue unmarried, but when they marry or die unmarried I bequeath the principal as follows—To each of my five sisters or their families £200 each." The other legacies then followed. The circumstances were as follows:—The testatrix died in the year 1825. The will was without date. Her five sisters, Jane, Sarah, Emma, Mary and Emily survived her. There was no evidence of the state of the surrounding circumstances, but it appeared that Mary Mulloy was married and had issue at the time of the testatrix's death. Jane afterwards intermarried with Michael Fox, and her property having been settled to her separate use, with power

of appointment by deed (never exercised) or by will she appointed it to her husband as residuary legatee. He obtained probate to her will, and on his death appointed Robert Jones Fox his residuary legatee and sole executor. Robert Jones Fox supposing himself entitled to the legacy of £200 which had been bequeathed to Jane Lloyd, assigned it by deed to Emily Lloyd, and she afterwards died, having appointed the Rev. William Jones Mulloy (petitioner in this suit) and Mrs Margaret Figgis her residuary legatees and executors. Jane had no issue. Sarah married Mulloy M'Dermott, and by him had issue two sons, who died in her lifetime, and five daughters—Mary, who married Alonzo Lauder, and who still survives; Margaret, who died intestate, and, as it seems, before the period of distribution; Julia, who still survives; Sarah, who married Henry H. De Manuel, and who still survives; and Hester, who still survives. Mulloy M'Dermott died intestate in his wife's lifetime, and she took out letters of administration to him. She herself died on the 16th December, 1859, before the period of distribution, but before her death she had in her own right, and as her husband's administratrix, assigned her legacy of £200 to Michael Fox, whose executor assigned it along with the legacy of Jane Lloyd to Emily Lloyd. Emma married John Lloyd (and seems to have had issue who died in her lifetime). She survived her husband, but died in the year 1862, before the period of distribution. She made Miss Hester M'Dermott her residuary legatee, and to her administration with the will annexed was granted. Mary married Coote Mulloy, (who afterwards became executor of the testatrix) during the lifetime of the testatrix, and issue—Mary Hutchinson, Coote Charles Mulloy, Hessay, who died, but left issue; Margaret Figgis, who was the executrix of Emily Lloyd, and William James Mulloy, the petitioner in this suit. Mrs. Mulloy died in 1838; her husband survived her, and died in 1842; and his son, Coote Charles Mulloy, became his administrator. Emily survived all her sisters, and died without having been married on the 29th Oct. 1863, and, as already mentioned, constituted Wm. James Mulloy and Margaret Figgis her executors and residuary legatees.

The testatrix, by her will appointed her sister Jane and her brother-in-law, Coote Mulloy, to be her executors and residuary legatees. Coote Mulloy obtained probate, saving the right of the executrix, Jane Lloyd, and acted in the administration, and kept £200 out of the assets as the legacy bequeathed to his wife. After his death, and that of Jane Lloyd, administration *de bonis non* to the testatrix with her will annexed was granted to R. O. Armstrong, the respondent in this suit. After the marriage of Jane Lloyd, the interest of the whole residuary monies of the testatrix was paid to Emily Lloyd as the surviving joint tenant of the particular estate, and it was admitted that the death of Emily was the period of distribution. After her death the cause petition in the present suit was filed by William James Mulloy, a specific legatee of the testatrix (and who was also, as above stated, one of the executors of Emily Lloyd) praying for an account and for payment of his legacy. The case was referred to the Master under the fifteenth section, and charges were filed by

R. O. Armstrong, and Rev. Coote Charles Mulloy, and a discharge by Mr. and Mrs. Lauder, and Mr. and Mrs. De Manuel. While the cause was in the Master's office, the children of Coote Mulloy agreed to forego all right to claim the legacy bequeathed to their mother, except so far as regarded any monies which on the taking of the accounts and the allocation order should be properly applicable as assets of Coote Mulloy to recouping said legacy. Master Litton declared by his report that upon the true construction of the bequest contained in the will of the said testatrix such of her five sisters alone as should be living at the marriage or death unmarried of whichever of the said Jane and Emily, should last marry or die unmarried, would become and be entitled to vested interests in the said respective legacies of £200 each, and that the children of such of the said five sisters as should die before the happening of either of the said events, who should be living at the happening of whichever event should last happen, would become and be entitled under the substituted gift to vested interests in the legacies thereby respectively bequeathed to their said mothers; and that in the events which have happened said interests respectively vested on the death of the said Emily Lloyd, and that the three legacies of £200 each bequeathed by the testatrix to her sisters Jane, Emma, and Emily, upon the death of the said Emily lapsed, and fell into the residue, the said three sisters having died without children before the said interests in said respective legacies vested. Three cross-motions by way of appeal from this declaration were now moved. *First*, on behalf of the petitioner, as of the executors of Emily Lloyd, that it might be declared that upon the true construction of the bequest the respective legacies of £200 each *either* vested [indefeasibly] in each of the five sisters of the testatrix subject to the previous life estate in the interest of the residue, or that those legacies vested (subject to the life estate) subject to a liability to be divested in favour of the children of such of the said five children as should die before the period of distribution, and should leave children who should be surviving at the period of distribution, and that in the events which happened, the several legacies of £200 each bequeathed to the said Jane Fox (otherwise Lloyd,) Emma Lloyd, and Emily Lloyd, were vested legacies, and never became divested. *Secondly*, on behalf of Mr. & Mrs. Lauder and Mr. and Mrs. De Manuel, that it might be declared that the legacies of Jane, Emma, and Emily did not lapse, but vested in the events which happened in the petitioner, Coote Charles Mulloy, Mrs. Hutchinson, Mr. and Mrs. Figgis, Mr. and Mrs. De Manuel, Mr. and Mrs. Lauder, Miss Hester M'Dermott, and Miss Julia M'Dermott, as being next of kin to the sisters at the period of distribution, thus construing the word "family" as "next of kin." *Thirdly*, on behalf of Miss Hester M'Dermott, that the second construction proposed by the petitioner might be adopted.

*Jellet, Q.C., and Ritchie, for the appellant, Wm. James Mulloy, the petitioner.*

*Warren, Q.C., and Shekleton, for the appellants, Mr. and Mrs. Lauder, and Mr. and Mrs. De Manuel.*

*Exham, Q.C.*, and *R. Robertson*, for the appellant, Miss Hester M'Dermott.

*Battersby, Q.C.*, and *Gamble*, for Rev. Coote Chas. Mulloy, in support of the Master's rulings.

*R. M'Donnell* for R. O. Armstrong, the respondent.

It was admitted by all parties that the life-interest of Jane and Emily was a joint one, and that the whole of it was properly paid to Emily after the marriage of Jane, as entitled by survivorship.

On the question of vesting, arising out of the words "but when they marry or die unmarried, I bequeath the principal," &c., it was admitted by Mr. Jellet that the first construction suggested by the petitioner, viz. that the legacies over vested indefeasibly in the sisters of the testator immediately upon her death, was unsustainable. It was contended in favor of the view that the legacies vested subject to be divested in favor of the "family" of the testatrix, that it is a general rule that when a testator creates a particular estate in either real or personal property, and then proceeds to dispose of the ulterior interest, the words descriptive of the time when shall be construed of the coming into possession, and not of the vesting (*Benyon v. Madison*, 2 Bro. C.C. 75; *Lanphier v. Buck*, 34 L. J., N. S., Ch. 655a, followed and relied on in *Merrick's trust*, 1 Law Rep. Eq. Ca. 551; *Hervey v. M'Laughlin*, 1 Price, 264, and as to real estate, *Hawkins*, Construction of Wills, 237, 239; *Boraston's Case*, 3 Rep. 21a-b; *Goodtitle v. Whibby*, 1 Burr. 228, 233; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 Ad. & El. 636). It was admitted that there were exceptions, but the fact that a substitutionary clause (which it was insisted the clause "or their families" was in this case) had been added, or the fact that the prior bequest was of the interest only, and the subsequent bequest was of the principal, did not create such exceptions (*Westwood v. Southey*, 2 Sim. N. S. 192; 1 Jarman, Wills, 3rd ed. 800; "the mere introduction into an ulterior gift of new words of disposition, has no effect in deferring the vesting.") The true criterion for determining whether a gift was vested or not, was whether the reason of postponing the payment was the position of the fund, in which case the legacy would vest at once, or whether it was the position of the legatee, in which case it would be contingent (*Bennett's trust*, 3 Kay and J. 280). It was also strongly urged that the Master had held that the other legacies over in the will were vested, although they were given subject to the same life-estate as those under discussion, and in the same language, excepting the words "or their families."

On the other side, it was insisted that the legacies over were only given after the determination of the life-estate, and that therefore they did not vest until that period (1 Jarman, Wills, 3rd ed. 795). That the word "when" is naturally conditional, *Hanson v. Graham* (6 Ves. 238, was cited, where it was otherwise construed only because the interest in the mean time was given to the legatee of the principal. *Price v. Lockley* (6 Beav. 180) was distinguished, as there were children who were held to take, and in *Merrick's trust* the Vice-Chancellor threw out an opinion that the shares of the parents could not vest in them unless living at the period of distribution; [the bequest there was to the parents "who should

be then living," or to the children (without exception) of such as should be dead]. The following cases were also cited on this point:—*Snell v. Dee* (2 Salk. 415); *Bruce v. Charlton* (13 Sim. 65); *Chevaux v. Aislabe* (13 Sim. 71); *Atkins v. Hiscocks* (1 Atk. 500); *Hanson v. Graham* (16 Ves. 239); *Morgan v. Morgan* (4 D. G., & Sm. 239.)

On the substitutionary meaning given by the word "or," the following authorities were cited:—1 Jarman, Wills, 3rd ed. 482, 2 *id.* 710; *Price v. Lockley* (6 Beav. 180); *Salisbury v. Petty* (3 Hare, 86); *Burrell v. Baskerville* (11 Beav. 525, where "and" was construed "or," in order to give a substitutionary meaning); *Girdlestone v. Doe* (2 Sim. 225); *Merrick's trust* (1 Law Rep. Eq. Ca. 551.)

On the meaning of the word "families," there were two constructions proposed—That it meant "children surviving at the period of distribution," and that it meant "next of kin ascertainable at the period of distribution." In support of the former, it was strongly insisted that "children" was the ordinary meaning according to *Terry's will* (19 Beav. 680); *Parkinson's trust* (1 Sim. N. S. 242, 245-6); *Gregory v. Smith* (9 Hare, 708); *Wood v. Wood* (3 Hare, 65), and that such a construction ought to be put upon the substitutional bequest as to prevent the possibility of any of the primary legatees taking under it according to the dictum in *Wood v. Wood*, but here some of the sisters might have survived the tenants for life, and been the next of kin of those who had predeceased them. It was, however, admitted, in answer to the Master of the Rolls, that all descendants were probably included. That "next of kin" was meant, it was observed that a bequest to a "family" had never been held to lapse because there were no children. In those cases in which the word had been construed "children," the children were also next of kin (2 Jarman, Wills, 3rd ed. 87).—*Williams*, Exors. 5th ed. 1010, 4th ed. 984; *Gower v. Mainwaring* (2 Ves. Sr. 110); *Cruwys v. Coleman* (9 Ves. 319); *Grant v. Lynam* (4 Russ. 292); *Re Maxton* (4 Jur. N. S. 407), were cited. *Terry's will* was distinguished, as there the M. R. seems to ground his decision on the fact that there were children, and admits the construction he adopted might be improbable if there were no children. The testatrix had contemplated not only the case of her sisters Jane and Emily marrying, but that of their dying unmarried, and must have intended the next of kin of those who died unmarried to take, and so must have meant to designate "next of kin" by the word "family." On the question, when the next of kin should be ascertained, 2 Jarman, Wills, 114-16, was referred to.

May 21st.—THE MASTER OF THE ROLLS, after stating the facts, proceeded:—The question arises upon the construction of a clause in the will of the late Susannah Lloyd. It is very desirable to ascertain the state of the surrounding circumstances at the time when the will was executed. It is very awkward not to have the facts, for one of the questions arises on the word "family," and depends in a great measure on which of the sisters of the testatrix had children at the date of will, and I am left in the dark, except so far as I can collect from the will itself, although every body knows you should construe the

will according to the surrounding circumstances, including the state of the family. With respect to the first part of the will, "the interest of the remainder of any money I give to my sisters Jane and Emily as long as they continue unmarried." Jane and Emily were both unmarried at the testatrix's death, and the money was paid to Jane and Emily until the marriage of Jane, and then the whole to Emily until her death. This arrangement has been acquiesced in, and I should be slow to interfere with it. Jane and Emily were among the legatees in remainder. The limitations over however did not take effect in the lifetime of the sisters, Emily having died unmarried. Upon the subsequent part of the bequest, the Master's order contains the following declaration. [His Honor here read the passage in the Master's order which states his views on the construction of the passage, and the three notices of motion, and continued]. It should be kept in mind that the state of the family at the death of Emily Lloyd was this. Mary had died in 1838, leaving issue; Jane, the second sister, had died married, but without leaving issue; Sarah, the third, had died in 1859, leaving five children. She had had seven children. The effect of the declaration of the master, as I understand it, is this—that Jane, Emily, and Emma, having died without issue, the bequests to Jane, Emily, and Emma, or their families, did not take effect, and that Mary and Sarah having died, but left issue, the bequests to Mary and Sarah, or their families, vested in their children. In the case of *Terry's will*, Sir John Romilly says, "I have looked into the authorities, which have confirmed the opinion which I entertained during the argument, that the primary meaning of the word 'family' is 'children,' and that there must be some peculiar circumstance arising either on the will itself, or from the situation of the parties to prevent that construction being given to it. In ordinary parlance the word 'family' means 'children.'" This very observation shows the importance of instructing counsel as to the circumstances. I cannot say I think that such is the result of the authorities, but although Sir John Romilly may be wrong in that view, I am referred to *Terry's will* itself as an authority in point. Mr. Jarman, in the 2nd vol. of his book on Wills, 3rd ed. page 87, makes some observations on the subject. I think Mr. Jarman is right in saying, that "every case must depend upon its particular circumstances." I think the children take by way of substitutionary bequest, and in case any of the sisters should die without leaving children, to go to her representatives. In this construction I am therefore of opinion that the Master's decision was right in holding the word "family" to mean "children." The question then arises, whether the Master was right in holding that the legacies of Jane, Emma, and Emily, lapsed. The question is, whether the bequests to the five sisters of the testatrix vested in them respectively, subject to be divested in case any of them respectively should die leaving children or issue before the period of distribution. *Hervey v. M'Loughlin*, referred to in 2 Jarm. 3rd ed. 708, seems to be at variance with the Master's view. There the testatrix bequeathed two several sums of stock to a trustee in trust to pay the dividends to I. for life, and after her death she gave the two

sums to G., E., and E., the three children of I., in equal shares, and in case of the death of either of them, the share of such as might die to go and belong to the children, or child if but one, of the persons so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life, and the Court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the legatee for life in the place of their parent, and that therefore the parents took vested interests on the death of the testator, subject to be divested in the event specified. The point is referred to in 1 Jarm. 3rd ed. 483, and the case is approved of in *Salisbury v. Petty*. *Price v. Lockley* proceeds on the same principle. *Merrick's trust* does not, I think, apply to this case. If I am right, the sum vested on the death of the testatrix, and the event on which the legacies to Jane, Emily, and Emma, would have divested not having taken place, the order of the Master must be varied.

It is ordered and declared that upon the true construction of the will of the said Susannah Lloyd, subject to the bequest in the said will of the interest of the remainder of her money to her sisters Jane and Emily, as long as they should continue unmarried, with a devise over when they should marry or die unmarried, the five legacies of two hundred pounds each to the five sisters of the testatrix, viz. Mary Molloy, Sarah M'Dermot, Emma Lloyd, and the said Jane and Emily, vested in them respectively on the death of the testatrix, subject to be divested as to the legacy to each sister respectively by her death before the said legacies became payable leaving children or issue. And the Court doth declare that the testatrix's sister Jane having had no issue, and the testatrix's sister Emily never having married, and the testatrix's sister Emma having left no issue living at her death, and the events by which the legacies to the said Jane, Emily, and Emma, would have been divested not having taken place, the said three legacies did not, nor did any of them lapse or fail, or fall into the residue of the testatrix's personal estate. And it is further ordered, that the order of the master be varied accordingly, having regard to this declaration. And the Court doth make no rule on the rest of said appeal motions. And it is further ordered, that the parties respectively do abide their own costs. And it is further ordered, that the deposits be returned to the parties who respectively lodged same. And it is further ordered, that the several parties be at liberty to apply to the Master for payment of their costs respectively out of the assets of Susannah Lloyd, but the Court doth not decide, or offer any opinion, on the subject as to whether the said costs should be allowed out of the assets or not.

**BENNETT v. WOLFE—May 31.**

*Practice—Taking out attested copy of amendment to cause petition.*

*On special motion the Master of the Rolls will permit an attested copy of amendments to a cause petition to be taken out by a respondent who has already had to take out an attested copy of a common copy deposited in the Master's office, notwithstanding Birch v. Hutchinson (1 L. & G. temp. Sugd. 363), because the practice of depositing a common copy of the petition in the Master's office is irregular, and to save expense to the respondent.*

THE cause petition had been referred to the Master under the 15th section, and the respondent had then been obliged to take out an attested copy of a copy of the petition deposited as a charge in the Master's office. The petition had afterwards been amended, and the respondent's solicitor had applied to the proper officer for a copy of the amendments, and when told that if he brought his attested copy they would be added to it, he brought the attested copy of the copy deposited in the Master's office. The officer refused to add the amendment to any other than an attested copy of the original record. He suggested, however, that the solicitor should take out an attested copy of the petition as amended, but this the solicitor refused to do on account of the expense of taking out a second copy of the whole petition.

Gibson now moved of course that the respondent might be at liberty to take out a copy of the amendments alone.

THE MASTER OF THE ROLLS.—This arises from the irregular practice pursued in the Master's offices in fifteenth section cases, a practice directly contrary to the practice in the Court of Chancery and in this Court. Here and in the Court of Chancery you must have an attested copy of the petition. In the Master's office the solicitor files a common copy. The subject was brought before Lord St. Leonards when he was here, and he decided you cannot take out a portion only of a pleading. After an elaborate argument he decided in *Birch v. Hutchinson* (L. & G. temp. Sugd. 363) that although you may take out a portion of a report, you cannot take out a portion of a pleading, and, strictly speaking, I should refuse your motion. A common copy of a document is often a copy of a copy, and the Masters have decided on common copies very often inaccurately copied. Then you have to take out an attested copy of a common copy. I do not know what would be said in the House of Lords of such a practice. There is no legal evidence that there is a petition at all. I am not going to alter the practice of the Court, and in every case in which this course is pursued I will put the parties to a special motion; but I know it was not the fault of your client, and I do not want to do him an injustice.

ORDER.—It is ordered that the Deputy Keeper of the Rolls be at liberty in this case, but not in future without the order of the Court, to give an attested copy of the amendment to the cause petition in this matter filed on the 22nd day of May, 1865, to the respondent's solicitor, but the

Court doth declare that in the opinion of the Court the practice in the Master's office is irregular in receiving in evidence in cases under the 15th section a copy of the cause petition not in any manner verified as a true copy instead of an attested copy thereof, and allowing such unverified copy to stand as a charge, the practice before the Lord Chancellor and in this Court being to require an attested copy of the petition to be produced at the hearing of a cause.

## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

**CORAM MONAHAN, C. J., AND KEOGH, J.—April 26, 27; May 8.**

**KANE v. MULVANY.**

*Demurrer—Libel—Plea of fair and bona fide comment—Plea of fair, true, and accurate report—Proceedings in a Dublin court of justice—Matter of aggravation.*

To an action for libel, in which the plaintiff, in the first count of the summons and plaint, complained that the defendant published of and concerning the plaintiff in the form of a written document, purporting to be a report of a speech addressed to a committee of the House of Lords, by the counsel for the promoters of a certain railway bill, statements imputing to the plaintiff that in procuring himself to be called as a witness, before the said committee, by the promoters of the said bill, and in the evidence he gave, he had practised an imposition upon the said promoters of the said bill; the defendants pleaded that the proceedings before the said committee and the evidence of the plaintiff were matters of public notoriety and discussion; and that the alleged defamatory matters were fair and bona fide comments by the defendant on the conduct and evidence of the plaintiff. Held—upon demurrer, a good plea.

The third count of the same summons and plaint complained that the defendant published of and concerning the plaintiff in the form of a printed document, purporting to be a copy of a petition to the House of Lords, statements, that the plaintiff procured himself to be called as a witness by the promoters of the said bill, and on cross-examination gave evidence that the existing station of the D. & D. R. could be enlarged; and that the proposed line would not be remunerative; that subsequently the promoters of the said bill ascertained that the plaintiff had been in communication with the agent for the opponents of the said bill, who had taken down his evidence on paper at an earlier part of the day, and had furnished it to the counsel for the opponents of the said bill, who afterwards made use of the said paper in cross-examining the plaintiff; and that at the time the plaintiff volunteered to give evidence in favour of the promoter's

case, he concealed from them his opinion upon these matters, as embodied in the paper so drawn up by the said agent, or that he had made any statement to him injurious to the promoters case.

To this count the defendant pleaded the same plea.

Held—upon demurrer, a good plea.

To the first count the defendant pleaded that the said select committee was a public court of justice, and that the alleged defamatory matter was a true, fair, just, and accurate account and report of the proceedings so laid before the said committee in the said public court, with reference to the said bill.

Held—upon demurrer, a bad plea, inasmuch as the publication set out the speech of a counsel, made after the case had terminated and without the evidence which justified the speech.

To the fourth count (which was the same as the third, with the exception of an inuendo) the defendant pleaded as a plea of justification; that the plaintiff procured himself to be called as a witness by the promoters of said bill, and did on cross-examination give evidence that the D. & D. Railway Station could be enlarged, and that the proposed line would not be remunerative; that the promoters of the said bill ascertained that the plaintiff had been in communication with the agent for the opponents of the said bill, who had taken down on paper the evidence of the plaintiff, and had furnished the same to the counsel for the said opponents to the said bill, who afterwards made use of it in cross-examining the plaintiff; and that the plaintiff, at the time he volunteered to give evidence, concealed from said promoters an opinion which he then entertained as to the possibility of enlarging the said D. & D. Station, and the remunerative character of the said proposed line; and that he had made statements to the said agent of the said opponent's injurious to the case of the said promoters.

Held—upon demurrer, a bad plea, inasmuch as it purported to be pleaded to the entire count and did not justify the entire.

THE first count of the summons and plaint complained that the defendant falsely and maliciously published of and concerning the plaintiff in the form of a written document, purporting to be a report of a speech addressed by Mr. Rodwell, Q.C., to a committee of the House of Lords, in reference to a bill which had then lately been thrown out by said committee, the false, scandalous, malicious, and defamatory matter following, that is to say, "House of Lords, Select Committee, on the Dublin Trunk Connecting Railway (City Extension) Bill, Thursday, 6th April, 1865, the Earl of Devon in the chair. Mr. Rodwell—My lords, before the clauses of the Dublin Trunk Connecting Railway (Deviation) Bill are proceeded with, I wish to make an observation or two. Your lordships will recollect that yesterday evening a gentleman was called by me almost at the last moment; he volunteered his evidence. We were ignorant indeed that he was going to give it. He made a statement to those who instruct me that he could give evidence which would be most material to us, and stated that his company was friendly to us, and that they would look with favour upon our scheme as to the station.

Your lordships will recollect what took place when he was called, and I am here to say to your Lordships that we feel that we were most completely imposed upon by that gentleman as to the mode in which he gave his evidence before your lordships. Further, we have this fact in confirmation of our view that when he was cross-examined he was cross-examined from instructions in my learned friend's (Mr. Pallett's) hands. This gentleman placed himself in the box as a material witness to the case: he had been in the room all the time, and, therefore, knew all the weak points of the case. Your lordships will recollect the damaging evidence which he gave against us, at last, and what we propose now to do is, and I will state to your lordships what our course is going to be, in order that we may be acquitted of anything like disreputable to your lordships or dissatisfaction with the decision which your lordships came to upon that evidence. Feeling that we were imposed upon, we are going to ask to have the bill recommitted, because we feel that the evidence which that gentleman gave was not correct in fact, and we had no means of meeting it, because it took us completely by surprise. It is not necessary for me to say more now upon that point. It will be only for the promoters to move for the recommitment of the bill. We thought that we ought not to do so without informing your lordships that such was our intention, and the promoters are desirous of its being understood that this step will be taken, not because they feel any dissatisfaction with your lordships' decision upon that evidence. We think that your lordships were quite justified, after that evidence, in the decision at which you arrived; but we say that we were imposed upon, and that that evidence was not the evidence with which we could have left the case in your lordships' hands, had we previously known that Mr. Kine was going to be called. I have only made these observations in order that your lordships may distinctly understand the position in which we stand in relation to the bill and in relation to your lordships' decision. Chairman—We thank you for the communication you have made to us. Will you let us know on what day you will apply for a recommitment of the bill, because the House will rise to-morrow? Mr. Rodwell—We will do so, my lord. Chairman—I am going out of town to-night. Mr. Rodwell—Due notice will be given, my lord. The Duke of Marlborough—You will not do anything before the House rises, I suppose? Chairman—I believe you must give three days' notice. Mr. Rodwell—We had only decided upon the course which I have indicated to your lordships this morning; we will take what steps we can; but we only thought it our duty to inform your lordships of what it is our intention to do. Chairman—We do not mean to imply any opinion as to what portion of the evidence weighed with us or otherwise. Mr. Rodwell—No, certainly not, my lord. Mr. Pallett—In consequence of what my learned friend, Mr. Rodwell, has stated, I wish, on the part of the Corporation of Dublin, to say one word as to the mode in which the paper, which my learned friend has referred to, was obtained, and I mention this because I think it is but fair to the parties when an *ex parte* statement of this kind is made that the answer should not be reserved for a

future day. A few days before the bill came on, a conversation took place between the agent who instructs me and the witness who has been referred to, and in consequence of that, a note of his evidence was taken down by Mr. Muggeridge, not in his presence nor with his knowledge. Mr. Muggeridge said that, probably he would call him as a witness; but when that document was put into my hands, I advised my clients not to call him at all as a witness against the bill. He has supplied to me this statement as to matters which took place personally to himself. A day or two before the meeting of the committee on this bill, I had a conversation with the solicitor for the promoters, respecting the injury that would be done to the rear of my house in Talbot-street, if the bill passed, and I told this also to the agent for the Corporation, who said they would examine me on the subject. This took place before the agreement was come to with the Drogheda Company during the progress of the bill in committee. I was asked by the clerk of the agent to the Corporation to be sworn as a witness, which I refused, unless compelled. Mr. Murphy, the counsel for the promoters, was present and heard this. I never gave any proof of my evidence or saw it up to this time but during Mr. Rodwell's speech and after the evidence was closed on both sides. Mr. Murphy was talking about the Drogheda Company, and asked if they were likely to use the station, if made. I said I was sure; but I remarked that it was now useless: he said he would speak to Mr. Rodwell when he had done, and I presume he did so, as I was called then as a witness; but I did not know anything of the questions put to me in cross-examination; my personal interests were in favour of the passing of the bill." Of course your lordships, if you wish it, will be at liberty to inspect this document; my learned friends have not seen it; but I may state that the two most important questions which were put on cross-examination were not taken from that document, for one of them, in reference to whether the line would pay was suggested by an idea of my own, judging from the length of the line, and that it was not possible it should pay; and the other, as to the extent of ground of the station, was suggested by an observation addressed to me by my learned friend, Mr. O'Hara; but that document was not seen by Mr. Kane. I think that this *ex parte* statement had better not have been made. Mr. Murphy.—My lords, as my name has been mentioned, I think it right to say that I entirely deny the truth of Mr. Kane's statement, which has been just read. He addressed me and volunteered his evidence in support of our case, and it was upon the faith of my having known him for many years that I told my learned friend, Mr. Rodwell, that he might rely upon his statement. I do not think it necessary to say more at present upon the subject, meaning thereby that the plaintiff, with intent to betray the promoters of said bill, and to defeat said bill, by giving evidence injurious to the project, and which had been preconcerted between the plaintiff and the opponents of said bill, treacherously induced said promoters to produce plaintiff as a witness in support thereof, and also that plaintiff having been produced as a witness by said promoters, gave evidence ad-

verse to said project from instructions which had been previously furnished by him to the opponents of said bill.

The second count omitted the innuendo in the first. The third count complained that the defendant falsely and maliciously published of and concerning the plaintiff in the form of a printed document, purporting and pretending to be a copy of a petition to the House of Lords, the false, scandalous, malicious, and defamatory matter following, that is to say, "In the House of Lords, Session 1865, Dublin Trunk Railway (Sackville-street Extension) Bill. To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled. The humble petition of the undersigned being three of the promoters of the Dublin Trunk Railway (Sackville-street Extension) Bill. Sheweth unto your Right Honourable House that a bill is now pending in your Right Honourable House by which power is sought to construct a line of railway in and near Dublin, its object being to bring the passenger traffic of the Dublin and Kingstown Railway and other railways in Dublin to a head or terminal station in Sackville-street in that city, that the aforesaid bill was referred to a select committee of your Right Honourable House, presided over by the Right Honourable the Earl of Devon. That the said bill was considered by the Select Committee on Wednesday the 5th April instant. That the said bill is a most popular measure with the citizens of Dublin, and was not opposed before the Committee by any of the existing railway companies or land owners through which the intended line would pass; but it was opposed in the name of the Corporation of Dublin, who alleged in their petition that it would interfere with the streets of Dublin, although it would not block up or stop a single street or passage. That the Dublin and Drogheda Railway Company originally petitioned against the said bill, on the ground that it would interfere with their existing station; but before the hearing of the case of your petitioners, the said petition was withdrawn pursuant to an agreement come to with the Dublin and Drogheda Railway Company, under which your petitioners bound themselves not to apply for compulsory powers over the Dublin and Drogheda Railway Company and Station, while that Company bound themselves, neither directly or indirectly, to oppose the passing of your petitioners' said bill, and Richard Deane Kane, the solicitor to the Dublin Company, was a party to and prepared said agreement. That witnesses were called on the part of your petitioners to prove that the proposed station at Sackville-street would be a great public accommodation; that it would accelerate the public service in Ireland; that the present station in Dublin of the Dublin and Drogheda Railway Company was wholly inadequate for the existing traffic, and that it would be quite impossible to enlarge it. That the Dublin and Drogheda Railway Company, Ulster Railway, Dublin and Belfast Junction, and Irish North Western would use the proposed station in Sackville-street, of which, by their chairman, the Dublin and Drogheda Railway and Dublin and Belfast and Irish North Western by their engineer expressed approval, and that the proposed line of your petitioners would be remunerative. That thereupon the Corporation of



Dublin opened their case in opposition to your petitioners' scheme, suggesting amongst other things that the said Drogheda station could be enlarged, and that the proposed line would not be remunerative, and that it would not be used by the Dublin and Drogheda Railway Company. That in support of this part of their case they called but one witness, Mr. Neville, the engineer of the Corporation; and at the close of the reply of your petitioners' counsel, an order was made that the room should be cleared. That while this was being done, the said Richard Deane Kane addressing one of the counsel of your petitioners, with whom he had been long personally acquainted, said that he could give most important evidence in support of said bill, and in particular, as to the use of the said station by the Dublin and Drogheda Railway Company, and which would be certain to satisfy the committee as to the importance of the project of your petitioners. That the said Richard Deane Kane further urged that even at that late moment it would be for the interest of your petitioners to apply to the committee to hear his evidence. That at this moment the solicitor to your petitioners as well as many others in obedience to the above-mentioned order of the committee to withdraw, had left the room. But the counsel for your petitioners in his absence and relying on the above representation of the said Richard Deane Kane, applied to the committee to hear his evidence, which the committee consented to do, subject to the cross-examination on the part of the said Corporation; and thereupon the said Richard Deane Kane gave the following evidence in his examination in chief. Mr. Richard Deane Kane sworn. Examined by Mr. Rodwell. 899—You are a solicitor to the Drogheda Company? Yes. 900—You are aware of the agreement prepared by our company? Yes. 901—Now, if this line is passed are you authorized to state that the Drogheda Company will enter upon fair arrangements for working that line and using it? I think it is very probable, if it is made. 902—By a lord. You think it very probable? Yes. The reason they objected was that they wished to have a control as they had expended a large sum of money. 903—Mr. Rodwell, I ask you whether you think there is a reasonable probability and whether your company are disposed to enter into relations with the company if the line is passed? I have no doubt if the station is made they would. That thereupon the counsel for the Corporation at once produced a paper, and holding it in his hands proceeded to cross-examine the witness from the said paper, who then the astonishment of your petitioners gave the following evidence on such cross-examination. Cross-examined by Mr. Pales. 904—Is there room enough at the station at Drogheda to extend it, in your opinion? We have ample ground close to the present station to improve it; but we were delayed very much, owing to the rival schemes of last year. 905—There are no clauses either in the bill of last year or of this year, which will enable the company to use the Drogheda station? Oh! they have no power. 906—At present, therefore, there are no facilities for this traffic, even with a station built in Sackville-street, as proposed by this bill? Not at present. 907—I need not ask you, you cannot take

upon yourself to say, that facilities will be given by your company? No, I cannot say that, but I think there is very little doubt if a good station were made at Sackville-street, they would use it for passengers, but they could not use it for traffic. 908—Your company will have them altogether in their power, the promoters, is not that so? Yes. 909—And you will use that for making the best sum you can? Of course we shall do the best we can for ourselves. 910—From your experience of traffic upon these railways, do you think the proposed line will pay? I should think not, certainly, according to my experience. I have had a great deal of experience for twenty years, and I know what the expense of purchasing land is. 911—By a lord—Are your company in this position that you are waiting to see whether the station will be subservient to your purposes before you enlarge your own station? No; in the last two or three years several metropolitan schemes have been projected in Dublin, and of course if any of those were passed, our improvements would go for nothing; there are fifteen acres of ground there. 912—Is it probable that if this station in Sackville-street should not be built, you would enlarge your own station? We must do it; at present it is very inconvenient, it is very small. That while the Committee of Lords were deliberating, your petitioners ascertained that the said Richard Deane Kane had been in communication with the parliamentary agent for the Corporation, who had taken down his evidence on paper at an earlier part of the day, and had furnished it to the Counsel of the Corporation, with the intention of calling him as a witness. That your petitioners also ascertained that the said Richard Deane Kane was quite aware of the nature of your petitioners' case, and the points which had been relied upon by the opponents, and your petitioners further beg to say that the paper so used by the Counsel for the Corporation was the same which had been prepared by such agent as aforesaid. That the said Richard Deane Kane was present in the room during the greater part, if not the whole, of the investigation by the said committee, and was quite aware that a principal part of the case for the petitioners was and that it was most important for them to prove before the committee, that the existing station of the Dublin and Drogheda Railway Company could never be enlarged, and that it must, ultimately, be brought further into Dublin, and that the proposed line if sanctioned would be a remunerative concern, and that at the time he volunteered to give evidence in favour of the petitioners' case as aforesaid, he entirely concealed from them his opinion upon the last-mentioned matters, as embodied in the paper so drawn up by the said parliamentary agent as aforesaid, or that he had made any statement to him as agent for the opposition injurious to petitioners' case. That the said Richard Deane Kane was a solicitor for a project called the Dublin Metropolitan Railway Bill, which was rejected in the last Session of Parliament, and was a competing scheme with that of the Dublin Trunk Connecting Railway (since passed into law) with which your petitioners are connected, and since that time he has always been most unfriendly to the scheme of the Dublin Trunk Connecting Railway Company. That

the said Richard Deane Kane was personally hostile to the passing of the pending bill into law, inasmuch as he alleged that it would materially injure certain property of his own; that had your petitioners' solicitor not left the room in obedience to the order of the committee, he would have informed his counsel of these last-mentioned facts, as well as of other matters within his knowledge concerning the feelings of the said Richard Deane Kane, with reference to the bill before the committee, of which petitioners' counsel were wholly unaware. That upon your petitioners being readmitted before the committee, they declared the preamble of the bill had not been proved. That your petitioners were imposed upon by the said Richard Deane Kane in volunteering himself as a witness and urging that he could give evidence in their favour, and they aver that his answers as to the possibility of enlarging the existing Dublin and Drogheda Station, and as to the unremunerative character of the line are wholly untrue, as your petitioners are and were, if it had been necessary, prepared to prove. That your petitioners were prepared with much further evidence on these two points, and only omitted to call witnesses to give the same, in order not to weary the committee. That your petitioners' counsel were not only taken by surprise, but entirely deceived by the conduct of the said Richard Deane Kane; and your petitioners while they do not question the decision of the committee after the evidence so given by the said Richard Deane Kane himself, submit that the testimony given under such circumstances and when there was no opportunity of rebutting it, was calculated to mislead the committee and cause a failure of justice. Your petitioners, therefore, humbly pray that your Right Honourable House will, in order to prevent such miscarriage of justice be pleased to order that the "Dublin Trunk Railway (Sackville-street Extension) Bill, 1865," be recommitted to the same committee, or to such select committee of your Lordships' House as your lordships may be pleased to appoint. John O'Meara, Thomas White, Edward N. Burgess;" meaning thereby that the plaintiff with intent to betray the promoters of said bill and to defeat said bill by giving evidence injurious to the project, and which had been preconcerted between the plaintiff and the opponents of said bill, treacherously induced said promoters to produce plaintiff as a witness in support thereof; and also that plaintiff having been produced as a witness by said promoters gave evidence adverse to said project from instructions which had been previously furnished by him to the opponents of said bill.

The fourth count omitted the innuendo in the third. The defendant pleaded, with other pleas, the following, which were demurred to; 2. And for a further defence to the first, second, third, and fourth counts of the summons and plaint, the defendant says that before the publishing by the defendant of the said alleged defamatory matter in the said counts, respectively, complained of, there was depending in the House of Lords a certain bill, entitled the Dublin Trunk Connecting Railway (City Extension) Bill; and that said bill was referred to a Select Committee of said House; and that said bill was opposed by the Corporation of Dublin, who appeared before the said

committee by their counsel and agent, and that the passing of the said bill and the inquiry into the merits of the said measure before the said committee were matters of public notoriety and interest; and the plaintiff gave evidence before the said committee, and that the said bill was, after hearing the case of the promoters and opponents thereto, rejected by the said committee; and that the proceedings before the said committee and the evidence of the plaintiff were matters of public notoriety and discussion; and that the alleged defamatory matters in the said counts, respectively, complained of were and are fair and *bona fide* comments by the defendant on the conduct and evidence of the plaintiff on the occasions therein referred to, and were published by the defendant, *bona fide*, and without malice; and that when he published the said several matters he believed them to be true.

5. And as a further defence to the said first count of the said summons and plaint, the defendant says that before the publishing by the defendant of the said alleged defamatory matter in the said first count complained of, there was depending in the House of Lords a certain bill, entitled the Dublin Trunk Connecting Railway (City Extension) Bill; and that said bill was referred to a select committee of the said House; and the said defendant avers that the said select committee was a public court of justice; and the defendant says that the said committee sat on the fifth and sixth days of April, 1865, respectively, in a committee-room of the House of Lords in London, and certain proceedings in reference to and concerning said bill were thereupon had upon the said fifth and sixth days of April, 1865, respectively, by and before the said committee in the said public court, the said committee having lawful and competent authority to inquire into and determine upon the merits of the said bill; and the defendant says that the said alleged defamatory matter in the said count complained of was and is a true, fair, just, and accurate account and report of the proceedings so had before the said committee in the said public court as aforesaid, with reference to the said bill, on 6th day of April, 1865, and was published by the said defendant, as he lawfully might as and for such true, fair, and accurate account and report, *bona fide*, and without malice; and that when he published the said matter, he believed it to be true.

The sixth defence pleaded to the second count was similar to the fifth defence pleaded to the first count.

9. And as a further defence to the fourth count of the said summons and plaint, the defendant, by leave of the Court says that, before the publishing by the defendant of the said alleged defamatory matter in the said fourth count complained of, there was depending in the House of Lords a certain bill, entitled the Dublin Trunk Connecting Railway (City Extension) Bill, and that by said bill it was proposed amongst other things to acquire powers to construct a central station in Sackville-street, and to extend the line of the Dublin Trunk Connecting Railway from its then sanctioned junction with the Dublin and Drogheda Railway to the proposed central station; and that the said bill was referred to a select committee of the said House, and that the Corporation of Dublin opposed the said bill and appeared be-

fore the said committee by their counsel and agent; and that the Dublin and Drogheda Railway Company originally presented a petition against the said bill, on the ground that the said line would interfere with their existing station; but that before the hearing of the case of the promoters of the said bill, the said petition was withdrawn, pursuant to an agreement with the Dublin and Drogheda Railway Company, under which the promoters of the said bill submitted to certain conditions by which the said Dublin and Drogheda Railway Company bound themselves, neither directly nor indirectly, to oppose the passing of the said bill; and the said plaintiff was party to and prepared the said agreement, and that witnesses were called by the promoters of the said bill, to prove that the station proposed to be made at Sackville-street would be a great public accommodation, that it would accelerate the postal service in Ireland; that the present station of the Dublin and Drogheda Railway Company was wholly inadequate for the existing traffic, and that it would be quite impossible to enlarge it. That the Dublin and Drogheda Railway Company, Ulster Railway, Dublin and Belfast Junction, and Irish North Western would use the said proposed station in Sackville-street, of which by their chairman the Dublin and Drogheda Railway and Dublin and Belfast and Irish North Western Company by their engineer expressed approval, and that the proposed line of the said promoters would be remunerative, and that thereupon the Corporation of Dublin opened their case in opposition to the case of the said promoters, suggesting amongst other things that the said Drogheda station could be enlarged, and that the proposed line would not be remunerative, and that it would not be used by the Dublin and Drogheda Railway Company; and that in support of this part of their case, said Corporation of Dublin called but one witness, Mr. Neville, the engineer of the said Corporation, and that when the promoters and opponents of said bill had respectively closed their cases, the said plaintiff stated to one — Murphy, Esq. one of the counsel for the promoters, that he could give most important evidence in support of said bill, and in particular as to the use of the said station by the Dublin and Drogheda Railway Company, and which would be certain to satisfy the committee as to the importance of the said project, and that the plaintiff urged that even at that late moment it would be for the interest of the said promoters of the said bill to apply to the said committee to hear the evidence of the said plaintiff, and defendant avers that the solicitor for the promoters of the said bill had left the committee room, and was not present at and did not hear the said statement of the said plaintiff to the said Murphy; and the defendant further avers that the counsel for the said promoters of the said bill in the absence of the said solicitor for the said promoters, relying on the representations so made by the said plaintiff to the said Murphy, applied to the said committee to hear the evidence of the said plaintiff, and thereupon the said plaintiff was examined by Mr. Rodwell, Q.C., and gave the following evidence, that is to say, 899—You are a solicitor to the Drogheda Company? Yes. 900—You are aware of the agreement prepared by our company? Yes. 901—

Now, if this line is passed, are you authorised to state that the Drogheda Company will enter upon fair arrangements for working that line and using it? I think it is very probable if it is made. 902—By a Lord. You think it very probable? Yes; the reason they objected was that they wanted to have a control as they had expended a large sum of money. 903—Mr. Rodwell, I ask you whether you think there is a reasonable probability whether your company are disposed to enter into relations with this company if the line is passed? I have no doubt if the station is made they would. And defendant further avers that thereupon Mr. Pales, Q.C., of counsel for the said opponents of the said bill, produced a paper, and holding the paper in his hand, proceeded to cross-examine the said plaintiff from the said paper; and that the said plaintiff on such cross-examination to the astonishment of the said promoters gave the evidence following, that is to say—904—Is there room enough at the station at the Drogheda to extend it; in your opinion? We have ample ground close to the present station to improve it; but we were delayed very much, owing to the number of rival schemes of last year. 905—There are no clauses either in the bill of last year or of this year, which will enable the company to use the Drogheda station? Oh! they have no power. 906—At present; therefore, there are no facilities for thro' traffic, even with the station built in Sackville-street, proposed by this bill? Not at present. 907—I need not ask you, you cannot take upon yourself to say what facilities will be given by your company? No, I cannot say that; but I think there is very little doubt if a good station were made at Sackville street, they would use it for passengers; but they could not use it for traffic. 908—Your company will have them altogether in their power, the promoters, is not that so? Yes. 909—And you will use that for making the best sum you can? Of course we shall do the best we can for ourselves. 910—From your experience of traffic upon these railways, do you think that the proposed line will pay? I should think not, certainly, according to my experience. I have had a great deal of experience for 20 years, and I know what the expense of purchasing land is. 911—By a Lord. Are your company in the position that you are waiting to see whether the station will be subservient to your purposes before you enlarge your own station? No. In the last two or three years several metropolitan schemes have been projected in Dublin, and of course if any of these were passed, our improvement would go for nothing. There are fifteen acres of ground there. 912—Is it probable that if this station in Sackville-street should not be built you would enlarge your own station? We must do it; at present it is very inconvenient, it is very small. And the defendant avers that the said evidence so given by the plaintiff on his cross-examination as aforesaid was damaging and injurious to the interest of said bill; and the defendant avers that while the committee were deliberating, the said promoters of the said bill ascertained that previous to speaking to the said Murphy, Esq., the said plaintiff had been in communication with one R. M. Muggerridge, Esq., the Parliamentary Agent of the said opponents to the said bill; and

that the said Parliamentary Agent for the said parties had taken down on paper the evidence of the plaintiff, and had furnished the same to the counsel for the said opponents to the said bill, with the intention of calling the said plaintiff as a witness in support of the case of the said opponents; and the defendant further avers that the paper so used by the said counsel for the said opponents to the said bill for the cross-examination of the said plaintiff was the same paper upon which the said agent of the said opponents had taken down the evidence of the said plaintiff, and which had been handed by the said agent of the said opponents to the said counsel for the said opponents as aforesaid; and defendant further avers that the promoters of the said undertaking also ascertained during the deliberation of the said committee, as was the fact, that the plaintiff was quite aware of the nature of the case of the said promoters, and of the points which had been relied upon by the opponents; and defendant further avers that plaintiff was present in the said committee-room during the greater part, if not the whole, of the investigation of the said committee; and that at the time he volunteered to give said evidence in favour of the said bill, he was quite aware that a principal part of the case of the said promoters was and that it was most important for the said promoters of the said bill to prove before the said committee that the existing station of the Dublin and Drogheda Railway could never be enlarged, and that it must ultimately be brought farther into Dublin, and that the proposed line if sanctioned would be a remunerative concern; and the defendant avers that the plaintiff at the time he so volunteered to give said evidence concealed from said promoters an opinion which he then entertained as to the possibility of enlarging the said Dublin and Drogheda Station, and the remunerative character of the said proposed line, and that he the said plaintiff had made statements to the said Parliamentary Agent of the said opponents injurious to the case of the said promoters; and defendant avers that the plaintiff was solicitor for a project called the Dublin Metropolitan Railway Bill, which was rejected in the then last session of Parliament, and which was a competing scheme with that of the Dublin Connecting Trunk Railway, with which the said promoters of the said Dublin Trunk Connecting Railway (City Extension) Bill were connected, and since the rejection of the said bill as aforesaid, the plaintiff was and is most unfriendly to the scheme of the said Dublin Trunk Connecting Railway Company, and was personally hostile to the passing of the said Dublin Trunk Connecting Railway (City Extension) Bill into law, inasmuch as plaintiff alleged that it would materially injure certain property of his; and defendant avers that had the solicitor of the said promoters not left the said committee-room, he would have informed his counsel of the last-mentioned facts as of other matters within his knowledge concerning the feelings of the plaintiff with reference to the said pending bill, of which said counsel were wholly unaware; and defendant avers that the promoters of the said bill were imposed upon by the said plaintiff in volunteering himself as a witness for and representing that he could give evidence in favour of the said bill, and by the evidence so

Given by the said plaintiff as aforesaid; and the defendant avers that the answers of the plaintiff as to the possibility of enlarging the existing Dublin and Drogheda Station, and as to the remunerative character of the said proposed line so embodied in the paper so drawn up by the said Parliamentary Agent as aforesaid were and are wholly untrue, and that they were at the close of their said case prepared with further evidence as to the enlargement of the said Dublin and Drogheda Railway, and the remunerative character of the said proposed line, and omitted to call witnesses to give said evidence, in order not to weary the said committee; and the defendant avers that the counsel for the promoters of the said bill were taken by surprise, and were entirely deceived by the conduct of the said plaintiff; and the defendant further avers that the said evidence given by the said plaintiff under the circumstances as hereinbefore mentioned, and when there was no opportunity of rebutting the said evidence, was calculated to mislead the said committee and to cause a failure of justice; and the defendant avers that he did publish the alleged defamatory matter in the said fourth count complained of, as he lawfully might, and for the cause aforesaid.

*Boyd* (with him *S. Ferguson*, Q.C.) for the demurrer.—As to the second defence, this is not a comment at all. The plaintiff published a petition which never was presented.—*Popham v. Pickburn* (7 H. & N. 891). Neither is this libel within the rule which means a public comment on a public man. *Gathercole v. Miall* (15 M. & W. 319); *Davison v. Duncan* (7 El. & Bl. 220). This committee was not a court of justice. In all the cases in England this question has been raised under the general issue, and it is therefore difficult to get a precise parallel as to the pleading. The defendant would have to prove that he published the libel with the intention of giving the public information which he does not allege in this plea. It omits the material allegation. As to the 5th and 6th defences, a court of justice can only be created by patent or by Act of Parliament. These are reports of *ex parte* proceedings.—*Rex v. Fisher* (2 Campbell 563); *R. v. O'Brien* (Cooke & Alcock 128); *Howe v. Silverlock* (9 C. B. 20); *Saunders v. Mills* (6 Bingham 213); *Duncan v. Thwaites* (3 B. & C. 556). Another objection is that the pleas are officious.—*Lewis v. Levy* (El. Bl. & El. 537). The committee had made their report; the members of it were then sitting in another committee. As to the ninth defence, which is only pleaded to the fourth count, it assumes to justify the whole, and it only justifies a part and is therefore bad. The defendant was bound to justify also the matter of aggravation. *Helsham v. Blackwood* (11 C. B. 111); *Morrow v. McGaver* (1 Ir. C. L. R. 579); *Brabazon v. Potts* (8 Ir. Jur. N. S. 6).

*Heron*, Q.C. and *Monahan* in support of the pleas.—As to the second plea the questions raised are what cannot be decided on demurrer and must go to the jury. That an alleged libel is a fair comment, does not mean a comment on nothing but on what actually took place. The plea involves a statement of a set of facts; it involves a statement that enough is true to make it legitimate for the defendant to

comment as he did. The defendant may publish in many ways. He may adopt what Mr. Rodwell said here, and say that is a fair statement of what occurred. He may say "every word that Mr. Rodwell uttered, I adopt, and say it is true." That is one mode of publishing, and till the mode of publishing is known, the Court cannot come to a decision, therefore it is for the jury.—*Cooper v. Lawson* (8 A. & E. 746). This plea of fair and *bona fide* comment is scarcely known in England, because the question arises on the plea of "not guilty."—*Lord Lucan v. Smith* (1 H. & N. 481; 26 L. J. n. s. Ex. 94); *Clinton v. Henderson* (13 Ir. C. L. R. App. 43); *Walker v. Brogden* (19 Scott's Rep. N. S. 659); *Nixon v. Harvey* (8 Ir. C. L. Rep. 446) decided that "no libel" is in Ireland a good plea. The question of "no libel" is for the jury, ever since Fox's Act.—*Campbell v. Spottiswoods* (3 Best & Smith 769). This privilege is not confined to the case of persons holding public positions. In *Paris v. Levy* (9 C. B. N. S. 342) the plaintiff was a dealer in marine stores. *Kelly v. Tynling* (14 W. R. 51). It is objected that this defence does not go on to say the publication was for the benefit of the public; but it is not true that this privilege is confined to comments in a newspaper published for the benefit of the public. This right to criticize belongs to every citizen. Where it is a question of true report or untrue report that distinction might be taken, but not where it is a question of fair comment.—So *Campbell v. Spottiswoods*. It is objected that the occasion was not one of public notoriety and interest, but that is a question of fact. The committee represented the House of Lords. The business being transacted affected one of the most important cities in the empire.—*Travers v. Potts* (15 Ir. C. L. R. App. 11). As to the fifth and sixth defences, this committee was a public court of justice.—Coke 4th Inst. 23 "Of Judicature." *Lake v. King* (1 Saunders's R. 131 b). It will not be intended that we published the statement to those to whom we were not justified in publishing it. This committee were not *functi officio*. There is no averment that they had reported and at the time they had not reported. The law on this question is in a state of flux. Each case goes a little farther than the one before it. The last, accordingly, goes farthest. It was objected that this was a preliminary proceeding. That is disposed of by *Lewis v. Levy*. As to the 9th defence the question is more a matter of construction of what the defence means and what the petition means, than a question of authority.—*Edwards v. Bell* (1 Bingham 403); *White v. Tyrrell* (5 Ir. C. L. R. 498).

*S. Ferguson, Q.C.* in reply.—To say that a particular individual committed the Road Murder would not be a comment. A history is not a "fair comment." The defendant should also have shown that the conduct of Kane was a matter of public interest. The plea alleges that the evidence of Kane was a matter of "public notoriety and discussion;" but the fight between Sayers and Heenan was a matter of public notoriety. The plea of "fair comment" is an extension of the principle of pleading privileged communication. As to the 5th and 6th defences, the House of Lords is a court of justice only acting so

far as judicially to make reports. The statements of a counsel in a court of justice of what he will prove may not be published by himself. The committee had declared that the preamble of the bill had not been proved.—*Delegal v. Highley* (3 Bingham's N. C. 950).

*Cur. adv. vult.*

May 8.—MONAHAN, C.J. having stated the pleadings proceeded to deliver the judgment of the Court.

The question was argued whether Kane's conduct and evidence were properly the subject matter of comment, so as that the defendant might justify on the very old ground of the alleged libel being a comment on a public man or one filling a public situation. It was argued at considerable length that Kane's evidence and conduct were not. Several cases have been referred to. The question is whether the evidence of a witness examined in a public court (because it was conceded by Mr. Ferguson that a committee of the House of Lords hearing or conducting an inquiry referred to them constitutes one of the highest courts in the realm) whether that evidence given on oath is of that public interest and importance as exposes it to *bona fide* comments. The case of *Cooper v. Lawson* (8 A. & E. 746) has been referred to. We think that on principle that case decides that conduct and evidence such as those of Kane here are properly the matter of public comment. A petition was presented. In order to sustain it it became necessary that security should be given, and one of the securities proposed was Cooper, the plaintiff. He was objected to on the ground that he had not sufficient property. He made an affidavit in which he showed that he had property, and had sufficient means for the security required. The sitting members asked for time to answer that affidavit; the committee declined to give time and disposed of the case, and ultimately decided that he was a proper person. The Times newspaper published an account of the whole proceedings in detail, the affidavits that he had no property to authorize the petition; but there were strong comments on this tailor being unconnected with the borough, and the question was asked what could have induced this tailor to come forward to expose his means to the public. It is plain, said the Times, he must have been bought. He brought an action for libel. The plea stated that a portion of the matters were true, in fact, and so far as they were not, that the libel was a fair comment in relation to those proceedings. The case was tried. Some charges were proved, but no proof was given of his being hired, and the plaintiff had a verdict. The question came back to the Court, Lord Denman having left the question to the jury whether the imputation of being hired was a fair comment from the circumstances. The jury found that it was not. The Court gave judgment that, no doubt, the plaintiff's conduct in the situation he held was conduct of such public nature that if the libel were fair comment, the thing would have been justified. There was recently in this country the case of *Travers v. Potts*. The facts were these:—Miss Travers brought an action against Lady Wilde for libel, and she got a verdict with a farthing damages. Saunders's Newsletter set forth a report of the pro-

ceedings and commented on them, and an action was brought against Saunders, and it was pleaded that the words were a fair and *bona fide* comment upon the said action. The jury were asked to say if they were of opinion they were a fair comment and made *bona fide*, and ultimately the defendant got a verdict. If that case be rightly decided, it shows this, that the conduct of a plaintiff who was being examined for herself is the subject matter of a fair comment. We have no doubt that Kane filled such a situation as justified a fair comment on his conduct. But then it is said there is no authority for a private individual, such as Mr. Mulvany would appear to be, to publish this statement. It is not alleged that he published it in a newspaper or pamphlet. All that is said is that he published and circulated the libel. It has been argued by the plaintiff's counsel that there is no authority that it is privileged on the ground of being a fair comment. We have not been referred to any case, but on principle, neither Judge Keogh nor myself have any doubt that the right to comment on acts of public men—(because once you come within the rule he is on a par with judges, generals, with public men) that it seems to follow as a necessary consequence that every one has a right to discuss the conduct of public men. We do not doubt nor are we afraid of making a precedent in establishing the right of every one to discuss the conduct of every public man. Therefore the circumstances of publication not being shown in the defence will not make it bad. It is said by the counsel for Mr. Kane that this is not a comment but a statement of several matters of fact. True it is, but it is also an inference from these matters of fact. Assuming that justified, was the pleader bound to separate what was comment from what was statement? We think not. The precedents are all the other way, as in *Earl of Lucan v. Smith* (1 H. & N. 481) where the words complained of charged the plaintiff and Lord Cardigan with misconduct, libelling them to an extreme degree. The form of the plea was this that Lord Lucan was a general, that Lord Cardigan had also a command, that they conducted themselves so that a commission of inquiry was issued, that these things were matters of public interest, (but there was not a particle of what the misconduct was) that the article was a compound article, that the whole was a fair comment on the conduct of Lord Lucan and the subject referred to, and no one doubted but that that was the proper form of pleading. In this country there is a case of *Clinton v. Henderson* (13 Ir. C. L. R. App. 43). The action was brought by a constable. The plea was that the letter above mentioned (which contained various acts and various comments on them) that that letter was a fair and *bona fide* comment upon the several matters therein referred to. The plea was objected to, but on what grounds? That it stated the facts without averring they had existence in fact, and the Court ordered that plea to be amended and it was amended. There it was exactly in form as the present, that the libel was a fair comment on the conduct of the plaintiff; and the same occurred in *Travers v. Potts*. There was a short plea which did not go into facts, but in terms already read alleged that the statement complained of was a fair comment. Therefore we

are of opinion on this portion of the case that there is no objection in form and really on principle too. We all know that whether libel or not libel is a question of fact. The jury must decide under Fox's Act what is or what is not a libel. The meaning of this plea is this is no libel. The case must be left to the jury. The defendant undertakes a very onerous task, but just as in that case before Lord Denman, in which the party charged that the man was hired to become a security, in the same way the question here will be whether all this matter was fair comment, (which must be given in evidence) was fair comment, as in the case of the public officer. Mr. Ferguson referred us to a case of *Walker v. Brogden* (19 C. B. n. s. 65) which is not a very satisfactory case one way or the other; but it is plain the decision does not run counter to our's here. The action was brought by Mr. Walker, a clergyman. There were two libels, two different articles, one was a letter to the editor giving an account of the clergyman turning a churchwarden out of his pew. The second libel was a letter to the editor, beginning—"Our vicar has committed a slight mistake," &c. [His Lordship stated the pleadings and the observations of Erle, C.J., and Byles, J.] This has no reference to a case in which there is an averment that the party did such and such acts, and that the libel is a fair comment on such. Therefore it is no decision where the party had done acts of a public character, and the libel was a fair comment on such acts, and if it were, it would be running counter to those I have referred to, where it was left to the jury to say if the libel was a fair comment. We are of opinion that the second plea is a good one, and the demurrer to it must be overruled. The next question is very different. The fifth plea states that the alleged libel was a fair report, that a petition was presented in the House of Lords, that it was referred to a committee, that certain proceedings were being held on the 5th April and the following day, that the libel was a true, fair, and accurate report of what occurred on this occasion, on this 5th or 6th April. The next plea is also a plea of justification of the matter contained in the second count, the only difference being that one count contains an innuendo, and the other does not. We must look at the whole record, and it appears to be thus, that on the 5th April the Committee examined witnesses, investigated the whole matter, retired, came to the conclusion that the bill was to be rejected, and declared the preamble not proved when strangers were re-admitted. It does not appear that the Committee had reported. Mr. Rodwell, the counsel for the Promoters, comes before this Committee and makes a speech—"I think it is my duty to inform your Lordships of the circumstances;" then he goes on to allege details as to misconduct and fraudulently deceiving them, and mentions all these matters, and concludes—"I do not quarrel with what you have done, you could not have done otherwise, Kane being examined; we cannot question your decision, but we were so much deceived by Kane's conduct that we think it only respectful to inform you we will make a motion in the House to have the bill recommitted." Mr. Palles intervenes, and says, it is not true, and the question is if a speech of counsel made in that way, after the case has terminated, the

evidence not being given which justified the speech—whether that is a thing, which can be honestly and fairly reported, and justified as a fair and candid report of a proceeding in a Court of Justice. It was stated that public courts are public property, and everything, if honestly and fairly reported, is privileged, and no matter how hard it may press on individuals, speeches of counsel and evidence, if fairly reported, are privileged. But we cannot hold that a publication giving a libellous speech and not the evidence, and given without an object in the prosecution of a cause, we cannot hold that that is a report of proceedings in a Court of Justice within the rule. It is hard to find a case exactly in point, but *Saunders v. Mills* (6 Bingham, 213), may be referred to as bearing on this. You must report the proceedings, and you may report the speech of counsel as a part of them; or if a proprietor of a newspaper publishes proceedings conducted *de die in diem*, you may continue them, but there is no allegation here that this speech was justified by the facts. Therefore, we come to the conclusion that the demurrer to these two defences, the fifth and sixth, must be allowed. Then as to the ninth plea, pleaded to the last count, which contains the petition without an innuendo; it purports to be a libel of justification, and every one knows a plea of justification must justify all the libellous matters contained in it, i.e., where it purports to be pleaded to the entire. I must call attention to a portion of the libel for the purposes of this demurrer. It alleges that the Promoters of the Bill discovered that Mr. Kane had in the course of that day been in communication with Mr. Muggeridge, the Parliamentary agent of the Corporation; that he had given to Mr. Muggeridge the heads of the evidence he could give against the Bill; that Muggeridge took down the evidence in writing, and that amongst it was some of the opinion of Kane which on cross-examination Mr. Pales got out, and which had the effect of throwing out the Bill; and that Kane concealed the fact of giving his evidence, and the fact of his opinion, from the counsel on whom he pressed his evidence; but a prominent part of the libel is that he not merely concealed the opinions he had formed, but that he had communicated those opinions on the same day, a few hours before, to the opposite party; in other words, that Kane gave evidence hostile to the parties, and that he concealed the evidence so given from the Promoters of the Bill, and induced them to examine him. The plea of justification purports to be pleaded to the entire count, but it does not justify the statement that the evidence so hostile and taken down in writing, it does not allege that that was the evidence given. It does allege that Kane entertained hostile feelings to the Bill, and that he concealed them, but it does not justify or show facts to show these were the facts he had communicated to Muggeridge. We are of opinion that this aggravates the libel very much, to say that so shortly as within an hour or two he had given the hostile information to the opposite party. The defendant should have justified the entire. We do not give any opinion as to whether that portion can be separated from the rest of the libel, but if the pleader was of that opinion he should have purported only to plead to that part, and not to the entire. We have come to the

conclusion that the second plea is good, but that the other ones are bad. There will be judgment for the defendant on the second plea, and for the plaintiff on the other pleas.

*Judgment for the defendant on the second defence, and for the plaintiff on the fifth, sixth, and ninth defences.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

KEARNEY v. PRICE.—May 8.

*Demurrer—Discharge of prisoner against his will—Bankrupt and Insolvent Act, 1857.*

*A., a prisoner for debt, brought an action against B., the governor of a gaol, for discharging him from prison against his will, whereby his petition in bankruptcy pending was discharged, and he suffered damage. Held, on demurrer to the plaint, that it must be amended as not averring that defendant had notice or knowledge of the petition pending in bankruptcy.*

THIS was an action against a governor of a gaol for discharging a prisoner against his will. The facts will appear from the pleadings, which were as follows:—

Summons and plaint:—Victoria, &c., to the said Henry Price, greeting. Henry Price, the defendant, is summoned to answer the complaint of Peter Kearney, the plaintiff, who complains that upon and at the time of the committing of the grievances hereinafter complained of, plaintiff was a prisoner in the custody of the governor of Kilmainham gaol, in the County of Dublin, under a writ of *capias ad respondendum*, at the suit of John M'Aneeny, to levy the sum of £30 2s. 6d., and whilst the plaintiff was in such custody as aforesaid, plaintiff caused to be filed a petition under the Act for the relief of insolvent debtors, entitled, "The Irish Bankrupt and Insolvent Act, 1857," and said petition was pending at the time of the committing of the grievances hereinafter mentioned, and afterwards the said John M'Aneeny caused to be lodged with defendant an order for the discharge of plaintiff from detention under said writ of *capias ad respondendum*, and plaintiff avers that said order of discharge was given by said detaining creditor after the filing of said petition of insolvency, and previous to the final adjudication thereon, and that the said plaintiff, on the same being notified to him, did forthwith signify to defendant his, the said plaintiff's, desire that such order of discharge should be void, nevertheless said defendant wrongfully, in breach of his duty in that behalf, acted upon said order of discharge, and wrongfully, and by breach of his duty, discharged plaintiff from such custody as aforesaid, and plaintiff avers that by reason of the premises the said petition and proceedings in insolvency became abortive, and said petition was dis-



missed, and plaintiff avers that he had incurred considerable costs and charges in and about said insolvency proceedings which so became abortive as aforesaid, and plaintiff was, by reason of the premises and said wrongful act of said defendant, deprived of the benefit and relief of such petition of insolvency to plaintiff's damage of £200; and plaintiff prays judgment against said defendant, &c.

**Defence and demurrer:**—The said Henry Price appears and takes defence to the action of the said Peter Kearney, and says that plaintiff did not, on the order of discharge in the summons and plaint mentioned being notified to him forthwith, signify to defendant his, the said plaintiff's, desire that such order of discharge should be void as summons and plaint stated; and for a further defence (by leave of the Court) defendant, admitting that plaintiff's said petition was dismissed, and that plaintiff sustained the alleged damage, says that he did not sustain the said loss and damage by or in consequence of the wrongful acts of defendant as alleged, and therefore he defends the action; And the said Henry Price, defendant, (by leave of the Court) further says that the summons and plaint does not disclose any cause of action good in substance, because it does not show how the damage of which plaintiff complains arose from the act of defendant in discharging him as therein mentioned, and does not show that any assault was committed by defendant on plaintiff to remove him from the prison, and does not show that defendant in any way compelled or forced plaintiff to leave the prison, and does not set forth any facts to show any wrong done by defendant to plaintiff; and because it is consistent with the facts stated in the summons and plaint that defendant may have merely told plaintiff that he was at liberty to leave the prison if he wished so to do, and that plaintiff may have left defendant's custody of plaintiff's own free will, and is in other respects insufficient.

**J. Murphy** (with him *Jellatt*, Q.C.) opened the demurrer.—This is an absurd and romantic summons and plaint, and cannot be sustained. There was no duty cast on the governor, and therefore no breach of duty committed by him. The plaint does not aver that the governor turned plaintiff out of the gaol, and he may have merely walked out of himself.

**M. Keena**, contra, in support of the plaint.—If an Act of Parliament provides that a certain thing shall be done, it becomes the duty of everyone to obey it, and if it directs that a certain person shall do a certain thing, an action will lie against that person if he neglects to do the act commanded. Under the Bankruptcy Act a prisoner must be in actual custody, otherwise his petition will not be heard—hence the damage to plaintiff here. By reason of defendant's conduct plaintiff's petition was discharged. [*Hughes*, B.—There is no duty cast on defendant by the Act unless he had notice of prisoner's petition in bankruptcy. Should you not then aver that notice in your plaint?] I admit that if defendant's knowledge of the petition pending in bankruptcy were necessary, the plaint is bad as not averring that knowledge, but the statute does not contemplate anything of the kind. 20 & 21 Vict., c. 60, s. 205, is quite clear, and the governor must be taken to have been aware of that section. The dis-

charge is void if the prisoner wishes it to be so, and says so to the gaoler. A plain duty was cast on the governor, which he has violated, and therefore an action lies against him, whether damage has resulted to plaintiff or not.—*Broom's Legal Max.* 194, and the authorities cited there; *Ferguson v. Earl of Kinnoull* (9 Cl. & Fin. 279), and the judgment of Lord Lyndhurst, C. It is a contradiction to say that the prisoner first refused to go, and then walked out of his own free will. I have brought my plaint within the words of the Act, and cast a duty on the gaoler, and I have so averred.

**Jellatt**, Q.C., in reply.—When an order is given for the discharge of a prisoner by a creditor in a *ca. ad.* the sheriff or governor is bound to discharge him. In an action like the present it is not enough to aver that defendant had violated his duty, but the plaint must show what the duty was, and how he violated it.

*Cur. adv. vult.*

The judgment of the Court was delivered by **Prior**, G.B.—The summons and plaint in this case was for an alleged breach of duty on the part of defendant, founded on s. 178 of the Bankruptcy Act. Section 205 provides as follows—[His Lordship read the section.] It is manifest that this was to prevent proceedings by creditors maliciously disposed towards an insolvent who might be inclined to terminate his custody against his will. There is no allegation in the summons and plaint that defendant had notice of the insolvency proceedings, or in any way became aware of them. It was argued by defendant's counsel that no action would lie here for the discharge of the prisoner against his will, and there was some criticism on the manner in which the discharge took place; but that argument did not satisfy me that the demurrer could be sustained on that ground; but we are of opinion that the absence of an allegation in the plaint that defendant knew of the petition pending in bankruptcy is fatal to it. This was first mentioned by my brother *Hughes* in the course of the argument; it was not relied on in the demurrer book. It was contended for plaintiff that by s. 205 the discharge becomes void when the prisoner signifies his desire to remain in custody, but the question here is not whether the discharge is void or not, but whether defendant can be made liable when left in ignorance of a fact by which a duty was alleged to have been cast on him. Under section 205 the mere wish of the prisoner that his discharge should be void, does not cast upon the governor the duty of allowing him to remain in prison, but it is necessary besides that a petition shall have been filed and pending in bankruptcy. Irrespective of authority we would be inclined to think that it would be a solecism to hold that a gaoler should be liable for discharging a prisoner in compliance with an order so to do. In the absence of an allegation in the plaint that defendant knew of the petition in bankruptcy, we must assume that defendant did not know of it. The rule in pleading is clear that when a plaintiff knows some fact which defendant has not an equal opportunity of knowing, plaintiff must set out that fact in his pleading.—*Chitty's Pleading*, 227; *Comyn's Digest*, c. 73;

Archbold's Practice, 90, 91. There was no obligation cast upon defendant to search the files of the Bankruptcy Court. No direct authority was cited on either side, but there is a class of cases analogous to the present, where, in order to make a sheriff liable to the landlord under 8 Anne, c. 14, extended to Ireland by 9 Anne, c. 8, for taking and selling the goods of a tenant under a *fi. fa.* without retaining a year's rent, it is necessary that the sheriff be aware by some means that rent is due by the tenant to his landlord. The cases on this subject are—*Waring v. Deuberry* (1 Str. 97); *Pulgrave v. Windham* (1 Str. 212); *Smith v. Russell* (3 Taunt. 400); *Lane v. Crockett* (7 Price, 666); *Henchett v. Kimpson* (2 Wils. 140); *Andrews v. Dixon* (3 B. & Al. 645). Where, from the nature of the office which defendant holds, there may be inferred a knowledge on his part of facts with regard to which under the Act a duty is imposed on defendant, it is not necessary then to aver the knowledge of such duty on the part of defendant.—*The King v. Holland* (5 Term. R. 607). Plaintiff contends that as section 205 gave him a power to make void his discharge, but only where a petition is pending in bankruptcy, defendant must be presumed to have known of the pendency of the petition, for that he must know the law; but we must assume that plaintiff did not apprise defendant of the existence of the petition, for if he had done so, nothing would have been easier for him than to have alleged it in the plaint. The refusal by a prisoner to be discharged is not a common occurrence, and when the prisoner abstains from giving the reason of his wish to remain in prison, suppressing the facts within his own knowledge, the governor may have ascribed prisoner's wish to perversity on his part, or a desire to embarrass the governor, or to make lodgings of the prison, or in fact to any other reason whatever. To yield to plaintiff's argument would be to hold that defendant knew of sec. 205, also that he knew of the petition in bankruptcy by the simple expression of plaintiff's wish to remain in prison, and thus unduly to extend the maxim—“*Ignoratio juris quod quisque scire debet neminem excusat.*” We think the summons and plaint cannot be sustained, but we will allow plaintiff to amend, otherwise judgment must be given for defendant.

\*[BEFORE FITZGERALD, HUGHES, AND DEASY, BB.]

GUNNING v. SKERRETT.—May 23rd.

*New trial motion—Ejectment on title—Motes and Bounds.*

A. brought an ejectment on the title against B. for the recovery of the lands of Kilgare, or Kilgariff. B. took defence to all except 64A., which he admitted had been demised by lease in 1770: the term in the lease had expired, and plaintiff was the assignee of the reversion. The question was, whether the whole denomination of Kilgariff, containing 283A. Or. 18r. or only 64A., passed by the lease of 1770. There

was conflicting evidence at the trial, and the jury found for plaintiff by direction of the Judge. Held on motion to enter verdict for defendant, or for a new trial, that there must be a new trial, but that no costs should be given.

THIS case was tried at the last Summer Assizes for the Co. Galway before Deasy B. It was an action of ejectment, brought for the recovery of the lands of Kilgare, or Kilgariff, with the unprofitable lands and common thereunto belonging, as now in the possession of John Locke Skerrett and his undertenants, in the parish of Kilcoona, barony of Clare and Co. of Galway, claiming title from May 2nd, 1864. Defendant's amended defence, filed in pursuance of an order of Mr. Justice O'Brien in Chamber, bearing date July 11th, 1865, was for all the said lands of Kilgare or Kilgariff, with the said unprofitable lands and common, save and except all that part or portion of the said lands containing 64 acres, Irish plantation measure, colored red on the Ordnance Sheet, No. 56, of the Co. Galway, and which is marked with the initial letters J. L. S., and which said last-mentioned portion was comprised in and demised by a certain indenture of lease dated Sept. 26th, 1770, made between one Robert French of the one part, and one Dominick Skerrett of the other part. Plaintiff claims, as assignee of the reversion of said last-mentioned lease, the term granted by which has expired. The question in the case was, whether the whole denomination of Kilgariff, which appears by the Ordnance Survey to contain 283A. Or. 18r., statute, or only 64A., Irish plantation, passed by the said lease of September 26th, 1770. Plaintiff gave in evidence a patent of 16 Car. II., which was a patent to Colonel Legg of (*inter alia*) “Kilgare, one quarter, with the appurtenances, containing 64A. useful lands, be it more or less, situated in the parish of Kilcoona, barony of Clare, and Co. Galway.” Also the above-mentioned lease of Sept. 26th, 1770, by which Robert French demised to Dominick Skerrett “All That and Those the farm and land commonly called and known by the name of Kilgare, containing 64A., or thereabouts, Irish plantation measure, pursuant to the map thereunto annexed, be the same more or less, and then and for several years last past in the tenure, occupation, and possession of him the said Dominick Skerrett as tenant, to the said Robert French, for certain lives therein mentioned, and for 31 years from the death of the survivor of them, at the yearly rent of £21 14s. Od.” This lease expired on May 2nd, 1864. Also a conveyance, dated May 21st, 1847, from Robert French and others to plaintiff, of the reversion expectant on the determination of said lease of Sept. 26th, 1770, in the lands comprised therein. The lease, when produced, had no map annexed to or delineated upon it. Plaintiff's evidence was not material. The only other witness examined for him was Mr. Samuel Roberts, a civil engineer, who produced a document purporting to be a map of the townland, and deposed that the whole townland of Kilgariff is partly arable, partly scrubby pasture, mixed with rock and brushwood. That the arable land is interspersed throughout the whole townland, and this applies to the 64A. marked red in the Ordnance map, and referred to in the

\* Pigot, C.B., was absent from indisposition.

defence. That that portion fairly partakes of the character of the whole townland. Plaintiff's case then closed, and defendant's counsel contended that plaintiff was only entitled to the 64A. Irish plantation measure, demised by the lease of 1770. For the defence, Peter Richard Skerrett, one of the defendants, was first examined. He proved the family pedigree, showing that he is brother to the co-defendant, John Locke Skerrett, who is heir at law of Dominick and Edmund Skerrett, grantees in the patent of 30 Car. II., referred to below, and named as owners of separate portions of Kilgariff in the extract from the Book of Distributions mentioned below. On cross examination, he stated that a denomination of land adjacent to Kilgariff, called Lymnagh East, is the property of his brother, the co-defendant, and that another denomination adjacent thereto, called Lymnagh West, which had belonged to his family, had been sold in the year 1811 under a decree of the Court of Chancery. He also proved that he had searched for but could not find the lease of 1770 or the map referred to. Defendant then put in evidence an attested copy of a patent of 30 Car. II., whereby His Majesty granted to Edmund Skerrett, great-great grandfather of defendants (*inter alia*) "in the quarter of Kilgariff, 12A., profitable land, plantation measure, in the barony of Clare and Co. Galway, together with (*inter alia*) the woods, underwoods, meadows, pastures, feedings, turbary, furze, heaths, moss, mountains, moors, marshes, and the like, thereunto belonging or in any wise appertaining to be held in fee and common solage, yielding and paying for the said lands in the quarter of Kilgariff, making 19A. 1R. 30P., plantation measure, the yearly rent of 2 shillings and 5 pence;" and to Dominick Skerrett "in the quarter of Kilgariff 76A. profitable land, plantation measure, with unprofitable lands amounting in all to 123A. 0R. 17P., at the yearly rent of 15 shillings and 4 pence 8 farthings." Also an attested copy of the part of the Book of Distributions of forfeited estates, which relates to Kilgariff, by which it appears that Colonel Legg, the grantee in the patent above mentioned, is returned as proprietor of 64A. profitable land, without any unprofitable land; Edmund Skerrett of 12A., like profitable land, and Dominick Skerrett of 76A. profitable land, together with unprofitable lands. Also lease dated Nov. 14th, 1782, whereby Dominick Skerrett granted to Edmund Lynch Athy (*inter alia*), the farm and lands of Kilgariff, at a yearly rent of £250. Also extracts from the Quit Rent receipt book of Galway.

At the close of defendant's case, Baron Deasy intimated that he would direct a verdict for plaintiff, for the whole of the denominations of Kilgariff as claimed by plaintiff, but that he would first leave the following questions to the jury.

- (1). Whether the lands called Kilgare are the same as those called Kilgariff on the Ordnance map?
- (2). Are they the same as those called Kilgare in the patent of 18 Car. 2?
- (3). Is there more than one denomination of Kilgare in the barony of Clare?
- (4). Is there any part containing 64 acres Irish, distinct from the rest of the denomination?
- (5). Was the whole denomination in the possession

of Dominick Skerrett at the date of the lease as tenant to Robert French, or how much had he in his possession as tenant to Robert French?

(6). Was there a distinct denomination called Kilgare, or Kilgariff?

The jury found the 1st and 2nd questions in the affirmative; the 3rd, 4th, and 6th, in the negative; and as to the 5th, they did not agree. The learned Baron then discharged the jury from any finding on said 5th question, and directed a general verdict for plaintiff, with liberty to defendants to move to have it changed into a verdict for them, either for the whole quantity over the 64A. marked red, or such part or proportion thereof as the Court may think them entitled to; the Court to be at liberty to draw inferences of fact notwithstanding the finding of the jury.

Carleton, Q.C. (with him Morris, Q.C.) now showed cause against the conditional order obtained by defendants, in pursuance of the leave reserved by the learned judge at the trial, that the verdict had for plaintiff be set aside, and the verdict be entered for defendants, or that the verdict be set aside, and a new trial had on the grounds of misdirection of the Judge at the trial.

When the demised premises have been set out by metes and bounds, even if there be more than 64A. in them, the lessee or grantee—plaintiff here—is entitled to all.—*Bacon, Tracts*, 102, 103; *Doe d. Smith, v. Galloway* (5 B. and Ad. 51); *Lord Willoughby v. Foster* (1 Dyer, 80 b.); *Lessee Dawson v. Bell* (3 Ir. Law R. 140); s.o. in *Cam. Scac.* (5 Ir. Law R. 229); s.c. in *Dom. Proc.* (12 Cl. and F. 151); *Ros v. Lidwell* (9 Ir. C. L. R. 184); s.c. in *Cam. Scac.* (11 Ir. C. L. R. 320); *Boyle v. Mulholland* (10 Ir. C. L. R. 150). As to grants by the Crown—*Cumming v. Forrester* (2 Jac. and Walk. 342); *Morgan v. Seaward* (2 M. and W. 561). The Denominations Lymnagh East and Lymnagh West do not occur in the patent. Defendants changed the name Kilgare into Kilgariff, and Kilgariff into Lymnagh East and Lymnagh West.

Robinson, Q.C. (with him Chatterton, Q.C., *Baytagh*, and *Nash*), contra, in support of the order. Upon the evidence at both sides, the learned Baron ought not to have directed a verdict for plaintiff for the whole denomination of Kilgariff. The patent and copy of the Book of Distributions, and the rest of the evidence given by defendants, show a title in them, or one of them, to at least 88A. profitable land, plantation measure, in that denomination. It lies upon plaintiff to show a title to anything beyond the 64A. granted by the lease of 1770, and tendered to him by the defence. He must recover on the strength of his own title, not on the weakness of ours; and though we are but defendants, the evidence was at least as consistent with defendant's case as with plaintiff's. The jury having disagreed on the 5th question submitted to them, ought to have been discharged without finding any verdict, or should have been directed to find for defendants. Unless there was a latent ambiguity, the Judge ought to have construed the deed.—*Waterpark v. Fennell* (5 Ir. C. L. R. 129), the judgment of Moore J.; *Day v. Fynn* (Owen, 133). The words "more or less"

mean some reasonable variance, not such a large one as here.

*Chatterton, Q.C.*, on same side. If at the termination of a tenant's interest his boundaries are so confused that the landlord cannot find out what they are, Equity will aid the landlord by issuing a commission of perambulation for establishing the boundaries. The authorities are collected in 1 Furlong, Land and Ten. 696. Plaintiff ought to have proceeded in Chancery. It was evidently in the contemplation of the parties to the original lease that 64a. alone of Kilgare should pass, and not the whole number of 283a.—14 and 15 Car. 2, c. 2, s. 30, as to acreable description, and s. 45 of the Directions and Instructions incorporated with the Act; Cole, Ejectment, 240.

*Morris, Q.C.*, in reply.

*Cur. adv. vult.*

June 5th.—The unanimous judgment of the Court was now given by Fitzgerald B. [His Lordship referred to the deeds which had been put in evidence and the facts of the case, at considerable length, and proceeded]. The answer to the 5th question, if the Judge was entitled to put it, would have decided the case, and the question now before us is, whether the Judge was warranted in leaving that question to the jury. Now, bearing in mind that the jury have found that Kilgare and Kilgariff are the same, and that in the old patents it was usual to mention only the profitable lands in a grant, and not the unprofitable, which were often much larger in extent, we think that plaintiff made a *prima facie* title to the whole denomination of Kilgariff. On the other hand, by the patent of Charles II., the whole of Kilgariff was in defendant's possession without anything to distinguish the 64 acres, and if there were nothing else in the case, plaintiff would not be entitled to recover. The Book of Distributions compared with the patent would warrant the finding of the jury that Kilgare and Kilgariff are the same; and I see no other course open except that the jury should answer the 5th question, and we must therefore direct a new trial. I say nothing about the costs, as both parties were wrong in claiming a direction, and if the question had been persisted in, there would have been a disagreement, and the parties be in the ordinary state.

*Rule made absolute for a new trial, but without costs.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

DICKSON v. M'MASTER & COMPANY.—May 8; June 18.

*Partnership—Good will—Trade-marks—Name.*

By indenture of 1st April, 1858, entered into between the partners of a partnership concern, under the name of "*Dickson, M'Master & Co.*" and "*Dunbar, Dickson & Co.*," for the manufacture of linens, &c., it was witnessed that the lands, mills and ma-

chinery, which before that time were the exclusive property of M'Master should still remain and thenceforward continue to be his sole property, but subject to the use and enjoyment during the partnership for all partnership purposes, and it was provided that at the end of the partnership "the retiring partners.....shall be paid the value of their respective shares [the deed making no mention of the good will, name of the firm, or trade-marks] in the said stock and capital of the said partnership by the promissory notes of said M'Master." The partnership having been dissolved at the end of eight years, it was thereupon insisted that M'Master should pay for the good will, name, and trade-marks at a valuation to the outgoing partners. Held, upon the true construction of the said deed, that M'Master was entitled, as continuing partner, to the good will, name, and trade-marks, upon payment therefor to the outgoing partners, as provided be said deed, without being subject to any separate valuation therefor.

Held also, that the petition, which prayed for an injunction to restrain said M'Master from using the name and trade-marks, should be dismissed with costs.

THIS was a cause petition presented by Benjamin Dickson, the petitioner, against the respondents, John Walsh M'Master, James Dickson, William Spotton, and William Robert Masaroon. Practically John William M'Master was the only respondent here, inasmuch as the interest of James Dickson, the petitioner's brother, was identical with that of the petitioner; and respondent, Robert Masaroon, did not claim to have a valuation made of any of the premises, inasmuch as he was retiring from business, and William Spotton had no rights as retiring partner. The petition prayed that it might be declared that the "good-will, names, and trade-marks of the partnership of 'Dunbar, M'Master and Co., and Dunbar, Dickson and Co.,' and debts due to said partnership, and that the warehouses and business premises, except certain premises—namely, the Gilford and Belfast premises, were assets of said partnership, and belonged to petitioner and respondents in common, according to their respective shares and interests in said partnership, and that a proper account might be taken of all the capital, stock in trade, assets, and property of the said partnership since the last annual settlement of the partnership accounts, and of all the debts and liabilities of the said partnership, and that all the property and assets of the said partnership, including the said good-will, names, and trade-marks, stock in trade, and debts due, and the said warehouses and business premises, except as aforesaid, might be realised, and the business affairs of the said partnership wound up under the direction of the Court.....and that the respondents and their agents might be restrained by injunction from using any of the names or trade marks of the said partnership, or any name or names indicating that they, or any of them, alone, or with any other person or persons, are the successors to the firm of Dunbar M'Master & Co. or either of them, or are entitled to the good-will of the said firms, or either of them, or from otherwise appropri-

ating the said good-will, names, or trade-marks, or any of them, and that the shares of the petitioner and respondents respectively in the property and assets of the said partnership, after all just charges and credits, might be ascertained and paid to them respectively when and as the said partnership property and assets should have been realised." The petition also prayed for an account.

The facts of the case as disclosed on the face of the petition are these, that the petitioner, James Dickson, and the respondents, John Walsh M'Master, James Dickson, William Spotten and William Robert Masaroon on the 1st of April, 1858, entered into and signed a partnership agreement, whereby after reciting that certain messuages, lands, and premises, situate near Gilford in the County of Down, together with the mills and building thereon, and all the engines, machinery, standing and running-gear therein belonged exclusively to said John M'Master, subject to certain rents payable thereout, and that the parties thereto had entered into an agreement dated 28th of December, 1855, to carry on a partnership on the terms therein mentioned, and that such partnership had been carried on by them, and that they had agreed to settle all accounts on foot thereof, on the terms therein mentioned up to the 31st of March, 1858, and to vary the terms therein-after mentioned, it was witnessed that the parties thereunto mutually agreed that they would, "from the 1st of April, 1858, be bound in co-partnership together in the trade and business of linen manufacturing, flax spinning, and thread manufacturing, and of the bleaching of thread yarn and brown linen, and other fabrics, whether of their own manufacture or otherwise, and that the said co-partnership shall be deemed, and for all purposes considered to have been commenced upon the said 1st of April, 1858, and shall continue for the space or term of eight years then next ensuing. That the flax spinning and thread manufacturing shall be carried on under the partnership and name of 'Dunbar M'Master and Company,' and the linen manufacturing, and the brown and white linen and the bleaching business under the name and style of 'Dunbar, Dickson, and Company.' That the capital stock of the partnership shall be £75,000, and that the same shall be made up and contributed in cash by the parties hereto respectively, in the proportions following, that is to say, by the said John Walsh M'Master, £27,000; by the said James Dickson, £16,500; by the said Benjamin Dickson, £16,500; by the said William Spotten, £7,500; and by the said Robert Masaroon, £7,500. That the said James Dickson and Benjamin Dickson shall severally and respectively forthwith advance and pay in his said full proportion and capital stock in cash, but inasmuch as the said John Walsh M'Master, by consent of said other parties, will only advance at present the sum of £2,000, and William Robert Masaroon, by consent of said other parties, will only advance at present a sum of £2,000 into the partnership stock, they, the said John Walsh M'Master, William Spotten, and William Robert Masaroon are respectively to be charged interest from time to time on such deficiency of the said respective proportions, at the rate of 5 per cent. per annum for such time and on such amount as they shall

respectively leave unpaid on the account of said co-partnership, same to be debited to them respectively half-yearly on such portions of their respective contributions to said capital as shall remain unpaid on the accounts of said co-partnership, same to be debited to them half-yearly on such portions of their respective contributions to said capital as shall remain unpaid by them respectively... That the co-partnership stock shall be employed solely for the said joint trade and business, but that each of said parties shall have an estate and interest as a tenant in common, and not as a joint tenant, in the said capital, to the extent and in the proportion to the sum by him brought in, and that the profits and losses of said partnership business shall be paid to or borne by each of the said parties in proportion to his said share of the capital so by him agreed to be vested therein, that is to say, John William M'Master, 18 parts; the said James Dickson, 11 parts; said William Spotten, 5 parts; and William Robert Masaroon 5 parts, and that for the purpose of dividing the profits and distributing the losses, the said several contributions shall be considered as actually paid up by said several parties. That if any of the parties shall lend to the said joint concern any money beyond the capital therein, or shall leave any part of his share of the profits in the business, the capital stock shall be chargeable therewith to the party lending the same, with interest at the rate of 5 per cent. per annum, but if the same be withdrawn or paid off on six months' notice in writing given by any party to the other, it shall not in the meantime be considered as part of the capital of the party lending the same. That none of the parties shall be at liberty to draw out of the business any portion of his or their paid up capital without the previous consent in writing duly signed by all the other partners, it being by the said parties hereto intended and agreed that the before-mentioned capital of £75,000 shall not be diminished unless all the said partners shall hereafter determine otherwise, and express such determination by a written instrument, to be signed by them respectively. That the lands, tenements, buildings, and machinery, so as aforesaid the exclusive property of the said John William M'Master shall still remain and continue to be his sole property, but to be subject to the use and enjoyment thereof for all partnership purposes by the said co-partnership, for which use and enjoyment the said John William M'Master is to be compensated in manner next herein-after stated," viz. by allowing him interest at 5 per cent per annum upon the estimated value of the premises, equal to £17,454, and of the machinery, £24,791, with certain allowances for deterioration. The deed then provided that if any new machinery would be required on the premises, same should be provided and erected upon the premises for the purposes of the partnership at the expense of the said John William M'Master, who should be allowed therefor, in the same manner as he was for all other portions of the machinery on said premises. That the rents and taxes shall be paid by said partnership. The deed then contained a provision for the insurance of the premises. That in consideration of the expected attention of the entire time and abilities of the said William Spotten and William Robert Masaroon to the immediate

care and management of the partnership concerns and business, each of them shall be paid out of the partnership funds before any ascertainment of profit and loss, the yearly sum of £500, as therein is mentioned. That losses happening through the gross or wilful neglect of any of the said parties should be borne by such party only. "That all contracts and engagements entered into by any of the said parties, on account of the joint business, and all checks or drafts upon bankers and others, and all bills of exchange, promissory notes.....shall be made, given, and taken respectively in the said partnership name of Dunbar M'Master and Company, and Dunbar, Dickson, and Company, that clear and self-explaining entries shall be duly and regularly made in proper books to be provided for the purpose of all moneys that shall be received or paid, and of all goods which shall be purchased, and of all partnership transactions in the usual and proper course of practice of book-keeping by double entry." That on the 31st March in each year, or within one calendar month thereof, a general account in writing should be made of the stock and effects of said partnership, and a balance should be struck at foot of the same accounts in order to ascertain and exhibit the true state thereof, and for the purpose of making and completing such yearly account of the stock in trade, goods, chattels, and effects of the said partnership, and a balance-sheet be struck at foot of the same accounts in order to ascertain and exhibit the true state thereof; and for the purpose of making and completing such yearly accounts they should be estimated and truly valued according to their proper marketable value, and also all the debts due to the said partnership on the 31st March should be included in the said accounts, at such value as the said partners, or the majority of them, should put upon the debts, making due allowance for bad and doubtful debts, and which accounts should be fairly transcribed into the proper books to be kept for that purpose, and a true copy of such balance-sheet should also be furnished to, and be retained by, each of the said partners, and on being approved of and agreed to should be conclusive as therein mentioned; that upon each settlement of the half-yearly accounts the clear profits of the joint trade should be divided amongst the said partners in the proportions aforesaid, and be credited to them respectively.

The petition then stated that by said deed no valuers were appointed, nor was any mode of valuation thereby prescribed for ascertaining the value of the said shares, in case, as happened, the said partners should differ in respect thereof. The petition then stated that the partnership formed between the petitioner and respondents under the said agreement of the 1st of April, 1858, continued down to the 1st of April, 1866, and petitioner alleged that no agreement could be arrived at among the said partners as to the value of their said shares. That the business, which was very extensive, was carried on at the Gilford premises mentioned in the said agreement of the 1st April, 1858, and at the warehouses and premises situate in Belfast, Dublin, London, Manchester, Glasgow, Paris, and New York; that the lease under which the said warehouse and premises in Belfast are held was taken by the said John Walsh M'Master in his

own name, and that same and the additions thereto were built at his own cost, while those in Belfast, Dublin, London, Manchester, Glasgow, Paris, and New York were paid for by the said partnership.

That the good-will of the said partnership, and the said partnership names of "Dunbar, M'Master, and Company," and "Dunbar, Dickson, and Company," and the trade-marks used by the said partnership for marking and stamping the goods sold by the said partnership became and are extremely valuable, and the manufactured goods marked or stamped with the said trade-marks command a much readier sale and a higher price in all markets than other goods of the same description. That said John Walsh M'Master now claims to be entitled to the good-will of the said partnership, and to the use of the said partnership names and trade marks without paying any sum whatsoever for the same. That prior to the termination of the said partnership, the said John W. M'Master, without in any way consulting petitioner, and without his knowledge, or the knowledge of the said James Dickson, or Wm. Robert Masaroon, sent extensively to and amongst the customers and correspondents of the partnership at home and abroad, and others, a circular, of which the following is a copy:—

"Gilford Mills, Ireland,

"10th March, 1866.

DEAR SIR,—The co-partnership at present subsisting between James Dickson, Benjamin Dickson, William Spotten, William Robert Masaroon, and myself under the firms of 'Dunbar, M'Master & Co.,' and 'Dunbar, Dickson & Co.' will be dissolved on the 31st day of March inst. The trade of Dunbar, M'Master & Co. flax spinners and linen thread manufacturers, will be continued and carried on as hitherto by me under the same style in co-partnership with my son Hugh Dunbar M'Master. The trade of the firm of Dunbar, Dickson, & Co., linen manufacturers and bleachers, will be continued and carried on by me in all respects as hitherto in co-partnership with William Spotten (who for many years has conducted the business at Belfast under James Douglas of New York) under the style of 'William Spotten & Co.' successors to Dunbar, Dickson & Co.' All debts due to and by the firm of Dunbar, M'Master & Co. will be received and paid by that firm as usual, and debts due to and by the firm of Dunbar, Dickson, & Co., will be received and paid by the firm of William Spotten & Co. I take this opportunity of thanking the friends of the old firms for their confidence and generous support during the past, and I respectfully solicit the same for the future.

"I am dear Sir,

"Yours very truly,

"J. W. M'MASTER."

That in the month of Nov. 1865, the said William Spotten, acting in conjunction with the said John W. M'Master, sent Robert M'Cormac, the manager of the business of said partnership in Paris to the West Indies for the ostensible purpose of collecting debts, but in reality, as petition charges for the purposes of the then intended new firm of Wm. Spotten & Co. That the said Robert M'Cormac was so sent to the West Indies not only without the consent, but against the

wishes of petitioner and the said James Dickson, who objected thereto, and as evidence that the collection of debts was not the real object with which the said R. M'Cormac was so sent to the West Indies, your petitioner shews that before the said R. M'Cormac left he was furnished by the said William Spotten with samples and price lists of the goods of the said partnership, for the purpose, as petitioner charges, of obtaining orders for the then intended new firm of William Spotten & Co., and petitioner believes that before the said partnership terminated, goods from the stock of the said partnership were sent to America and elsewhere by the said J. W. M'Master and William Spotten, marked with the names and trade-marks of the said partnership, and which said goods have, as petitioner believes, been taken to account by, and are now being disposed of by, and on account of the said new firm. That in the month of March last the said William Spotten, acting in conjunction with the said J. W. M'Master also sent Ernest Bruntzsch, a clerk of the said partnership, to Russia, ostensibly to take orders for the said partnership, but in reality, as petitioner charges, for the objects and purposes of the said firm of William Spotten & Co., for petitioner says that being in the warehouse of the said partnership in Belfast on Tuesday, the 27th day of March last, petitioner read a telegram from the said E. Bruntzsch from Moscow, asking for permission to reduce the prices on some goods from those in the quotations given to him, and as the said 27th March was only four days before the day on which the said partnership terminated, it is evident that the said E. Bruntzsch was so sent to Russia for the purposes of the said new firm of William Spotten & Co. That John W. M'Master and William Spotten, prior to the termination of the partnership, have, through the servants and agents of the said partnership, and otherwise, made preparations and have taken steps to appropriate to themselves the good-will and business of the said partnership to the exclusion of petitioner and the other members thereof. That upon the 2nd of April inst. the name of William Spotten & Co., successors to Dunbar, Dickson & Co., was put up at the London warehouse of the said partnership, without any intimation having been previously given to petitioner that this was about to be done, but petitioner has since then been informed by the said J. W. M'Master that said change was intended to be made immediately at the several other warehouses and places of business of the said partnership, and petitioner believes that the same thing has accordingly been done at others of the warehouses of the said partnership, and the said new firm of William Spotten & Co. are, as petitioner believes and charges, now answering the letters for, and executing the orders of, the customers and correspondents of the said partnership in the name of William Spotten & Co., successors to Dunbar, Dickson & Co. That the said J. W. M'Master also claims to be entitled to take and use all the stock in trade of the said partnership both at home and abroad, and also the said warehouses in Dublin, London, Manchester, Glasgow, Paris, and New York, for the purposes of the new firms mentioned in his said circular, although no valuation of the said stock in trade, which is very large, and warehouses, or any of them, has been

agreed upon by the said partners. That the last annual settlement of the partnership accounts was made up to the 31st March, 1865, and the manner in which stock was taken by the said partnership at the last-mentioned and each preceding annual settlement was to value the stock then on hands at cost price, save when the market price was below the cost price, in which case the market price was taken as the value; but the market price was not taken as the value when it was higher than the cost price, and petitioner shews that the said annual valuation of the stock in trade of the said partnership, though sufficient for the purposes of the partnership accounts, and for making up the balance-sheets, cannot be taken as representing the actual value of the said stock itself, and the present value of so much of the stock in trade of the said partnership as was on hand at the last stock taking exceeds the value then put upon it for the purpose of stock taking, and there is now on hand a large quantity of stock in trade belonging to the said partnership, and consisting both of unmanufactured and manufactured goods which was not in hands at the last stock taking. That as indicating the extent of the business of the said partnership, petitioner shews that the stock of the said partnership at the last estimate thereof in November, 1865, was taken at upwards of £500,000, and the sales of the said partnership in the last year amounted to about a million sterling. That the use of the names and trade-marks of the said partnership by the said J. W. M'Master and William Spotten is causing irreparable injury to petitioner, inasmuch as every day which passes is establishing the said J. W. M'Master and his said son as the firm of Dunbar, M'Master & Co., and thus entitled to the good will thereof, and is also establishing the said firm of William Spotten & Co. as the successors to the firm of Dunbar, Dickson & Co., and entitled to the good-will thereof, and the said J. W. M'Master and William Spotten, if permitted to use the name and trade-marks of the partnership for a very short time, will in effect have succeeded in appropriating to themselves the good-will of the said firms, and in almost altogether depriving petitioner of any benefit therefrom, and it will be soon impracticable to realize the true value of the said good-will, names, and trade-marks, for the common benefit of petitioner and the respondents, if the said J. W. M'Master and William Spotten be permitted to go on using and appropriating the same, as they are now doing. That the importance of securing the good-will of the said partnership, as the said J. W. M'Master is endeavouring to do for himself and his new partners, can scarcely be over-estimated, and that the loss which petitioner, as a member of the said late partnership, will sustain by such appropriation of the said good-will, will be very great and wholly irreparable. That petitioner submits and claims that the good-will, names, and trade-marks of the said partnership, and the said ware-houses and business premises in Dublin, London, Manchester, Glasgow, Paris, and New York respectively are assets of the said partnership, and belong to all the said partners in the proportions of their shares, and that the same should be realised for the benefit of all the said partners, and the proceeds divided amongst them accordingly. That petitioner



also submits and claims that the stock in trade of the said partnership should be disposed of for the benefit of all the said partners, and that a manager or managers should be appointed to dispose of the same, and to wind up the business of the said partnership in such manner as this Court may determine to be most beneficial for all the said partners.

The following is a transcript of so much of said deed of partnership as is conversant with the payments to be made by M'Master at the close of the partnership by the continuing partners:—"And it is hereby further agreed that as between such of the partners hereto as shall be living at the end of said term of eight years, the said partnership shall still continue for one year more unless any of said partners shall have given notice in writing to the other surviving partners twelve calendar months next before the expiration of said term of eight years, of his intention to dissolve and terminate said partnership at the expiration of said term of eight years; and so the said partnership shall continue from year to year after the expiration of said term and until such twelve months' notice shall have been given, and shall so continue upon the terms herein contained so far as same shall be applicable thereto. And upon the dissolution of said partnership at the expiration of such twelve months' notice whether same shall be at the end of said term, or at the end of any subsequent year, and as between the surviving partner and the representatives of a deceased partner or partners irrespective of any notice of dissolution at the expiration of said term of eight years, the general account of said partnership shall be duly taken and made up, and the shares in the capital and stock in said partnership of all the surviving partners and of the personal representative of any deceased partner or partners shall be ascertained and valued. And in case it shall happen that at the expiration of said term of eight years the said John Walsh M'Master shall be living, and some one or more of said partners shall also be then living, and shall be desirous to continue partner or partners with the said John Walsh M'Master, and to carry on said business with him at said mills, and at such other place or places as shall be then used for said business; and if at the same time other or others of said partners shall have died, or shall have served such twelve months' notice for dissolving said partnership at the expiration of said term of eight years, then the value of the share or shares in the said partnership, stock, and capital of the personal representative or representatives of such deceased partner or partners, and of the share or shares of such retiring partner or partners, having served such twelve months' notice as aforesaid, as the case may be, shall be duly and correctly ascertained, assuming as the foundation of such ascertainment the value of the same partner's shares, which may appear on the face of the books to have been ascertained at the then last or previous stock-taking and settlement of the partnership accounts; and when so ascertained, the value of such share or shares shall be paid to the personal representative or representatives of such deceased partner or partners, and to the retiring partner or partners, in manner following, that is to say, by the promissory notes of the said John Walsh M'Master and such of

the said partners as shall be so desirous to continue in partnership with him as aforesaid, such notes to be for an equal third part of the value of the share of each deceased or retiring partner; and said notes to be payable at six, nine, and twelve months, to be computed from the day of the expiration of said term of eight years, that is to say, from the 1st day of April, 1866; and in the case of retiring partners at the end of any year subsequent to the expiration of said term of eight years, then such notes are to be dated and run from the day of the expiration of such subsequent year. And it is hereby further agreed that in case all the said parties hereto shall, at the expiration of said term of eight years, have either died or shall have served such twelve months' notice of dissolving said partnership, or in case at the end of any year subsequent to the end of said term of eight years, all the other continuing partners shall, by service of such twelve months' notice, have put an end to the said partnership, so that the said John Walsh M'Master shall, at the expiration of said term of eight years, or at the end of any subsequent year, have the said mills, buildings, machinery, and premises upon his hands, then, and in such case, the said retiring partners and the representative or the representatives of such deceased partner or partners, as the case may be, shall be paid the value of their respective share or shares in the said stock and capital of said partnership by the promissory notes of the said John Walsh M'Master, of like number, and payable at same dates and by like equal third parts as hereinbefore mentioned in the case of some of said parties retiring and some of them so continuing to be partners of the said John Walsh M'Master, such promissory notes, in every such case as aforesaid, to be payable with interest after the rate of £5 per cent. per annum, to be computed on their amount from the date of such notes, and to be added to the principal sum to be secured by each note. Provided that in case of said John Walsh M'Master happening to be the sole surviving or continuing partner and the sole party to such promissory notes so to be given to the said other partners or their representatives respectively, that in such case said John Walsh M'Master shall collaterally secure the payment of such promissory notes by his bond, with warrant of attorney for confessing judgment thereon, to each of the parties to whom such promissory notes shall be made payable, such bond to be for double the sum payable to such party by said promissory notes conditioned for the due payment of the sums mentioned in said notes at the times therein specified for the payment of the same, with interest at the rate aforesaid, and on which respective bonds and warrants of attorney the parties are to be at liberty to enter judgment against said John Walsh M'Master and to register such judgments respectively as mortgages against his tenements, lands, and premises. And said parties hereto severally and respectively agree to pass, and execute, and to receive such promissory notes, and bonds, and warrants of attorney as security for the payment of the value of the share or shares of the deceased or retiring, or deceased and retiring partners, as the case may be, in manner aforesaid, it being the intent of said parties hereto that said John Walsh M'Master and such of said parties

as shall be desirous to continue partners after the expiration of said term of eight years, or the said John Walsh M'Master alone, in case all said parties shall dissolve said partnership as aforesaid, shall have such twelve months' notice as aforesaid of the intention to retire at the end of said term or of any subsequent year, of such as shall desire so to retire, and have one year from the expiration of said term of eight years, or of any subsequent year, for the winding-up of said partnership business, and for paying by such equal half-yearly instalments the value of their respective shares in the stock and capital thereof to such retiring partner or partners, and to the representatives of such deceased partners as hereinbefore expressed."

The following is a short summary of the facts of this case, extracted from the affidavits and deeds, which are of very great length. Many years ago a Mr. Dunbar was the original proprietor of those mills at Gilford, and those premises afterwards passed to the Misses Dunbar, his sisters. In the year 1836 Mr. James Dickson entered into partnership in this business with Mr. M'Master, and that partnership was carried on as "Dunbar, M'Master & Co." and "Dunbar, Dickson & Co." Subsequently to this, in 1864, Mr. Benjamin Dickson, the present petitioner, became a partner, and in 1865 Mr. Spotten and Mr. Masaveon became partners in the business, and from 1865 to 1868 all of them continued to be partners. On the 1st of April, 1868, a new partnership deed was executed, and by this the Gilford property, which was of enormous value (as it is still), was arranged to be the exclusive property of Mr. M'Master, who had become the purchaser of it from the Dunbar family. Being thus the owner of the premises, it was never contended that he was to give up the ownership to the firm. He was only to yield the use of these Gilford premises to the partnership, and the use of this property, subject to being paid a percentage by way of compensation. On the 1st April, 1868, these parties became partners for a term of eight years, and this partnership was to expire, and did in fact expire, on the 1st April last. There was a provision that on the expiration of this term the partnership was to go on from year to year, unless a notice was served 12 months before the end of the term setting forth the intention to dissolve the partnership. Accordingly in March, 1865, the present petitioner gave the notice above-mentioned.

The respondent's answer to the above petition is substantially stated in the 44th paragraph of the respondent's affidavit, which is most important, and is as follows:—Deponent saith that he has in the first part of this answer set forth the several facts in connexion with the building of the mills at Gilford by the late Hugh Dunbar, and the founding of the several trades carried on there, and the first connexion of this deponent and said James Dickson therewith under the respective co-partnership names of Dunbar, M'Master & Co., and Dunbar, Dickson, & Co. And deponent positively saith it was never considered or stipulated by the said James Dickson or this deponent that either of them, by being so admitted into partnership with the said Hugh Dunbar, acquired any right or share whatever in the good will of the business or the trade-

mark thereof under the said agreements, dated respectively 31st March, 1847, and 25th March, 1854, and from time to time executed relative to the said business. And deponent saith that on the said agreement of 21st of January, 1856, being entered into, whereby the Misses Dunbar agreed to sell the said lands, mills, warehouses, machinery, engines, and implements to this deponent for £35,000, subject to two annuities of £1000 each, to one Isabella Dunbar and Henry Heron, who are still living, and upon which mills, buildings, and machinery, and subsequent improvements thereon, have cost deponent in all a sum of over £75,000; and also in consideration of £20,662 14s. 6d. to sell to him their shares in the then existing partnership, and all their rights in the concerns, which agreement was afterwards duly carried out by the deeds hereinbefore stated. And deponent saith that all through the various transactions and deeds relating to the form and to the changes therein, from time to time, in the years 1847, 1854, 1855, and 1858, no mention whatever was made of the good will of the business, or of the trade-marks thereof, by any of the partners, nor any right or claim asserted thereto; but same were always considered as annexed and inseparably attached to the said mills, buildings, lands, warehouses, and machinery, and to go along with them, and were not considered to have any existence apart from said mills, lands, buildings, and warehouses; and no valuation or estimate of the good will or trade-marks was ever made upon the dissolution or formation of any of the said partnerships, or upon any annual stock-taking; nor was any value ever put upon them; nor were they considered part of the stock or capital of any of the partnerships, it being, as deponent believes, always taken for granted by all the partners thereof that the good will was in fact a right arising from and as it were a part of the ownership of the mills and warehouses. And deponent saith that the value of such good will arises, to a great extent, from—first, the ownership of the mills of Gilford and of the machinery and works therein, which mills are the recognized seat of the manufactures of the late firm, and lithographic drawings upon a large scale of which mills were supplied to and are suspended in the warehouses of the several customers of the said firm on the Continents of Europe, Asia, and America; and secondly, from the ownership of the principal warehouse and place of business of said late firms at Belfast; and thirdly, from the ownership of the bleach-works of said firms at Mullamore, in the county of Antrim, at which the goods of the late firms received the particular bleaching finish which established their character in the different markets, and which mills, buildings, machinery, and premises at Gilford belong absolutely and exclusively as aforesaid to this deponent as part of his original property paid for by him to the Misses Dunbar, and which principal warehouse at Belfast is also the absolute and exclusive property of this deponent, having been built by him as aforesaid during the existence of the co-partnership at his sole expense, and which bleach-works at Mullamore are now the property of said William Spotten and one Thomas Barile, and not as his share of the stock or capital of the partnership, of which they never formed

part. And deponent saith that it never was the intention of this deponent, nor, as he believes and charges, of the petitioner or his brother when executing the deed of 1st April, 1858, that the good will, trade-marks, or names should form the subject of valuation upon the retirement of any or all of the partners at the end of the period of eight years therein mentioned or at any other time, or be paid for by this deponent. And deponent is advised and submits that upon the true construction and effect of the said deed of the 1st April, 1858, he is now absolutely and exclusively entitled to the said good will, trade-marks, and trade names, and entitled to carry on the business under the names set forth by him in the circular of 10th March, 1866, in the cause petition mentioned, and should not be restrained by this Court from so doing. And he is further advised and submits that the said good will, trade-marks, and trade names are not (in the events which have occurred, and having regard to the notices which have been served) to be made the subject of valuation or paid for by this deponent, or taken into account in estimating the stock or effects of the partnership. But this deponent saith that if the Court shall ultimately decide that this deponent is bound to pay for the said good will and trade names and marks, deponent will be prepared and hereby undertakes so to do. And deponent submits that he should not be restrained in the meantime from using the said names and marks; and that such user will not, as is alleged in the cause petition, cause irreparable or any injury to petitioner, or place it beyond the power of the Court to give the petitioner the relief to which he shall be ultimately held to be entitled under the deed of the 1st of April, 1858, or render it impracticable or in any respect more difficult than it is at present for this Court, or the Master to whom it shall be referred, to ascertain the value of the said good will, trade, name, and marks, or the sum to be paid by this deponent for their use according to the principles upon which this Court makes such valuations, in case the Court shall be ultimately of opinion that this deponent is bound to pay for the same.

*The Solicitor General* (with whom were *Chatterton, Q.C., Law, Q.C., and Gerald Fitzgibbon*) stated the petition. The petitioner, Benjamin Dickson, submits that upon the dissolution of the partnership, which happened on the 1st April, 1866, the warehouse and business premises, except the Gilford and Belfast premises, which were excepted by the deed of 1858, were the assets of the co-partnership and belonged to all the members thereof in common, precisely in proportion to their shares and interests therein; so also the trade-marks, good will, and name thereof are assets of the company. The question now before the Court turns on the deed (above in great part recited) of 1858. By that deed no provision was made for the appointment of valuers, nor was there any mode of valuation thereby prescribed for the valuation of the shares in case the co-partners should differ in respect thereof. It is clearly the province of this Court to direct a general sale of the property of the co-partnership. In *Fetherstonhaugh v. Fenwick* (17 Ves. 298) the marginal note says—"The consequence of the dissolution of partnership, where there are no ar-

ticles describing the terms, is a general sale and account of the joint property; one or more partners therefore cannot insist on taking the share of another at a valuation, or that he shall remove his proportion from the premises, thereby securing the "good will." The course is to sell the whole; in fact to sweep to a sale all that is comprehended in the phrase—the assets of the co-partnership; and so it was held in *Wilde v. Milne* (26 Beav. 504). The respondent, John Walsh M'Master, in the 44th paragraph of his affidavit, says—that it never was his intention, when executing the deed of 1st April, 1858, that the good will, trade-marks, or name, should form the subject of valuation upon the retirement of any or all the partners at the end of eight years, or at any other time; and, further, he insists that he alone of the firm is entitled to the good will, trade-mark, and trade names. We contend that these were the common property of the firm and must be sold; and if M'Master wishes he can have them on paying therefor. By the general law of partnership, the settlement, when the deed is silent, of the affairs of the coparceners must be by a sale and realization of all the assets—*Cook v. Collingridge* (Jacob, 607); Sugden, Vendor & Pur. 287, 14th edit. Now, the most important portion of the assets of a partnership may be (if the house is a thriving one) the good will, by which is "meant the value of the chance that the customers of partners retiring altogether will deal with those who purchase from such retiring partners and succeed to their establishment. A good will of that nature cannot be valued on the same principle as where the persons retiring, but not retiring altogether from trade, have also a chance—and a great chance—of carrying the old customers into their establishment. . . . And though the value of that chance cannot be the subject of estimate, it was going too far to hold that that chance is to be treated as of no speculative value, or of no value at all, to be regarded in the sale." Those are the words reported, though not until 1861, in the form of the decree in the above cited case (which was decided in 1825) of *Cook v. Collingridge* (27 Beav. 456). See also *Churton v. Douglas* (John. 174). Beyond a doubt, then, John Walsh M'Master would have taken without any purchase that chance which Lord Eldon so esteemed in this last mentioned case. But let us push this case further. Suppose one of the partners died during the time the partnership lasted, the good will would not even then survive to the remaining partners, but would belong to the estate of the deceased—*Smith v. Everett* (27 Beav. 446). The marginal note in that case is as follows:—"Under the 7 & 8 Vict. c. 32 the right of country banks to issue notes belong beneficially, on the death of a partner, to the surviving partner. The good will in a partnership does not survive beneficially to the others; when it has any value, a due proportion belongs to the estate of the deceased."—Co. Lit., 182 a, sec. 282. No doubt, the good will is clothed with uncertainty; that, however, may be made the subject of a valuation—*Jackson v. Jackson* (1 Smale & Giff. 184). Not alone, then, the good will may be the most valuable part of the concerns, but so also may be the trade-marks; and trade-marks are, beyond a doubt, become the

assets of the company; per Turner, C.J.—*Bury v. Bedford* (32 L.J. Ch. 204, 33 L.J. Ch. 204, 465).

Next, the name of the partnership became the assets of the company also. [*The Lord Chancellor*—How can you sell the name of a company. I don't see how the name of a company can be sold?] The name is included in the good will. Page Wood, V. C., in his judgment in *Churton v. Douglas* (Johns. Cas. in Ch. 189) says, "The word 'firm' is derived from an Italian word which means signature; and it is as much the name of the house of business as John Nokes or Thomas Styles is the name of an individual. The name of a firm is a very important part of the good will of the business carried on by the firm." The next branch of this argument is conversant with that portion of the prayer which prayed for an injunction from "using any of the names or trade-marks of the said partnership, indicating that they or any of them, alone or with any other person or any other person or persons, are the successors of the firm of Dunbar, M'Master & Co., or either of them." It is well settled that if one partner survives the other (a case much stronger than the one now under consideration), he has not the right to the good will and trade-marks; and in the case of all the partners surviving the determination of the partnership, none of them has a right to hold themselves out as successors or representatives of the old firm, or as continuing the original business. Some doubt existed upon this subject, but in the case referred to, *Hall v. Burrows* (3 N. R. 259, s. c.; 33 L. J. N. s. 204; 10 Jur. N. s. 55), before Lord Westbury, on appeal from the Master of the Rolls, it was decided that in estimating the share of the deceased partner, the good will of the business ought to be taken into account in the case. [*The Lord Chancellor* inquired whether these trade-marks were not used by M'Master before the formation of the partnership in 1858?] Yes; these trade-marks did exist previous to 1858; but the case already cited—*Bury v. Bedford* (33 L. J. Ch. N. s. 465)—decides that trade-marks will be deemed, in absence of any agreement to the contrary—and there was no agreement here—to form part of the partnership assets, though they may have been acquired by one of the members of the firm previous to the formation of the partnership.

Now, as to carrying on business in the name of the late firm, and as "William Spotten & Co., Successors to Dunbar, Dickson, & Co.," if William Spotten & Co. are allowed to go on even for a short time holding themselves out as successors to Dunbar, Dickson, & Co., and transferees of the old firm, the old name and good-will will be rendered utterly worthless by this, as we contend, illegal assumption.—*Churton v. Douglas* (Johns. Cas. in Chan. 189), where the using of the expression "successor" was held to be illegal. It is plain, unless there be something in the partnership deed to give a right to some of the partners to represent the old firm, Mr. Spotten can have no possible claim to represent it, whatever the rights of M'Master may be. The injunction we now seek is not confined to the use of this name on the Belfast property; but this illegal presumption prevails, wherever M'Master has his now correspondents in the whole world, at least wherever the use of linen is known. If Mr.

Spotten be at liberty to hold himself in Paris, Moscow, New York, Rome, China, Australia, &c., as the successor of Dunbar, Dickson, & Co. what will be the value of the good-will afterwards when it comes to be sold?—*Johnson v. Helleley* (5 N. R. 4; s. c. on appeal, 5; N. R. 211; *Turner v. Major* (8 Giff. 443). All the authorities amount to this: that pending the winding-up of the business the Court will restrain any of the former partners from the use of the partnership name, or from holding themselves out as successors to the old firm, or, as in the last-cited case, from using the old buildings for the purposes of the trade. The question next arises—is there anything in the frame of this partnership deed to alter the right of the parties from what they would otherwise have been? Turning to the clause which refers to the proceedings under the winding-up of the partnership in the event of its dissolution (and this word is important, and is the word used in the notices served), we find provisions for the valuation of the partnership assets upon a certain state of facts; but those are confined to the case of M'Master and others of the partnership continuing in partnership after the expiration of eight years. Then comes the case which has happened—"In case all the said parties hereto shall have served such twelve months' notice of dissolving the said partnership, so that the said John W. M'Master shall at the expiration of the term of eight years have the said mills, buildings, machinery, and premises upon his hands, then and in such case the said retiring partner or representative of such deceased partner or partners, as the case may be, shall be paid the value of their respective share or shares in the said stock and capital of said partnership by the promissory notes of the said J. W. M'Master," &c., as in the case of some of said parties retiring, and some of them so continuing to be partners of the said J. W. M'Master; but the only clause which provides for valuing, and the mode of valuation, is that which refers to the event of the partnership being continued by Mr. M'Master and some of the other partners. This deed leaves them without any express provision for the mode of effecting the valuation in the present case; and this is the first difficulty with which the opposite side have to meet when they contend that Mr. M'Master is entitled to keep the trade-marks and good will at a valuation; but supposing you could import from the preceding paragraph the mode of determining the value, it will be observed that the only provision is that the shares shall be ascertained, assuming, as the foundation of such ascertainment, the value of the partner's share which may appear on the face of the books to have been ascertained at the time last or previous stock-taking and settlement of the partnership accounts. It is not said that the partnership share is to be "the amount ascertained on the books at last stock-taking," that is—only to be taken as the foundation upon which a superstructure is to be raised; but upon the books no mention is found of the trade-marks or good will, which are, undoubtedly, part of the partnership assets; and, besides, a large amount of goods have been manufactured since the last stock-taking, the value of which must be taken into account in estimating the shares of the partners on the dissolution.

In this case, therefore, as there is no mode pointed out by the deed to ascertain the value of these shares the Court will (as it always does except in very exceptional cases) submit the property to public auction; where there is no perfect mode of carrying out a contract by means of valuation the Court will not enforce it. This is a common doctrine to be met with chiefly in cases of specific performance as in the cases of *Cooth v. Jackson* (6 Ves. 12); *Milnes v. Gery* (14 Ves. 400); *Blundell v. Brettargh* (17 Ves. 232); *Cooke v. Collingridge* (Jacob, 607); the decree of which is set out in the report of *Smith v. Everett* (27 Beav. 446) has a close analogy to this case. If, then, this is a *casus omissus* in the deed to which Mr. M'Master was a party as well as the others, he can be on no higher footing than they are. The valuation, then, of this portion of the partnership assets is incapable of being carried out in any way but by a sale.

*The Attorney-General (Lawson), Brewster, Q.C., Warren, Q.C., John Edward Walsh, Q.C., and F. White*, for respondents, Messrs. M'Master and Spotten.—The first case of importance in the consideration of this subject relied upon on the other side, is *Cooke v. Collingridge* (Jacob, 607). The whole of the argument on the other side appears to go on this, that there is no way in which the partnership can be wound up except by a sale. Now, our view of the law is, that nothing will induce the Court to decree a sale if any other mode of bringing about a proper division of the assets can be found. Now, the case referred to was not a case on partnership at all, properly speaking. It went upon this, that the person who sold was an executor as well as a partner, and if it had been a case of a different kind Lord Eldon would never have thought of ordering a sale. This case, and also *Smith v. Everett* (27 Beav. 446), show that the sale of the good-will cannot prevent a partner from carrying on the very same trade after the dissolution of the partnership. The parties, however, are bound by whatever stipulations they have made in the partnership deed. In *Wade v. Jenkins* (2 Gifford, 509), where the articles provided that the good-will should be valued at £5,000, a party was declared bound to pay that sum for it under the terms of the deed. As to the account as settled on the last stock-taking day being binding, *Coventry v. Barclay* (2 New Rep. 375; 33 Beav. 1) is an authority in point.

Now, as to the trade-marks, *Hall v. Burrows* (1 New Reports, 543), as decided by the Master of the Rolls, was not reversed in reality on appeal (3 New Rep. 259). The decree only was varied in form. In that case the surviving partner had the freehold in the works, as Mr. M'Master has here, and the two questions reserved by the Master of the Rolls were, whether the trade-marks were to be sold with the works, and whether the surviving partner could be restrained from using the trade-mark, and the Master of the Rolls held that under the circumstances the Court could not interfere with the surviving partner's use of the trade-mark, or give a right to use it to another person. In *Johnson v. Halleley* (5 New Reports, 4 & 211) it was held that the surviving partner was entitled to have inserted in an advertisement of a sale of the partnership business

a statement that the persons formerly interested in the business might still carry on the same trade. In *The Leather Cloth Company v. The American Leather Cloth Company* (6 New Reports, 209) it is shewn that although there is a property in trade-marks, it is a property that may not be always capable of assignment; *vid.* the judgment of Lord Cranworth and Lord Kingsdown in that case. But it is plain that upon the true construction of the clauses of the partnership deed, they exclude the idea of sale, and therefore as much as declare in express terms that no sale shall take place. It is contended by the petitioner that the deed of partnership does not provide for the case that has arisen; however it is manifest that it excludes the idea of a sale in any event, and therefore, as if in so many terms, it declares that the principle of valuation shall be applied to the partnership assets. The language of the deed shows that Mr. M'Master is to be regarded as the sole surviving or continuing partner, and that the retiring partners are entitled to nothing but promissory notes collaterally secured by judgment mortgages for their shares of the partnership stock—nothing points to a sale of the good-will. If that were to be the case it would be impossible for Mr. M'Master to continue the business in the manner that is plainly contemplated. He has a right to the use of the whole partnership property, subject to the obligation of compensating the other partners for the value of their shares and the good-will and trade-marks; being a portion of the partnership assets, he has as much right to use them as any loom in the factory at Gifford, or any bale of flax; and if he is entitled to use them, the injunction must be refused.

May 28.—THE LORD CHANCELLOR.—It is very difficult to know what are the principles in this case, because the points have been so varied, and have gone so wide of the real question, a question that ought never to have been raised, considering the magnitude of this property. This cause petition has been filed upon an assumption which is a bold one, I confess, and that is, that notwithstanding the obligations of this deed, which was from beginning to end one of a simple partnership, dissoluble after the lapse of a certain time, and to be wound up in the ordinary and general way, yet these stipulations in the deed about the purchase are of no consequence. The petition states that "whilst making certain provisions in the case of the death of any partner or partners within the said term of eight years (which event has not happened) it was at the same time thereby further agreed that as between such of the parties thereto as should be living at the end of the said term of eight years, the said partnership should still continue for one year more, unless any of the said partners should have given notice in writing to the other surviving partners twelve calendar months next before the expiration of the said term of eight years of his intention to dissolve and terminate said partnership at the expiration of the said term of eight years, and again, in effect that upon the dissolution of the said partnership at the expiration of such twelve months' notice the general account of the said partnership should be duly taken and made up, and the shares in the capital, and stock in the said partnership of all the partners should be ascertained and

valued, and in the said deed were also inserted certain provisions as to the *payment of the value* of such shares, and as to the payment of the debts and liabilities of the partnership and other matters, but which provisions being, in the events which happened, *inapplicable*, your petitioner deems it unnecessary to set forth, for your petitioner shows that by the said deed no valuers were appointed, nor was any mode of valuation thereby prescribed for ascertaining the value of the said shares in case (as has happened) the said partners should suffer in respect thereof." The petition says there was no valuator appointed—nothing was said beforehand about the valuation being made of anything, and therefore it is urged that no valuator being appointed, no valuation is to be taken. The cause petition goes on in that way, taking everything for granted and jumping to the conclusion that this was an ordinary partnership, and praying that the good will should be considered part and parcel of it, and for an injunction to restrain the respondent from using the name, or dealing with the trade marks of the company. The petition certainly now appears to have been framed so as to embarrass the Court exceedingly, and would have embarrassed it further if I had dealt with it at first, and made an injunction upon that petition to stop the use of these names and marks, and everything as in a common case. I saw, when I read the petition, that that was too serious a matter to deal with, and accordingly the case came before the Master of the Rolls, who also found a difficulty of dealing with it. The case now comes on on that cause petition as if the matter was one of simple partnership. The answer has disclosed [a variety of circumstances, and opened up the particulars of the deed, and the question now discussed is whether the petition is rightly framed, and whether the particular clauses of the deed should bear the construction put upon them by the respondent. The original petition has been passed by in almost the whole of the arguments on both sides. I have not a simple case of partnership before me—the nature of the partnership is to be seen from the deed, and in order to understand what the rights of the parties are, it is essential that every word of this deed should be considered, and the construction which it bears is, that if Mr. M'Master takes this property, and he claims the right to take it, the good will and trade marks go with it, and he is obliged to allow compensation to the petitioner in respect of them. He has obtained, by the particular clauses of this deed, a certain *locus standi* in regard to purchasing all this property. It is contended that the events have not happened which would allow Mr. M'Master to deal with this as a matter of purchase, but on opening the case, and looking at the clauses of the deed, it is impossible to maintain that argument, and in truth it was not so argued. The case comes round to this, that by this deed Mr. M'Master—for what reason I cannot very well conjecture—was to inherit, so to speak, the possession of these mills. It was to him a matter of vast importance to become the purchaser of the firm again while to the other parties it was of no consequence at all. They were to get pecuniary compensation. The deed was not framed with a view to give them any particular equities. They were dealt with as persons wanting to make money for a certain

number of years, but nothing further, as traders, but Mr M'Master's condition is regarded from beginning to end, and in the most important ways that could be imagined. There is a contract made with him that he must purchase this property, and that he must pay for it, and if the good will and trade-marks form part of that property, he must purchase that as well, because to say that he must purchase and pay for things to be taken from him, would be to support a most illegal and monstrous piece of injustice. These trade marks and other things are embodied in the partnership as long as it lasts, and so long as it continues, Mr. M'Master has the right to use them. Now, the question is this, What is he to pay for these things? He is bound to pay them—they receive his bills, and they are to be secured in every way. He is to indemnify them against all the debts of the partnership, all the liabilities, everything in point of fact that could result from their having carried on this business. [His Lordship here read the clauses of the deed which stated that "they the said parties respectively shall and will, as from the first day of April, 1858, be bound to the others of them in co-partnership together in the trades and business of linen manufacturing, flax spinning, and thread manufacturing, and of the bleaching of thread, yarn, and brown linen, and other fabrics, whether of their own manufacture or otherwise, and that the said co-partnership shall be deemed and for all purposes considered to have commenced upon the said first day of April, 1858, and shall continue for the space or term of eight years thence next ensuing."] The deed then recites that the capital stock of the partnership shall be £75,000, and it then goes on to show the proportions to be contributed by each of the partners to the said co-partnership stock, but there is no declaration, nothing whatever said, about any other property, good, bad, or indifferent, being part of this property except that £75,000. There is nothing said about goodwill, trade-marks, or name, and therefore nothing can be inferred from the deed. The deed showed what was the partnership stock of the firm, and the buildings erected or to be erected which were to be used and enjoyed by the firm. The rest of the deed is not very material in this respect, but it recites that the co-partnership stock shall be applied solely for the said joint trade and business, but that each of the said parties shall have an estate and interest as tenant in common, and not as joint tenant in the said capital, to the extent, and in proportion to the sum by him brought in, and that the profits and losses of said partnership business shall be paid to or borne by each of the said parties in proportion to his said share of the capital so by him agreed to be invested therein, that is to say, the said John Walsh M'Master 18 parts; the said James Dickson 11, and the said Benjamin Dickson 11 parts; said William Spotten 5 parts, and William Robert Masaroon 5 parts, and that for the purpose of dividing the profits and distributing the losses the said several contributions shall be considered as actually paid up by said several parties. The deed also recites that the lands, tenements, buildings, and machinery so as aforesaid the exclusive property of the said John Walsh M'Master shall still remain and continue to be his sole property, but to be subject to

the use and enjoyment thereof for all partnership purposes by the said co-partnership, for which use and enjoyment the said John M'Master was to be compensated in manner therein mentioned. The deed also contains a clause in reference to insuring the premises against fire, and then we come to a material part of the deed as to the taking of the annual account on the 31st March in each year. That clause recites "that on the 31st day of March in every year, or within one calendar month next thereafter, a general account in writing shall be made of the stock and effects of the said co-partnership, and a balance sheet shall be struck at foot of the same account in order to ascertain and intelligibly exhibit the true state thereof, and for the purpose of making and completing such yearly account, all the stock in trade, goods, chattels, and effects of said partnership, shall be estimated and truly valued according to the then proper market value thereof, and also all the debts due to the said co-partnership at the time of said account, that is, on the 31st day of March in that year, shall be included in the said account at such value as the said partners or the majority of them, shall put upon said debts, making due allowance for bad and doubtful debts, and which account shall be fairly transcribed into and entered in the proper book to be kept for that purpose, and a true and full duplicate of such balance-sheet shall also be furnished to and shall be retained by each of said partners, and upon the said yearly accounts being approved of and signed by the said partners respectively, the same shall be binding and conclusive upon all parties interested therein, and shall not be again opened or questioned unless some error to the amount at least of £100 shall be discovered therein within the space of one calendar month after the same shall be so furnished to said parties respectively, and shall be then open to investigation, so far only as may be necessary for rectifying such error. That upon each settlement of the said yearly accounts, the clear profits of the joint trade shall be divided amongst the said partners in the proportions aforesaid, and shall be paid or credited to them respectively." Now, here there is nothing whatever said about good will or trade marks. The accounts are to be conclusive, and are to be taken from year to year. They are binding according to this deed, and, if that is to be so, good will is entirely excluded from these accounts. The whole structure of the deed amounts to this, that if Mr. M'Master should happen to be the sole surviving or continuing partners, or that other surviving partners wished to join him in the partnership, he should pay for the shares of the deceased partners in the whole concern, and this account excluded every thing about good will, name, or trade mark, and Mr. M'Master and his firm were to carry on the business in the mercantile world as before. If Mr. M'Master should take this property at all, he should take it in its integrity. They say that he must pay for them if he is to get them. They say that this should be a partnership without any reference to these provisions. Now, it comes to this—What was he to pay? I cannot discover any ground for saying that I can add a halfpenny to these sums of money in respect of this good will. Suppose that he had to pay £10,000 for these things, was he

to be also asked to pay for a matter not mentioned in the deed? Now, looking at the terms of this deed, it is beyond the power of this Court to say what is the value of the shares in this concern. It is a curious thing enough that there are two clauses in this deed ascertaining the value of the shares. One of them is worded generally. If there is any meaning in words, Mr. M'Master is to pay for the value of the shares in the stock and capital mentioned before at £7,500, and the shares in the partnership assets. I am not quite sure about the argument as to the value of the stock and shares, but what he is to pay for them is to be duly and correctly ascertained. The shares in the partnership are to be ascertained and valued. The words, "value of the shares" may mean more or less. It might or might not mean what they would bring in the open market, but we all know that these things do not sell, or at least never bring the value which they really have if they continue to be dealt with. Now as to the value of this property in the abstract. What is the meaning of the words in reference to the value of the shares which the deed says may be ascertained at the last and previous stock taking. That throws us back upon these accounts. They have been taken, and the real difficulty in the case is to see how that is to be got at. It is said that the valuation cannot take place, and that this Court has no machinery for the purpose. Is it to be said that in a partnership contract the retiring partners' interest in the concern cannot be ascertained in this Court. That would be a most mischievous decision. There can be no more difficulty about taking a valuation of a partnership of this kind than there is about taking the accounts of the partnership. The value of goods and chattels can be very easily ascertained. Mr. Law says that such a thing cannot be done, but has he shown any ground to nullify the clauses of the deed just as if they had no existence? These clauses are the commonest things in the world, and are they to be thrown overboard if one party does not agree to matters being carried out in pursuance of them? It strikes me that this Court can ascertain what is to be the basis of this purchase. If the petitioner will not consent, I don't know that I can give any relief at all in this suit. As regards these trade marks, they are very much mixed up with the locality of the place, and what use they would be to any body buying them I cannot see. Mr. M'Master thinks he bought them, and he comes here as the owner of them, dealing with them as the purchaser, as he undoubtedly is. It is impossible to say that an injunction can be granted against him. He stands now as the purchaser of them by deed. My impression is, that I have power to enforce the clauses in this deed which determine the price to be paid. I would hold that the thing which Mr. M'Master purchased includes the good will, which is represented by the trade marks and name. He cannot use the name of the Messrs. Dickson. As to the valuation of the stock and effects, if the parties will not agree, the case must be discussed over again. My impression is, that there can be no difficulty in ascertaining the value through the master of this Court, and that, upon the whole of the case, this good will and property will pass to Mr. M'Master in the way he claims, and that



they are to be paid for by valuation founded on the basis of the accounts. The view I take of the matter is, that Mr. M'Master offers a fair bargain. He offers to the petitioner the capital stock as it stands on the books, meaning thereby the money value of it, and he says, I will pay you that down at once. I think the offer a fair one, and I will now leave the parties to consider how they will act. A great deal of argument as to good-will was used to show how good-will as part of partnership assets had to be treated; but in the present case the question was, whether assuming it to be assets of the partnership, the parties had not by the deed regulated the terms on which it was to be paid for. I am of opinion that by the deed Mr. M'Master is entitled to the good will and trade-marks, paying for them by the purchase-money which he is to pay under that deed; but then comes the question what is he to pay, in other words, is he to pay for them on a separate valuation of them, or does he get them, as continuing partner under the deed, on simple payment of the money, which by the terms of the deed he was to pay on the retirement of the parties.

After going through the facts, his Lordship stated that in his opinion Mr. M'Master was entitled to remain continuing partner, and as such entitled to the good-will and trade-marks, on payment to the outgoing partners of the amount of their shares, as provided by the partnership deed, and that therefore the good will and trade-marks should go to him without being the subject of any positive or separate valuation.

*Brewster, Q.C.*—My learned friends suggest that your lordship should refer the matter to the Master, declaring that the petitioner is not entitled to the trade marks and good will, and that the enquiry should not be proceeded with till we ascertain whether they will agree.

*THE LORD CHANCELLOR.*—Very well. They shall ascertain the basis of the accounts.

*Chatterton, Q.C.*—The parties set such a value on the good will, that they propose to bring the matter further. In that case it might be as well to refer the matter at once to the Master, to enquire and report, of course not taking into account the good will.

*THE LORD CHANCELLOR.*—I will do so.

*Brewster, Q.C.*—Will your lordship now adjudicate on the question of costs?

*THE LORD CHANCELLOR.*—The petitioner must pay all costs of suit down to the present.

## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

[CORAM MONAHAN, C.J., KEOGH, AND O'HAGAN, JJ.]

MURPHY v. NELSON.—June 5.

*Sitting aside defences.*

*In an action against an attorney for investing the money of his client on insufficient security, whereby it was lost, the defendant pleaded, with others, the*

*following defences:—1. "That the plaintiff did not retain the defendant to invest any money on good and sufficient security." 2. "That the plaintiff did not retain the defendant to invest or lay out any sum of money on mortgage." 3. "That before the retainer and contract alleged, the plaintiff and one W. B. informed the defendant that the plaintiff had agreed to lend the sum of £500 to the said W. B., and to act as book-keeper, &c. to the said W. B. in consideration of receiving eight pounds per cent. per annum upon said sum of £500, and a salary of £100 a year, and the said W. B. has agreed to give as a counter security for said sum of £500 the lease of certain houses in Abbey-street, and that the plaintiff and the said W. B. then requested the defendant to have a proper deed prepared to carry out the said agreement, and that accordingly the defendant did cause a proper deed to carry out said agreement to be prepared by counsel, and that the draft of said deed was afterwards fully explained by the defendant to the plaintiff, and was read over and approved of by the plaintiff, and was afterwards engrossed and executed by the plaintiff and the said W. B., and was acted upon by the plaintiff and the said W. B., and that the said deed was prepared and executed with the blanks that now appear thereon at the special instance and request of the plaintiff, and contrary to the advice of the defendant given to the plaintiff. That the said sum of £500 was paid by the plaintiff to the said W. B. previously to the execution of the said deed, and that such payment was made without the knowledge or consent of the defendant, contrary to the advice given by the defendant to the plaintiff, and that save as aforesaid the defendant did not enter into any contract with the plaintiff to invest any money upon any security whatever, or that any security should be procured by the defendant for the repayment of any money, or that any conveyance or grant whatsoever should be obtained for the plaintiff." The plaintiff having applied to set aside these defences, the Court refused the motion.*

THE first count of the summons and plaint complained that in consideration that the plaintiff retained the defendant as being an attorney and solicitor, for reward to the defendant as such solicitor, to invest certain money of the plaintiff for the plaintiff at interest, upon good and sufficient security, the defendant promised the plaintiff he would invest the said money for the plaintiff at interest, upon good and sufficient security, yet the defendant invested the said money upon bad and insufficient security whereby it became lost to the plaintiff, to the plaintiff's damage of one thousand pounds. The second count complained that in consideration that the plaintiff retained the defendant as and being an attorney and solicitor, for reward to the defendant as such solicitor to invest and lay out a large sum of money, to wit, five hundred pounds on mortgage for and on behalf of the plaintiff, he defendant undertook and promised the plaintiff to invest said money upon good and sufficient security, and to use due and proper care and diligence in and about ascertaining that a good and sufficient security should be procured by the defendant for the repay-

ment of said sum and interest thereon; and that a good legal and binding conveyance or grant by way of mortgage to secure said sum and interest should be obtained for the plaintiff by said defendant; yet the defendant, not regarding his duty in the premises, but contriving to injure and deceive the plaintiff in that behalf, did invest said sum of five hundred pounds upon bad and insufficient security, and did not use due care and diligence in procuring a good and sufficient security, and did not obtain a good, legal, and binding conveyance or grant by way of mortgage to secure said sum and interest, whereby it became lost to the plaintiff, to the plaintiff's damage of five hundred pounds. The third count complained that the defendant, before and at the time of the making of the promise and undertaking of the defendant hereinafter next mentioned, to wit, on the day of November, 1861, proposed to the plaintiff that he, the plaintiff, should lend a large sum of money, to wit, five hundred pounds at interest to one Walter Bourke, to be secured on certain houses and tenements situate in the city of Dublin. And thereupon plaintiff, at the request of the defendant, retained and employed defendant as the attorney of and for the plaintiff for fees and reward to him in that behalf to use due and proper care in ascertaining the title of said Walter Bourke to the said houses and tenements, and to use due and proper care and diligence that the same should be a good and sufficient security for the repayment of the said sum of five hundred pounds and interest. And in consideration of the premises the defendant then promised the plaintiff to use due and proper care and diligence in and about ascertaining the title of the said Walter Bourke in the said houses and tenements, and to take due and proper care that same should be a good and sufficient security for the repayment of said sum of five hundred pounds and interest, and to obtain a binding and legal conveyance of said houses and tenements upon making said proposed loan, and by way of security for the repayment of same. Nevertheless, the said defendant not regarding his duty in that behalf, nor his said promise and undertaking, did not take due and proper care to ascertain the title of the said Walter Bourke in the said houses and tenements; nor take due and proper care that the same should be a good and sufficient security for the repayment of said sum and interest, nor in obtaining a binding and legal conveyance of said houses and tenements. And the said plaintiff further complained that he, confiding in the said promise and undertaking of the said defendant, did in fact advance and pay to the said Walter Bourke the said sum of five hundred pounds upon the security of the said houses and tenements; and he has not at any time received from said Walter Bourke or any other person the said sum of five hundred pounds and interest, save and except a small portion thereof, to wit, one hundred and fifty pounds. Nevertheless, the said supposed title of the said Walter Bourke in the said houses and tenements was not a good title; and the supposed title, and estate, and interest of the said Walter Bourke in the said houses and tenements are not, were not, and will not be any sufficient security, or at all, for the repayment of said sum of five hundred pounds and interest; nor has there been

made to the plaintiff a legal, binding, and valid grant of said houses and tenements to secure the repayment of the said loan, but, on the contrary, one wholly invalid and of no binding efficacy, through and by reason of the neglect of the defendant as aforesaid. And the plaintiff in fact avers that for the reason aforesaid and by reason of the badness and insufficiency of said security the said plaintiff hath been and is wholly unable to recover the said loan or any part thereof save as aforesaid, and has in fact lost the same to the plaintiff's damage of one thousand pounds. The fourth count complained that in consideration that the plaintiff retained the defendant as being an attorney and solicitor for reward to him, the defendant, to invest certain money of the plaintiff at interest, upon good and sufficient security, the defendant promised the plaintiff he would invest the said money for the plaintiff at interest, upon good and sufficient security; and the plaintiff did retain the said defendant for the purpose aforesaid; yet the defendant did not invest said money upon good and sufficient security, but, on the contrary, laid out and advanced said money by way of loan to one Walter Bourke upon mortgage of certain houses and tenements of said Walter Bourke, he, the said Walter Bourke, being at the time of such mortgage in insolvent circumstances, whereof the defendant then and there had notice, and did not obtain a legal and binding conveyance by way of mortgage of the said houses and tenements, by reason of which several things the plaintiff hath wholly lost the said sum of five hundred pounds and interest to the plaintiff's damage of one thousand pounds. The defences were the following:—1. As to the first paragraph of the summons and plaint and the cause of action therein, that the plaintiff did not retain the defendant to invest any money on good and sufficient security. 2. And for a further defence to the said first paragraph and the cause of action therein, the defendant says that the defendant did not enter into the contract therein alleged. 3. And as to the second paragraph of the summons and plaint and the cause of action therein, the defendant says that the plaintiff did not retain the defendant to invest or lay out any sum of money on mortgage. 4. This defence (pleaded to the second count) was similar to the second defence (pleaded to the first count). 5. And for a further defence to the said second paragraph and the cause of action therein, the defendant says that before the retainer and the contract therein alleged the plaintiff and one Walter Bourke informed the defendant that the plaintiff had agreed to lend the sum of £500 to the said Walter Bourke, and to act as book-keeper, bank assistant, and general office clerk to the said Walter Bourke in consideration of receiving eight pounds per cent. per annum upon said sum of five hundred pounds and a salary of one hundred pounds a year, payable monthly. And the said Walter Bourke had agreed to give as a counter security for said sum of five hundred pounds the lease of certain houses in Abbey-street, in the city of Dublin, belonging to the said Walter Bourke; and that the plaintiff and the said Walter Bourke then requested the defendant to have a proper deed prepared to carry out the said agreement; and that accordingly the defendant did cause a proper deed to carry out said agreement to be prepared by counsel;

and that the draft of said deed was afterwards fully explained by the defendant to the plaintiff, and was read over and approved of by the plaintiff; and that the said deed was afterwards duly engrossed and executed by the plaintiff and the said Walter Bourke, and was acted upon by the plaintiff and the said Walter Bourke. And the defendant avers that the said deed was prepared and executed with the blanks that now appear thereon at the special instance and request of the plaintiff, and contrary to the advice of the defendant given to the plaintiff. And the defendant further avers that the said sum of £500 was paid by the plaintiff to the said Walter Bourke previously to the execution of the said deed, and that such payment was made without the knowledge or consent of the defendant, and contrary to the advice given by the defendant to the plaintiff. And the defendant avers that save as aforesaid the plaintiff did not retain the defendant to invest or lay out any money on mortgage; and save as aforesaid, the defendant did not enter into any contract with the plaintiff to invest any money upon any security whatever, or that any security should be procured by the defendant for the repayment of any money, or that any conveyance or grant whatsoever should be obtained for the plaintiff. 6. And as to the third paragraph of the summons and plaint, and the cause of action therein, the defendant says that the plaintiff did not retain or employ the defendant to ascertain the title of Walter Bourke to any houses or tenements, or to use any care or diligence that the same should be a good or sufficient security for the payment of any sum of money. 7. This defence (pleaded to the third count) was similar to the second defence (pleaded to the first count). 8. This defence (pleaded to the third count) was similar to the fifth defence (pleaded to the second count) down to the concluding words, which were as follows:—And the defendant avers that, save as aforesaid, the plaintiff did not retain or employ the defendant to ascertain the title of Walter Bourke to any houses or tenements, or to use any care or diligence that the same should be a good or sufficient security for the repayment of any sum of money; and that save as aforesaid, the defendant did not enter into any contract with the plaintiff to ascertain the title of the said Walter Bourke to any houses or tenements, or to take any care that the same should be any security for the repayment of any sum of money, or to obtain any conveyance of any houses or tenements. 9. This defence (pleaded to the fourth count) was similar to the first defence (pleaded to the first count). 10. This defence (pleaded to the fourth count) was similar to the second defence (pleaded to the first count). 11. This defence (pleaded to the fourth count) was similar to the fifth defence (pleaded to the second count) down to the concluding words, which were as follows:—And the defendant avers that save as aforesaid, the plaintiff did not retain the defendant to invest any money upon any security whatsoever; and save as aforesaid, the defendant did not enter into any contract with the plaintiff to invest any money of the plaintiff on any security whatsoever; and the defendant did not lay out or advance any money of the plaintiff to the said Walter Bourke.

*Macdermot* for the plaintiff moved that the first, third, and ninth defences should be set aside as embarrassing and calculated to prejudice the fair trial of the action, inasmuch as they were double and ambiguous, and traversed an inference of law, and raised an immaterial issue; and that the sixth defence should be set aside as double, ambiguous, and alternative, and as traversing an inference of law, and raising an immaterial issue; and that the second, fourth, seventh, and tenth defences should be set aside as uncertain and ambiguous, and as not traversing one or more material facts in the counts to which they were pleaded, and as amounting to the general issue; and that the fifth, eighth, and eleventh defences should be set aside as uncertain, argumentative, and repugnant, and because it was uncertain whether the said defences traversed or confessed and avoided the causes of action in the counts to which they were pleaded; and because it was doubtful what was meant by the word "proper deed" in said defences.

*Macdonogh*, Q. C., and *Foley*, contra.

*Macdermott* replied.

The following authorities were cited:—*Addison on Contracts*; *Fitzgibbon v. Nagle* (10 Ir. C. L. R. App. xxxv.); *Lysaght v. Lee* (8 Ir. Jur. n. s. 112); *Winton v. Moore* (8 Ir. C. L. R. 234); *Cantwell v. Cannock* (3 Ir. R. L. R. 78); *Dowling v. Wallace* (3 Ir. C. L. R. 83); *Kenyon v. Tayleur* (8 Ir. C. L. R. App. lxxvi.)

THE COURT refused to set aside any of the defences.

*Motion refused.*

## Consolidated Chamber.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM O'HAGAN, J.]

THE WEXFORD HARBOUR EMBANKMENT COMPANY v. REDMOND.—*Mar. 2.*

*Application to stay proceedings at law against an administrator—Court of Chancery (Ireland) Regulation Act, 1850, s. 22.*

*Where upon an application under 13 & 14 Vic. c. 83, s. 22, to stay proceedings at law commenced against an administratrix, it appeared that considerable delay in proceeding with the order of reference made by the Court of Chancery in an administration suit had taken place, the Court made the order to stay proceedings, but put the administratrix under terms to proceed before the Master within one week.*

*Joseph J. Greene* for Mrs. Margaret Redmond, administratrix of the late John Edward Redmond, the defendant, moved under the 22nd section of the 13 & 14 Vict. c. 89, for an order of the Court that all further proceedings in three actions (which had been brought before the Court of Common Pleas) be stayed until leave in writing to proceed therewith had been first obtained from the Master, to whom the matter of the petition in *Redmond v. Redmond* had been referred.

In an administration suit commenced for the benefit of all the creditors of the intestate, an order of reference had been made, and the twenty-second section of the Court of Chancery (Ireland) Regulation Act, 1850, enacts that while such order remains in force, it shall not be lawful for any creditor to commence or proceed with any action against the executor or administrator.

*Neligan*, for the Company, stated that the order of reference had not yet been brought into the Master's Office, nor had any proceedings been taken thereunder, though upwards of three months had elapsed from the time it was pronounced.

THE COURT made the order to stay proceedings, but put Mrs. Redmond on terms to proceed before the Master within one week.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

RICHARD O'REILLY AND PHILIP O'REILLY, PLAINTIFFS;  
CECILIA O'REILLY AND OTHERS, DEFENDANTS.  
May 24.

*Plea—Knowledge of contents of will—Blanks filled up by solicitor without instructions, and not communicated to the testator.*

*A solicitor drew from instructions a draft will settling in strict settlement on testator's sons and daughters his real estates, with powers of jointuring, charging portions, and giving maintenance; but in these latter the sums were all in blank, and also the names of trustees. The testator had an epitome of the draft, also in blanks in these respects, in his possession for a considerable time, and approved of it. On his taking suddenly ill, the solicitor, of his own motion, filled up the blanks, and did not communicate at all to the testator how they had been filled up, and the will was so executed. Held, that the matters so filled in, could not form part of the probate, but that the rest of the will was valid.*

THIS suit was instituted for the purpose of proving in solemn form of law, the will of Philip O'Reilly, late of Coolamber, in the County of Westmeath, esquire, who died on the 26th April, 1865. The plaintiffs were two of his sons, and were named executors in the will, which was dated on the 25th day of April, 1865. They had by citation instituted the suit, and had cited the widow and the rest of the children of the testator to see the will proved in special form of law. An appearance was duly filed for the several defendants, and the plaintiffs propounded in their declaration the will. To that declaration one of the defendants, Cecilia O'Reilly, pleaded non-execution pursuant to the statute, and also that the names of the trustees named in the will, and a great number of sums which were in various parts of the will, and represented the amounts of jointures which the respective tenants for life of the estates could provide for

their wives, and also portions for their children, and amounts to be allowed for maintenance and the like were not, nor were any of them, known or approved of by the testator. It appeared from the evidence of the solicitor who drew the will, that the testator had, on the 27th of August, 1865, personally called on him in Dublin, and had given him deliberate and minute instructions for his will, on which occasion a memorandum was taken down in writing by the solicitor of the testator's intentions, from which in the following November a draft was prepared by a clerk of the solicitor, and also an epitome or abstract of the several limitations, powers, and provisions in such draft, in fact the entire substance of the intended will; but the amounts of the sums for the jointures to be provided for the wives of the tenants for life of the lands, and for the portions and maintenances, &c., of their children, and the names of the intended trustees were all in blank. There were three estates, the subject of the limitations in the will, limited respectively in strict settlement on the three sons of the testator for life, with remainders in tail to their issue, with cross-remainders and remainders to the daughters also in like manner. The epitome was sent to the testator for his perusal and approval on the 5th December, 1865, and he kept it in his custody until he died, and on several occasions spoke to his solicitor about it, and expressed his approval of it and his intention to complete the matter. On the 25th April, 1866, however, he was taken suddenly ill, and sent for his solicitor in great haste to execute his will. The latter got the draft in his office, and of his own motion and from his knowledge of the value of the estates, and from inquiries made from testator's son, and with reference thereto, filled up all the blanks, and also filled the blanks for the trustees' names from his knowledge of the testator's regard for the persons so named, and deeming it probable that he would approve of them. He then took the draft so filled up to the testator, who asked him was it in conformity with the epitome, which the solicitor said it was, and also were the estates strictly entailed, and he said they were, and the testator gave him directions to name the plaintiffs his executors, and gave some dispositions in favour of his wife which the solicitor added in his presence, but the solicitor forgot to draw, and did not in fact draw, the attention of the testator to the said several sums and names so filled in by the solicitor in his office. The draft was then executed and attested with all due formality as a will, the solicitor intending to have it engrossed, and a more formal will executed, but the testator died in the course of the ensuing night, and the matter had not been again brought to his notice. The epitome was found in his desk.

*Dr. Ball*, Q.C. (with him *Dr. Miller*) for the plaintiffs, contended that the will as it now stood was entitled to probate. It is quite legitimate for a testator, if he so pleases, to delegate the making of his will to another person, and if he, in possession of his faculties, chooses to adopt it and executes it, he will be presumed to have conusance and to approve of all the contents. Besides, here the will is in all the substantial parts in exact accordance with the epitome; it is only in the powers which are necessary to carry

out and effectuate the intentions of the testator that the difficulties arise. Sir C. Cresswell in several cases laid it down that it was not essential that a testator should personally know the contents of his will—*Middlehurst v. Johnston* (30 L. J. Pr. 14) *Cunliffe v. Cross* (3 S. & Tr. 37; 32 L. J. Pr. 18); though Sir J. P. Wilde has in two recent cases decided the reverse.—*Hastilow v. Stobie* (1 L. R. Pr. 64); *Guardhouse v. Blackburn* (14 W. R. 163). *Turner v. Sargent* (17 Beav. 525); *Higgins v. Barkley* (2 S. & S. 516) *Hippesley v. Homer* (Turn. & R. 48, n.) were also cited as to Courts of Equity supplying defects in conveyances.

A. Hamill, for the defendant, relied on Sir J. P. Wilde's deliberate and successive judgments already referred to, and also cited *Hunt v. Hort* (3 B. C. O. 311); *Miller v. Travers* (8 Bing. 844); *Edmonds v. Waugh* (4 Drew. 275) *Hill v. Hill* (6 Sim. 144); *Duke of Bedford v. Abercorn* (1 M. & C. 312); *Montgomery v. Montgomery* (10 Ir. Jur. N. S. 102); and submitted that the Court could not ratify the act of the solicitor as to the sums and names which he without any authority introduced into the will.

Dr. Miller in reply.—Even Sir J. P. Wilde in *Guardhouse v. Blackburn*, in one of the rules or resolutions laid down by him, says that, except in certain cases, the fact of execution is proof of knowledge of contents. The exception appears to refer to cases of fraud which this is not.

Cur. adv. vult.

June 4.—KEATINGE, J.—I adhere to the opinion which I entertained during the argument. The suit is instituted to establish the will of Philip O'Reilly, and though it is a perfectly amicable suit, yet very serious questions of law arise in it for adjudication. The will is dated on the 25th April, 1865, being the day of the testator's death, and was prepared by Mr. Arthur O'Hagan, his solicitor, from verbal instructions given to him by the testator, of which Mr. O'Hagan at the time took a short note. That occurred on the 27th August, 1865, but previously to that interview there had been numerous conversations between the testator and his solicitor as to the preparation of the will; as part instructions the deceased gave his solicitor a former will dated the 12th of May, 1862. Armed with those instructions, which were very general, he instructed his clerk to prepare a will: the clerk suggested that they were deficient in many respects, particularly as to the provisions as to jointuring wives, and providing portions and maintenances for younger children of the tenants for life, and also the names of the trustees. However, the will was prepared on the assumption of the deceased's introducing those different matters into the draft, and accordingly the will was drawn with blanks in those respects, and Mr. O'Hagan thought it best to send a short abstract, or, as it has during the arguments been styled, an epitome, to the deceased for his consideration, and it was sent to him on the 5th December, 1864, and it was, as to the blanks, just as deficient as the draft, but in all other respects it contained the entire substance of the draft. In conversation with the testator, that epitome was called at all times the draft will, and he on several occasions

expressed his entire approval of it; but from some cause or other, no regular meeting took place about the will, but several interviews were had on business connected with the agencies of the deceased, who was an extensive land agent. In the morning, however, of the 25th April, 1865, Philip, the second son of the deceased, called on Mr. O'Hagan, and told him that his father was seriously ill. Mr. O'Hagan immediately got in his office the draft of the will, which was in precisely the same state as when the epitome had been sent to the deceased, with all the blanks in it already referred to. Mr. O'Hagan then had a conversation with Philip, the son, respecting the value of the estates of his father, not, however, telling him his object in so doing, for though Mr. O'Hagan, as the solicitor for a considerable time of the testator, had a general notion of the value of them, yet he could not without assistance fix their exact value. He then filled up the blanks in the draft according to the information he had so got, and he put in also the names of the trustees. He then went to the deceased's house, and the deceased himself referred to the epitome, or, as he called it, draft will, as in his desk, and particularly asked if the will corresponded with it, and made his sons strict tenants for life, which the solicitor assured him it did. Mr. O'Reilly, the testator, then named his two elder sons executors; it is not clear if he had done so before, but he also then made additional provisions for his wife, and gave her power to reside at Coolamber, and he likewise named his residuary legatee. Thus Mr. O'Hagan was enabled fully to complete the draft, with the exception of the blanks as to the names of the trustees, and the different sums for jointures, portions, and maintenance. The draft was signed in a very great hurry, the solicitor being apprehensive that there was not even time to engross it. I am bound to say, that though the evidence is entirely that of one person, the solicitor, it is in *omnibus* an honest and fair transaction, and I entertain no doubt that if the whole will had been read over to the testator he would have fully approved of it, and therefore I was most anxious if I could to carry out the intentions of the deceased, that all the will should take effect. But I do not feel authorised to do so. The testator did not give instructions for these matters, nor did he ever say that he would confirm what his solicitor would decide on, or had decided on. If the testator had said to his solicitor, Do you name the trustees, fix the several sums for jointures, &c., or if O'Hagan had said to him what he had done, and the other in reply said that he was satisfied, then a serious question might have arisen; and the inclination of my opinion would be at variance with the opinion expressed by Sir C. Cresswell, referred to in the argument, and would rather be in conformity with Sir J. P. Wilde's decision in *Guardhouse v. Blackburn*. That case is an express authority that nothing can be considered the will of a testator save that which he knew and approved of. In summing up the rules at p. 466 (14 W. R.) the 5th proposition is, "that subject to the last preceding proposition the fact that the will had been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when

coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof;" and the 4th proposition is, "that though the testator did know and approve of the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised upon the testator in obtaining his execution thereof." In this case no fraud exists, but the testator did not know and did not approve of the different matters filled up in the blanks. *Hartilow v. Stobie*, if law, expressly rules the case before me. There the marginal note says, "It is essential to the validity of a will that at the time of execution the testator should know and approve of its contents." In that case Sir J. P. Wilde remarks that Sir C. Cresswell's opinion was only a *dictum* which he disapproved of. Still it is plain that though it was not an express decision, his strong opinion was as laid down by him, and it is further to be observed that Sir J. P. Wilde's decision is greatly confirmed by the Lord Chancellor and the Chief Justice of England, who have sanctioned the new forms of pleas there, one of which is, "that the testator did not know and did not approve of the contents of the will"—those rules are dated 29th of September, 1865. No doubt, such approval of the rules is not final and conclusive, but I must say that my own judgment quite concurs with that view. My decree will be to establish the will save as to the several blanks so filled up, which I condemn. All parties to have their costs.

#### MULLARKEY AND WIFE v. MATHEWS.—*Juss.*

##### *Evidence—Declarations of testator—Revocation of will.*

*The declarations of a testator made after the act of revocation of a will of the fact of his having revoked the will by burning it, held at Nisi Prius inadmissible to prove revocation.*

THE plaintiffs, as representatives of Dr. M'Carthy, deceased, who was the executor and residuary legatee in a will of Thomas M'Mahon, deceased, dated the 17th April, 1865, and who had propounded that will for proof, but had died in the progress of the cause, now appeared on the trial to sustain it. Another will, dated the 16th April, 1859, was propounded by an intervenient, Austin Mullarkey, a legatee in it. The defendant, as next of kin and heir-at-law of the deceased, disputed both wills on the grounds of incapacity, undue influence, and also forgery; and though admitting that a will had been made by the testator on the 16th April, 1859, yet he insisted that such will had been revoked by the testator in 1863 by burning *animo revocandi*. The cause was now at hearing.

*Dr. Ball, Q.C., Dr. Walsh, Q.C., and Price, for the plaintiff.*

*M'Donough Q.C., and Dowse, Q.C., for the defendant.*

*Clarke, Q.C., and Dames for the intervenient.*

In reply to a question put by Mr. M'Donough, a witness named William M'Loughlin stated that the deceased had told him in 1863 that the will he had made in 1859 he had in 1863 burned, meaning to revoke it.

*Dr. Ball and Dr. Walsh, for the plaintiff, objected to that evidence as inadmissible.—Staines v. Stewart (2 S. & T. 320); Doe v. Palmer (16 Q.B. 747).*

*M'Donough and Dowse (G. Fitzgibbon with them) contra.*—The evidence is legal, and should be received. The cases cited are decisions of only co-ordinate tribunals. It appears strange to argue that the statement of a witness, such as had been given here, or as had been given in *Staines v. Stewart*, could be divided; and that it could be held, that while that portion of it relating to the making of the will could be received as evidence of a declaration of the testator as to the *factum* of the will, yet that the part of it showing on the same authority that such will so made had been burned and revoked was to be rejected.—*Miller's Prob. Prac.* 206.

*—KEATINGE, J.*—I am not inclined to decide against the case of *Staines v. Stewart* even though it is but the decision of a court of co-ordinate jurisdiction. It appears to me that the whole of the evidence now sought to be given as to the deceased having stated to several parties that he had burned the will of 1859 is inadmissible; and so far as it has already been given I shall direct the jury to strike it out of their notes altogether, and I decline to allow any further evidence of that nature to be given.

[The cause proceeded, but after a protracted hearing the jury could not agree to a verdict, and by consent were discharged.]

#### TIERNY v. BYRNE.—*May 24.*

##### *Pleading—Two wills—Interest—45th Rule contentious.*

*The defendant propounded in the declaration a will which named him sole executor, and also a legatee. A previous will was alleged in the plea by the plaintiff, who was a co-executor in it with the defendant; but that will did not contain a legatee, which the last will did, for the defendant. The defendant had appeared as executor in the last will, but was in fact also a next of kin. Held first—that the earlier will might be alleged in the suit; and secondly, that the plaintiff was entitled, if he pleased, to reply to the plea; and in his replication impeaching the first will to state his interest as next of kin.*

*Coates, for the defendant, moved to fix the mode of trial.* The defendant was sole executor in a will made in December, 1865, in which he was also a legatee for two sums of money. The plaintiff by his plea had alleged undue execution of that will, besides testamentary incapacity and undue influence; and had in addition propounded a former will, in which

the plaintiff and the defendant were co-executors. The latter will did not give the defendant one of the two legacies which were in the last will. [Keatinge, J.—Have you replied to the plea alleging the first will?] No; for it occurred to me that it could not be put in issue in this suit.

*Dr. Miller* for the plaintiff.—The 45th Rule (contempts) provides that a second and previous will may by permission of the Court be propounded in the same suit with a subsequent one. But I object to any replication being filed by the defendant to the plaintiff's plea. The defendant is before the Court merely as executor in the last will. If that will be successfully impeached, he then is merely an executor in the earlier will; he therefore would have an interest to *sustain*, but not to *impeach*, that will.

*Coates*.—But the defendant is a next kin, and as such is interested in contesting the first will.

*KEATINGE, J.*—The defendant has appeared in this suit only as the executor named in the later will. It is now alleged that he is also a next of kin of the deceased, and wishes to impeach the earlier will in the event of the latter one being pronounced against. It is clear that under the rule referred to by *Dr. Miller* the two wills may be alleged, but I think the defendant is entitled to reply; and he may do so by alleging in his replication that he is a next of kin, but it must be filed this day, the motion to fix the mode of that to stand over.

#### CASWELL v. DUFFY.—June 12.

##### *Trial at assizes—Grounds for.*

*The Court will not send a case for trial to the assizes merely on the ground that the great majority of the witnesses on both sides and the parties reside in the country; or on the ground that the characters of the parties are known to the jurors at the proposed assizes; and that the result will probably depend on the credit to be given to the parties.*

*J. Clarke, Q.C.*, for the defendant, applied that the questions to be tried in the case should be remitted for trial to the next going judges of assize for the city or county of Limerick, and a special jury of either of those places. *Andrew Caswell*, the deceased, had died on the 9th February, 1861, having made a will, dated the 5th February, 1861, appointing the defendant, his solicitor, his executor and residuary legatee, to whom probate in common form had been in due course, shortly after the deceased's death, granted by the district registrar of Limerick. The plaintiff, a brother, and one of the next of kin of the deceased, had by citation, recently called on the defendant to prove the said will specially, or show cause why it should not be condemned. The defendant thereupon in his declaration propounded the will; and the plaintiff, in his pleas, impeached it on the following grounds, viz:—1st, Non-execution, pursuant to the Wills Act. 2nd, Want of capacity. 3rd, Undue influence practised by the defendant. 4th, Fraud on the part of the defendant. 5th, That the deceased

did not know the contents. 6th, Special misrepresentation by the defendant at the time of the alleged execution and suppression by him of knowledge in his possession from the testator, the special circumstances being fully set out. It was alleged by the defendant in his affidavit to ground the motion that the deceased had for the last six years resided with the plaintiff or in his immediate neighbourhood, and was the owner for his life of certain estates and funded property. That in 1854 the plaintiff became embarrassed, and to relieve him the trustees of his father's will agreed to advance part of the trust property to which, on the death of the deceased, the plaintiff would become entitled; and to secure to the deceased the interest of the money so advanced the plaintiff, on the 24th February, 1859, executed to the defendant, as a trustee for the deceased, an annuity deed, securing to the deceased an annuity for his life equivalent to the dividends that would accrue on the money so advanced to the plaintiff. It appeared that the defendant had recently commenced proceedings at law against the plaintiff to recover the sum of £779 14s. alleged to be due on foot of said annuity deed for arrears of said annuity due to the estate of said deceased. The affidavit of the plaintiff enumerated a great number of persons whom he intended to examine on the trial of this cause, all of whom resided in or near Limerick, and some filled public situations there; and particularly relied on the case probably turning on the credit to be given to the evidence of the parties in the cause, and that therefore it would be most desirable that the trial should be had either in Limerick or some adjacent county where the parties were known. Counsel for the defendant offered to let the case be tried under the old system, and to allow the plaintiff to put by any 36 out of the 48 jurors to be returned by the sheriff.

*Ball, Q.C.*, and *Palles, Q.C.*, for the plaintiff, opposed the motion.—The defendant here had been the attorney for the deceased, and had drawn the will in question, in which he is named executor and residuary legatee. A suit is pending in Chancery between the parties to impeach the validity of the annuity deed, on the ground that it was drawn by the defendant beyond the instructions of the deceased, making it a security as well for future gales as for past arrears, the latter not being intended by the deceased, and those arrears being now the supposed assets of the deceased. The questions to be tried in this case are peculiarly proper for this Court, and should not be sent to the assizes; besides, the plaintiff intended to examine two medical men residing in Dublin.—*Cooper v. Moss* (1 S. & T., 143); *Fowler v. Connolly* (3 Ir. J., n. s. 352); *Adams v. Quinn* (8 Ir. J. n. s. 52); *Benson v. Derrig* (3 Ir. J. n. s. 350).

*M. O'Loughlin*, in reply, relied on the length of time that had lapsed since the probate and the plaintiff's acquiescence, and contended that the case should be sent for trial to Limerick in conformity with the practice of the law courts.

*KEATINGE, J.*—This is an application by the defendant for an order that the case may be sent for trial to the next assizes to be had either in the city or the county of Limerick. It is grounded on the allegation that the plaintiff and the defendant reside in



Limerick, and are both well known to the jurors there; and that all the witnesses of the defendant, and most of those for the plaintiff, reside there also. In a court of law that would be a strong case to change the venue, but the same considerations do not prevail in this court. In answer to the application it is sworn that the defendant is a person of considerable influence, and took an active part in several contested elections, and is otherwise well known in the city and county of Limerick; and, in addition, it is stated that there are two medical gentlemen who reside in Dublin whom the plaintiff intends to examine. As to the expense, the plaintiff says that he will take only such costs, in the event of his succeeding as he would be entitled to if the case were tried at the assizes. That is a very fair offer, though the plaintiff was not bound to make it; but having been made, I shall hold the plaintiff to it. The broad ground on which I decide this motion is, that there are no special circumstances in the case which lead me to see that by a trial in this court there would be a failure of justice. In the case of *Benson v. Derrig*, which arose soon after the institution of this court, it was stated on affidavit that several of the witnesses to be examined at both sides were very advanced in life, and could not be brought up to Dublin. No railway then was in existence to Sligo, where they resided; I had no alternative. It would have been a denial of justice to have refused the application; but here there is no such difficulty as to the witnesses being brought to Dublin. There is a direct communication from Limerick to Dublin by train, the time of transit not exceeding four or five hours; and though the defendant has in his affidavit enumerated a great number of witnesses whom he intends to examine, it probably will turn out that at the trial the number will be considerably reduced by a closer examination of what they can depose to. As to the merits I am unwilling to make any observation save this,—that the pleas raise very serious questions, and, in my opinion, questions that may be tried more satisfactorily before unknown jurors; for in questions such as are here raised, character is the last thing on which jurors can safely rely; and I am in the constant habit of telling juries—and on the authority of decided cases—that parties are to be tried by their conduct in the particular transaction in question and not by their previous character, however fair it may have been; and my experience is, that in many cases before this Court persons of the highest character have often been found to have been concerned in acts respecting the preparation of testamentary instruments, of which their best friends would have thought them wholly incapable. For these reasons I am of opinion that the present motion should be refused, but, as I already said, I will hold the plaintiff to his offer as to costs in the event of his succeeding.

*Motion refused.*

MULLARKEY, EXECUTOR OF M'CARTHY v. MATHEWS.  
AUSTIN MULLARKEY, INTERVENIENT.

*Issues—Different wills.*

*The plaintiff's testator had propounded a will in*

*which he was the executor and principal legatee. The intervenient propounded a former will, which appointed the same executor, who was also named a principal legatee, and the intervenient was named a legatee also. Both of these wills were impeached by the defendant on the grounds of forgery, and undue execution, and the last also for want of capacity, and undue influence. The witnesses to them were different persons. Held, that an issue as to both wills should be sent to the jury.*

*Dames*, for the intervenient, moved to fix a day for the trial of the cause. There were two wills of the deceased, Thomas M'Manus, alleged in the suit. The first in point of date, the 16th April, 1859, was propounded by the intervenient, and in that will he was named a legatee; and the late Dr. M'Carthy, who had been the former plaintiff, was executor and principal legatee. The legacies in that will amounted to about £1900, but by reason of lapses they were in fact reduced to about £600. The other will was dated the 17th April, 1865, and had been propounded in the declaration by Dr. M'Carthy in his life, who was the executor and principal legatee named in it. Dr. M'Carthy having died pending the cause, the present plaintiff, who was his executor, was made a party by suggestion (see *ante*, p. 120). The legacies in the last will amounted to about £400. The defendant, as a niece and next of kin of the deceased, impeached both wills. The last will was impeached on the grounds of undue execution, incapacity, undue influence, and forgery; the former for undue execution and forgery. The first will, as well as the last, had been brought in by Dr. M'Carthy with his affidavit of scripts, and also the legatees in the first had been cited.

*Dr. Ball, Q.C. (Price with him)*, for the plaintiff asked that the issue should be confined in the first instance to the first will of 1859, and undertook that if it were established to abide by it. If it were condemned on a ground of forgery, of course, as a similar ground of impeachment was also given to the last will, it would be idle to go on to establish it. If the first were set aside merely for informal execution, that would not operate against the second. The witnesses to the two wills were different; the lapse of time between them was considerable; and a jury would be greatly confused by having the two wills at the same time submitted to their consideration.

*G. Fitzgibbon*, for the defendant, objected to having separate trials of the two wills; they were nearly identical in their disposition, and could be more conveniently disposed of by the same jury.

*KEATINGE, J.*—I cannot see anything in this case to make an exception from the general rule; and by the 45th General Rule (contentious) it is settled that several wills may in the same suit be propounded, and evidence be given on the trial as to the validity of each. The issue, therefore, will be whether either, and which of the said two paper writings propounded respectively in the plaintiff's and intervenient's pleadings, is the last will and testament of Thomas M'Manus, deceased, the deceased in this cause.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

**MEREDITH v. MEREDITH.**—April 25; June 19.

*Election.*

*R. M., seised in fee of certain estates, on his inter-marriage with his wife R., executed a marriage settlement dated 23rd of August, 1837, whereby a sum of £5,254 was assigned to trustees upon trust for the children of the marriage in such manner as said R. M. and R. should during their joint lives appoint, and in default of such appointment then as the survivor of them should appoint, and in default of such appointment in trust for the children in equal shares, and if there should be no children, then in trust for R. M., his executors, &c. R. M. by his will, just previous to his death in 1854, devised his said fee-simple estates, after providing for his wife's jointure, to his eldest son, and his heirs, &c., he, acting in excess of his power, bequeathed the said sum to his second son and his executors, &c. Said R. M. and R. never executed the said power of joint appointment over said sum. R., having survived R. M., died in 1861, having previously by deed appointed £1,000, portion of said sum to her said eldest son. Said younger son now contended that his elder brother was bound when accepting the estates devised to him by his father's will, to elect between the estates so devised to him, and the appointment of the £1,000, and to give effect to the bequest made by said will to his younger brother. Held (affirming the order of Master Brooke) that this was not a case for election, and that it was competent for the elder brother to take the estate devised to him by his father's will, and also the £1,000 appointed to him by his mother.*

THIS case came before the Court by way of special case stated under the 11th section of the Court of Chancery Regulation Act. The petition was presented by John Robert Meredith of Gray-street, Manchester-square, in the County of Middlesex, against his eldest and only brother, Richard Meredith, the respondent. The petition stated that by indenture dated 23rd August, 1837, and made between Richard Meredith (herein-after called the elder) of the first part; Rose Helen Buckle, spinster of the second part, and William Buckle, Rev. Henry Arthur Herbert, and Robert Meredith, of the third part, being the settlement executed in contemplation of the then intended marriage between said Richard Meredith the elder and Rose Helen Buckle (of which marriage John Robert Meredith, the petitioner, and Richard Meredith, the respondent, were the two sons) after reciting as the fact was that Rose Helen Buckle was entitled to a sum of £5,254, standing in her name in the books of the governor and company of the Bank of England, and that she was also entitled under the will of Noah Hill, dated the 11th of August, 1819, to a legacy of £1,000 to be paid to her by his executors after the death of Ellen Neale, the testator's widow, and further reciting, as the fact was, that said Richard Meredith the elder was seised of, or well and sufficiently

entitled to some estate or interest in reversion, immediately expectant, on the death of William Meredith, his father, in the Meredith Estates, subject to the payment of several incumbrances amounting to £5,538, and further reciting that a sum of £4,717, portion of said Ellen Buckle, was transferred to trustees upon the trusts of said settlement, it was witnessed that the said Rose H. Buckle, with the consent of her said husband, did assign to the parties of the third part the said legacy of £1,000, and it was declared that the trustees should stand possessed of said sum of £4,717 at three and a half per cent., and the said £1,000 in trust, after the solemnization of the said marriage, and until the several persons entitled to the several sums of money specified in the schedule thereto annexed should be prepared to receive payment of the same, and should be actually paid, either to suffer the said sum of £4,717 Government Stock to remain in the then actual state of investment, or to invest same in other securities as in said deed is provided for, and among other trusts to pay the annual income, or permit the same to be received by Richard Meredith the elder and his assigns, during his life, and after his decease, in case Rose H. Meredith should survive him, and in case an annuity or rent-charge of £400 which the said Richard Meredith was by a certain indenture of release and settlement, bearing even date with said settlement, empowered to charge on the said Meredith estates, should not be well and sufficiently charged and paid to her, and by her accepted in discharge of the provisions next herein-after declared, upon trust, to carry out and invest the said trust funds or securities, or a competent part thereof, in the purchase of an annuity of £400 for her life, but in case of the waiver by her of such last-mentioned provision, then during the life of Rose H. Buckle, to pay and apply the said dividends and produce of the said funds and securities to such persons as would for the time being be entitled to the rents and profits of the lands out of which the said annuity was to be payable; and after the decease of the survivor of the said Richard Meredith and Rose H. Buckle, to stand possessed of all the said trust funds and securities, or such part thereof as shall be unapplied after answering the purposes aforesaid and the annual income thereof, "in trust for all and every or such one or more exclusively of the other or others of the children and child of the said intended marriage, at such age, day or time, or respective days, ages or times, and if more than one, in such parts, shares and proportions, with such annual sums of money and limitations, and for the benefit of the said children, or some or one of them, and with such provisions for the maintenance and education, or preferment and advancement in the world of any such child or children, at the discretion of the said trustees or trustee for the time being, or of any other person or persons to be named or appointed in that behalf or otherwise, and upon such conditions, with such instructions and in such manner as the said Richard Meredith and Rose H. Buckle, his intended wife, shall during their joint lives by any deed or deeds, with or without power of revocation and new appointment, to be by them both sealed and delivered in the presence of and to be attested by two or more credible witnesses, jointly direct or appoint, and in

default of such joint appointment and in default of such direction or appointment, and so far as every and any such direction or appointment shall not extend, then as the survivor of them the said Richard Meredith and Rose H. Buckle by any deed or deeds, with or without power of revocation or new appointment, to be by him or her sealed and delivered in the presence of two or more credible witnesses or by his or her last will and testament, or any codicil or codicils in writing to be by him or her signed and published in the presence of and to be attested by the like number of witnesses shall from time to time direct or appoint, and in default of such direction or appointment, so far as every or any of such direction or appointment shall not extend, in trust for all and every the children and child of the said Richard Meredith by the said Rose H. Buckle, who, being a son, shall attain the age of 21 years, or being a daughter or daughters shall attain that age or marry, to be divided between and among such children, if more than one, in equal shares, and if there shall be but one such child, the whole to be in trust for that one child, and in case there should not be any child of the said intended marriage who should attain a vested interest in said trust premises in manner aforesaid, then all the trust funds and securities should be held in trust for the said Richard Meredith, his executors, administrators and assigns." The said indenture was executed by the said Richard Meredith, Rose H. Meredith, otherwise Buckle, and Henry Arthur Herbert, and by no other person. The said marriage was shortly after the execution of said deed solemnized, and there were born two children, and no more—namely, Richard Meredith, the elder son, the respondent (herein-after called Richard the younger), and John Robert Meredith, the petitioner, the second son. The petition then stated that in 1838 the trustees sold out the sum of £4,608, portion of said sum of £4,717, and invested the produce, being £4,679 cash, in taking assignments to themselves of certain charges affecting the Meredith estate set forth in the schedule to the said settlement.

The petition next stated that the said Richard Meredith, the elder duly made his last will dated 25th July, 1854, and thereby, after reciting that he was seised in fee of his estate, consisting of the plowland of Dicksgrove and the several lands therein named, including the advowson or right of presentation to certain parishes therein mentioned, being the hereditaments known as "the Meredith estate," subject to certain charges affecting the same, he devised said estate and all other real estates of every nature and kind which at the time of his decease he might be seised or possessed of, or to which he might be entitled, unto the Rev. William Buckle and the Rev. Henry A. Herbert and their heirs for ever, upon trust, to permit his said wife, Rose H. Meredith, during her life to receive and take thereout £400 a year, provided she should by some writing under her hand and seal, attested by two witnesses, expressly accept the said jointure, and by the same or some other writing under her hand and seal, testify her consent to waive the benefit of the provision for purchase of an annuity of £400 a year made by the said indenture for the recovery thereof. He de-

vised his said estate and the said advowson, and all his real estates of every kind, to his eldest son, Richard Meredith, and his heirs and assigns for ever, in case he should attain the age of twenty one years (which event occurred). Having thus bequeathed his estates to his eldest son, the testator thus proceeded with respect to John Robert Meredith, his second son: "I give, devise, bequeath, and appoint to my said son, John Robert Meredith, his executors, administrators, and assigns, the several sums, charges, or mortgages now vested in the trustees of my marriage settlement, bearing date the 23rd of August, 1837, amounting to the sum of £5,700 or thereabouts, and all other sum or sums of money placed in settlement on my marriage with my present wife, Rose H. Meredith. And in case my said son, John Robert Meredith, shall die under the age of twenty-one years, I direct, and my will is, that said sums, charges, or mortgages shall merge and be extinguished for the benefit of my said son, Richard Meredith." Testator having then appointed the Rev. Henry A. Herbert and the Rev. William Hill Buckle guardians of his said sons, Richard (the younger) and of his eldest son, John Robert Meredith, and also executors of his said will, died in September, 1854, leaving his said widow and his said two sons him surviving, as also his eldest son and heir-at-law by a former marriage, named William Edward Meredith. Probate of said will was granted in June, 1858, to his said widow alone. She the said Rose Meredith elected then to accept the annuity of £400 per annum devised to her by testator's will, and charged on the Meredith estate in lieu of that directed to be raised by said indenture of settlement out of the trust funds therein comprised, but did not execute any deed expressing such intention; and she is now dead, and the trust funds were never sought to be made applicable therefor. The said Richard Meredith the elder and Rose Helen, his wife, did not to any extent whatsoever execute the said power of joint appointment over the said funds comprised in the said indenture of settlement and thereby conferred upon them.

The petition then stated that after the death in 1854 of said Richard Meredith the elder, his widow, said Rose H. Meredith, by deed poll, dated 22nd March, 1859, under her hand and seal, attested, &c., after reciting the above mentioned settlement of 23rd August, 1837, and that there was issue of said marriage two sons, namely—Richard Meredith (the younger) and John Robert Meredith, the second son, and that both said sons were then minors; also reciting the death of her husband, and that no joint appointment of the trust moneys and premises comprised in said settlement was ever made by the said Richard Meredith the elder and his wife; and that the right to appoint the same was then vested in her as the survivor; she as such survivor did in pursuance and in execution of the power so reserved to her, and of every other power her thereto enabling, irrevocably direct, limit, and appoint the said sum or legacy of £1000 which had been so bequeathed to her by the will of the said Noah H. Neale, to her eldest son, the said Richard Meredith, his executors, administrators, and assigns, as a then present interest in him; and as to all the

rest, residue, and remainder of said trust moneys, amounting to the sum of £4790 or thereabouts, she did thereby further, direct, limit, and appoint the same to her second son, John Robert Meredith, the petitioner, his executors, administrators, and assigns, as a vested interest in him when he should attain the age of twenty-one years, but without interest during her own life. Said Rose Meredith, without revoking said appointments, died on the 21st of June, 1861. She previously in 1858, together with the Rev. William Buckle, was appointed, after the death of the said Richard Meredith the elder, the guardian of said two sons, Richard and John Robert, who were then made wards of court. A portion of said Meredith estate was sold in the late Incumbered Estates Court for the payment of the charges thereon; and the trustees of said settlement, pursuant to the leave of this court in the minor matter given, obtained payment of the principal sum of £4,500 on account of the principal sum of £4,679 due to them on foot of certain of their said incumbrances, and they then applied said sum in taking assignments of two mortgages affecting the unsold residue of said estates, dated respectively the 19th of August, 1845, and the 6th of July, 1847, and which mortgages were theretofore vested in Charles Barton, Esq. The said executors having sold out the balance then stood possessed of £4778 as representing the original sum, £4717, and now held by the trustees in trust for the petitioner; and this last mentioned sum of money is now an incumbrance affecting the unsold residue of the Meredith estate devised as aforesaid to Richard the younger. The said £1000 legacy was paid in after the death of the said Ellen Neale, and was ultimately also invested in an assignment of a mortgage affecting the Meredith estate. Richard Meredith attained his age of twenty-one years on the 15th February, 1862, and entered into possession of the unsold residue of the Meredith estate under the devise to him by his father's will, and is now in the receipt of the rents thereof. By an order of the Lord Chancellor of the 11th of June, 1862, it was referred to Master Brooke to report what were the rights of the petitioner on the death of his said mother, and what allowance was to be made for his maintenance and education during his minority; and the contest now between the brothers—the petitioner and the respondent—was this: It was contended, on the part of the petitioner, that his eldest brother Richard could not adopt his father's will in part, but that if he took the estate thereby devised to him he was bound to give effect to the bequest to the petitioner contained in the same will of the whole of the trust funds comprised in said indenture of settlement, including said legacy of £1000 appointed to him by said Rose H. Meredith. The said Master made his report on the 25th of April, 1864, and he thereby found that the sum of £4778, charged as aforesaid on Richard's estate, constituted the petitioner's entire fortune, and that it was competent for said Richard to take the said estate devised to him by his father's will, and also the sum of £1000 appointed to him by said deed-poll of appointment made by his said mother. This report was confirmed by the Court save as to the £1000, upon which portion of the Master's finding the Court did

not offer any opinion. The petitioner now submits that under the circumstances aforesaid he has a right to have the said charges raised, and the respondent alleges the contrary. Both parties having agreed to the above state of facts, and further having agreed to abide by the decision of the Court, accordingly by an indenture of 25th November, 1865, the said trustees, by the desire of the petitioner and respondent, assigned said mortgage for £1000 to one John George M'Carthy upon trust for such one or either of the petitioner or respondent as might be declared entitled thereto by this Court. The following are the questions for the consideration of the Court. 1st—Whether the said Richard Meredith the younger was or was not bound when accepting the estates devised by the will of his father, Richard Meredith the elder, to give effect to the bequest made by the said will to petitioner of all the several charges or incumbrances then vested in the trustees of the said indenture of marriage settlement, and all other sum or sums of money placed in settlement on the marriage of said Richard Meredith with Rose his wife. 2nd—Whether said Richard Meredith the younger is not bound to elect between the estates devised to him by the said testator's will and the appointment of the sum of £1000 made to him by the said Rose H. Meredith by the said deed-poll. 3rd—Whether the said Richard Meredith the younger is or is not, under the circumstances aforesaid, bound to suffer the said sum of £1000 and the securities upon which the same is invested to be held by the said John George M'Carthy under the above stated indenture of the 25th of November, 1865, in trust for petitioner. The petition then prayed for the opinion of the Court upon the above case and questions, and for judgment, and that such judgment may be binding on the petitioner and of the respondent, and for a declaration as to how the costs are to be paid.

*Brewster, Q.C., Warren, Q.C.; and Charles H. Woodroffe*, were for the petitioners.—This is a question of very great nicety indeed. By the marriage settlement of 1837 a joint power of appointment was given to Richard and Rose Meredith—that is, a power jointly to appoint between their two sons, Richard and John Robert, the personal estate put in settlement on said marriage. What happened was this—the father devised his real estate, the Meredith Estate, to his eldest son, and he bequeathed the personal estate to his second son, but there was never any joint appointment during the joint lives of husband and wife. Well, the husband dies, and the wife then appoints £1,000 to her eldest son, thus taking from the second son £1,000 out of the portion which the father had endeavoured to appoint to him, and the eldest son now endeavours to take benefits under both father and mother's will. The doctrine of election applies here. The doctrine of election is founded on the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them—that is the doctrine of election, and if this equitable doctrine were unknown, see what would be the effect if the mother, instead of appointing £1,000 to her eldest son, appointed the whole *opru*; then the eld-

est would take first all the real estates under his father's will, and every farthing of the personal under his mother's, and the younger son in that case would be left a beggar-man. Suppose the wife made no appointment at all; then the eldest son would take all the real estate and half the personality; the other half would then go to John Robert. The father here, then, affects to dispose of property not his own, together with his.

*Jellet, Q.C., and Hickson, contra*, contended that this was not a case for election at all.

The arguments on this side, in which the Lord Chancellor concurred, are collected in his Lordship's judgment, as follows:—

**THE LORD CHANCELLOR.**—In this case, in which John Robert Meredith is petitioner, and Richard Meredith is respondent, a question was raised which comes before me on a special case agreed upon between the parties for the purpose of determining and of getting the opinion of the Court upon the questions whether or not Richard Meredith was or was not bound when accepting the estates devised to him by the will of his father to give effect to a certain bequest made by the said will to John Robert Meredith the younger brother of Richard, of all the several charges or incumbrances then vested in the trustees of the marriage settlement of Richard Meredith (the elder), the father of Richard, the respondent, and of John Robert Meredith, the petitioner. The second question we have to consider is the real question, to which the first is only preliminary, and that is, whether Richard Meredith, the younger was bound to elect between the estates devised to him by the testator's will and the appointment of a sum of £1,000 made to him by his mother, Rose Meredith, by a certain deed poll dated the 22nd March, 1859. The third question which is for the consideration of the Court depends on the second. The real question then here is— which of the two brothers is entitled to this £1,000. The case states the marriage settlement of the father and mother of the petitioner and respondent, which settlement, after reciting that Rose Buckle was entitled to a sum of £5,254 standing in the books of the Bank of England, and also to a sum of £1,000 under the will of a Mr. Neale, and also after reciting that a marriage was intended soon after to be solemnised between said Richard Meredith and Rose Buckle, those funds were settled in the ordinary way, that after the death of the survivor of the said Richard Meredith and Rose, his then intended wife, the trustees of the settlement should stand possessed of all the funds and securities therefor, in trust for the children of the marriage, but subject to the joint appointment of the husband and wife, and in default of such joint appointment, then the power of appointment was given to the survivor of said husband and wife among the children of the marriage, and then in default of such appointment of such survivor, share and share alike among said children. The case then states that the marriage was soon after solemnised, and that there were two children issue of that marriage, Richard and John Robert, of whom Richard was the elder. Well, Richard, the father, died in 1854, and previous to his death he made his will dated the 25th day of July, 1854, but neither he nor his wife ever jointly executed the power

given to them by their marriage settlement, so that the power of appointing at all events remained in the survivor. By that will he recites that he was seised in fee of certain estates charged with a jointure for his wife, and subject thereto he devised all those estates to trustees in trust for his eldest son Richard, and his heirs for ever, and he then proceeds to deal with those moneys over which he had the power of appointment; he says that he appoints all those moneys to his second son. [His Lordship here reads the will.] Well, Richard the elder died in the same year, having never, as I just observed, jointly with his wife, Rose Meredith, appointed the said moneys amounting to £5,700, or thereabouts. After his death she executed the power by deed poll, which, as she recites therein, she was empowered to do, and she appoints, as she says—the words of the deed are these—"Now these presents witness that the said Rose Helen Meredith in pursuance and execution of the said power given and reserved to her in and by the said in part recited indenture of the 23rd August, 1837, and of all and every other power and powers, authority and authorities her therunto enabling, doth.....irrevocably direct, limit and appoint the said sum or legacy," dealing with the £1,000 legacy bequeathed to her by Noah Neale, and all the rest of the personal property she appointed to her second son, John Robert Meredith. This lady died in the month of June, 1861. Now clearly this £1,000 was well appointed, as also was the larger sum to John Robert. The children were then made wards of Court, and the legacies were raised and vested on an estate which it is not here necessary to advert to. Richard, the eldest, attained his age in the year 1862, and he has taken the Meredith estates under his father's will. By an order of June, 1863, the matter was referred to Master Brooke, and in the proceedings of that order of reference it was contended that Richard the elder elected to take the estates devised to him, and that as he had done so he was bound to give effect to the trusts of the will in full, and that therefore the entire of the £5,700 went to the petitioner, John Robert. The Master made his report on the 25th of April, 1864, and he found that the sum of £4,700 in round numbers charged upon his elder brother Richard's estate formed the entire fortune of John Robert Meredith, the petitioner here; and the Master further found that the elder brother Richard was entitled to, and that it was competent for him to take those Meredith estates devised to him by his father's will, and also the sum of £1,000 appointed to him by said deed poll by his mother's will. It is upon this portion of the Master's report that we here had so much argument, a very nice question for a debating society, and the question we have now to determine is, whether this opinion of the Master is correct or not, having regard to the circumstances of the case. In that opinion of Master Brooke I entirely concur. The question simply is, what is the effect where a party having elected takes benefits under a will, whether the fact of that election is to include not merely anything derived under the will, but other gifts not derived under the will. The definition of this doctrine of election, as laid down in 1 Jarman on Wills, appears to be a correct definition; it is this, that

a party who accepts benefits under a will or deed must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it, as if a testator disposes of property not his own, and has given a benefit to the person to whom that property belongs, the devise or legatee accepting the benefit so given to him must make good the testator's attempted disposition, and equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of these rights. That is the doctrine of election. But it must be understood clearly that the property that testator devises is not only not the testator's, but that he has no present interest whatever therein. Now clearly in the present instance the testator had an interest in the funds he affected to dispose of, and therefore it would appear to be taken out of the rule laid down in *Jarman*, which I have just repeated; in fact, to use the words of Lord Eldon in *Randliffe v. Perkins* (6 Dow. 186), it is difficult in any case to apply this doctrine of election when the testator had some present interest in the estate disposed of, though it may not be entirely his own. In this case clearly he had an interest; he had the estates, the Meredith estates, and he had a reversion, or rather a remainder in the funds. Not alone then must the property devised or bequeathed be not his own, that is, not alone must he have no interest therein, but he must have an intention to dispose of what was not his own. Lord Eldon, in *Dashwood v. Payton* (18 Vesey, 27), says, "that to raise a case of election there must be a clear intention to give what is not his own." Now he does not manifest that intention; he knew well he had an interest in the funds, and in the estate. I have looked into the cases, and I have not found any case in which the doctrine has been extended; there is no case pushing the doctrine further than that which I have just stated. It may be wise or it may not be, but be that as it may, I have found no case pushing the case further. Now, the facts here are very few and very simple, the testator makes his will and dies in the year 1854. Seven years after that his widow dies—in 1861; and she then appoints, and in pursuance of her power and right has appointed that property, which was then unappointed; and the party taking under the mother's appointment was a *stranger* to the appointment made by the father, which was confessedly inoperative by reason of his not surviving his wife. I am of opinion that there is no case for election here. I think that Richard Meredith the younger is not obliged to elect between benefits conferred upon him by his father's will, which willed to him the landed estates and those benefits he took derivatively through his mother. In fact this is the principle laid down in *Lady Cavan v. Pultney* (2 Ves. Jun. 544; 3 Ves. 384). In that case the marginal note was as follows:—"A tenant in tail, with power to lease, remainder to B. wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power, reciting that he was seized of the freehold and inheritance, and covenanting for quiet enjoyment against any act of himself or those claiming under him, A. by his will devised the said estates and others to B. for life, remainder to

his first and other sons in tail male, remainder to his daughter and her first and other sons, and to D. and his first and other sons successively in same manner; and gave to B. and C. certain interests in his personal estates, and gave the residue to D., who filed a bill to have the will established. B. elected to take her estate tail in opposition to the will, which the Master reported for her benefit. After her death C., who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements. Neither the lessees nor D. are entitled to stop the ejectments, or to put C. to his election." Now clearly this is a derivative interest in this £1000 derived by Richard from Rose, his mother; and I don't see any case more in point than the one I have just cited. Well, in this case the father died, and the son Richard comes into possession. It was when the Meredith estate came into his possession, if election would apply at all, that he should have elected; but there was nothing for him then to elect between on his father's death; nor for seven years after, and it might as well have been twenty years after. He had no two estates then to elect between. One—namely, the appointment of the fund—was a mere chance. I have considered this case, which is a very novel one, very attentively, and I feel persuaded that Master Brooke has arrived at a sound conclusion. I have just read a case bearing upon this question decided and reported since this case was before me—*In re Vizard's trusts* (1 Law Rep., Eq. Ser. 667). In that case "a legatee who was entitled under a will to such share as testator's widow should appoint; and in default of such appointment, and in case she should not so appoint, and in default thereof, he gave, devised, and bequeathed one moiety to the children of his brother Charles, and the other moiety to the children of his brother John. Charles had five children, and Frederick Vizard was one of those five; and therefore if there was no appointment he became entitled to one-fifth of the moiety. A. by deed, under the English Bankruptcy Act of 1861, assigned all his estates and effects to trustees for creditors. The widow subsequently appointed to A. the same share he would have taken in default of appointment, viz. one-fifth; and it was held that the appointment by the widow was good, and that the appointed share did not pass under said deed to the trustees." In this case I have just cited every species of property to which the bankrupt was then entitled passed under the deed; but the chance of taking anything under the appointment of the widow, which was not a possibility coupled with an interest, but a mere chance, was incapable of being assigned, following *Lee v. Olding* (2 Jur. n. s. 850), which is cited in Sugden on Powers, 8th ed. 78. It appears to me that this case goes to show that when a party (the respondent) had only a mere chance, not a possibility coupled with an interest; that in other words he had no interest in this fund in the interval that was between his father's death and the time of the appointment, viz. his mother's death; and clearly in that interval he could not be called on to elect; no case then arising, he could not be called on to elect; and he is not bound to carry out the testator's intentions out of the interest he has

now in this fund, for that interest was a derivative interest and came to him by the appointment of his mother. I then entirely concur with Master Brooke that those questions must be answered in the negative. Let each party abide their own costs.

## Rolls Court.

Reported by H. W. B. Mackay, Esq., Barrister-at-Law

BOAG v. BRADFORD.—April 30; May 1, 2, 23.

*Evidence—Ch. Reg. Act, 1850, sec. 13—Documentary evidence on appeal—Practice.*

*The Court is at liberty, on appeal from the Master's decretal order (15th sec.) to receive documentary evidence which was not before the Master.*

*The Court has jurisdiction to review a decision of the Master as to what evidence is capable of being received upon the true construction of the Court of Chancery Regulation Act, 1850, 13 & 14 Vict. c. 89, s. 13.*

*The practice in the Master's offices under the above section is irregular. The proper course would be that the Master should make a proper order directing the books of account to be received as prima facie evidence, and it is desirable that such items as are capable of being proved independently should be so proved before such order is made.*

THIS was an appeal from the Master's decretal order under the 15th section, declaring that the sum of £541 16s. 2d. was due from the estate of the testator to one John Low, a respondent in this suit. The grounds of the appeal were that the Master's order was founded on evidence inadmissible in point of law, that it was against evidence and the weight of evidence, and that the charge of John Low was not supported by proper or sufficient evidence. The appellants asked at the same time for the costs of the motion as part of their costs in the matter. The evidence objected to consisted of a copy of a lost day-book marked D, and two ledgers, marked C. and E. respectively; a bill book commencing 15th of October, 1851; a cash book entitled "John Low's Cash Book," called cash-book marked 12; a ledger marked 7, and a memorandum entitled *Low v. O'Donnell*, dated 7th June, 1856. The principal question in the case was on the ledger marked C. Witnesses had been examined *vivâ voce* while the cause was in the Master's Office, and it appeared from the evidence of J. G. Beatty, who had been the book-keeper of the respondent Low from 1849 to 1857, that the whole of that ledger was in his (Beatty's) handwriting, that the former part of it contained accounts of the year 1855, and was posted from the 26th September, 1855, from the day-book produced, and the latter part contained accounts of the year 1854, and was not posted from

any forthcoming day-book, nor could witness tell from what book, nor at what time it was posted. Witness could give no explanation of the fact that the accounts of 1854 were introduced after those of 1855, and refused to deny that they were inserted in 1855 after the posting of the accounts of that year, but the direct question whether such was the case, was objected to and withdrawn. He had previously sworn that it was some years since he had seen the day-book from which the entries in the ledger marked C. were posted, and that as far as he could recollect, the entries in that ledger were a correct representation of the entries made by himself in the day-book. The question whether the entries in the ledger were a fair copy of those made by himself in the day-book, had been objected to on the ground of the non-production of the day-book, of which it had been alleged to be a copy, and had been accordingly withdrawn. The respondent Low was himself examined *vivâ voce*, but had died before the hearing of the appeal. In his examination he had answered affirmatively to the question—"Were those entries in this ledger, or any part of them, made up from a day-book that you say was lost?" and had stated in answer to another question that these entries were those up to September 26th, 1855, but both questions were objected to, on the ground that he did not keep the entries himself, and there was no distinct statement by any of the witnesses that those entries were posted from a lost day-book.

Some additional documentary evidence was received on the appeal under the circumstances stated in the judgment.

Harrison, Q.C., Jackson, and for the appellants.

W. Bourke, Q.C., and O'Moore, for the respondents.

The question discussed was the admissibility of that part of the ledger C. which contained the accounts of 1854. It turned on the Chancery Regulation Act, 1850, 13 & 14 Vict. c. 89, s. 13, the latter part of which enacts that "in taking any accounts other than any partnership accounts, where it appears to him [the Master] that the books of account have been *bona fide* kept, and the entries duly made therein from time to time, as occasions for such entries arose, or when from any circumstances the account cannot otherwise be taken, it shall be lawful for the Master, if he think fit, to direct that the books of account in which the accounts so required to be taken have been kept, or such of them as he thinks fit, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." 1 Taylor on Evidence, sec. 641, was cited to show that the evidence was inadmissible at common law. With regard to the statute it was insisted that the language of the corresponding English Act, 15 & 16 Vict. c. 86, s. 54, was very similar, and the cases on its construction applied, and that consequently the item should have been corroborated, and all the independent means of proof should have been exhausted before recourse was had to the statute and Morgan's Chanc. Ord. 3rd ed. 217, *Ewart v. Williams* (3 Drury, 21, and on appeal, 7 De Gex M. & G. 68) were cited. It was also contended that the



Master should have made a special order constituting the books evidence (*Morg. ubi sup.*). On the other side it was contended that this Court had no jurisdiction to hear the appeal. The statute gave the Master authority to make the books evidence if he thought fit, and they having been made evidence, the parties might take objections, but none had been taken here, as this was an application to send back the case, on the ground that the books were never evidence, and that therefore it never had become necessary to take any. *Ewart v. Williams* did not militate against their view, for there the point was not raised, and besides the order was confirmed; and the fact that the proceedings in the office partake so much of the nature of a personal colloquy, was a reason for adopting such a construction. [*The Master of the Rolls* intimated that the objection to the jurisdiction could not be sustained, as two cases had been argued on appeal in England without such an objection having been taken.]

May 23.—THE MASTER OF THE ROLLS, after stating the facts and proceedings, continued—The entries in the day book produced might be admissible if made contemporaneously, after the death of the party who made them, but not otherwise, unless unfavourable to his interest. This appears from the leading case of *Price v. Torrington* (1 Sm. L. C. 5th ed. 277). The more modern cases are decided on the same principle. It appears to me that the ledgers produced are not admissible according to the ordinary rules of evidence. However, it was insisted by counsel on behalf of the personal representative of Neal Boag, that the Master was authorised to admit them under the 13th section of the Chancery Regulation Act. [His Honor here read the passage quoted above.] With regard to this question the case of *Ewart v. Williams* (7 De G. M. & G.) on the analogous section in the English statute, should be kept in mind. "I think," says Lord Justice Turner, in pages 74 and 75, "that this provision of the statute is one which is to be applied with the utmost possible circumspection, and that in applying it regard ought to be had both to the period when the decree was made, and to the nature of the account directed. It is a provision which empowers this Court to alter the rules of law, and those rules ought not to be departed from except in cases in which the justice of the case renders it necessary to depart from them. If the means exist of proving the items of the account by independent evidence I think those means should be applied before the provisions of the statute are called in aid. Independently of other considerations, the mere fact of some of the items being proved by independent evidence would give weight and character to the books." The same question arose in *Lodge v. Pritchard* (3 De G. M. & G. 906). If the Master had made an order under the Chancery Regulation Act, as the Vice Chancellor did in *Ewart v. Williams*, and if such an order under the circumstances of this case had been justified, the matter would have ended. If not there might have been a direct appeal from that order. I think it is very desirable special orders should be made in such cases according to the cases referred to. Lord Justice Turner says an account ought not to be admissible under the statute if the means exist of proving it in-

dependently. In an earlier part of the proceedings I called the attention of counsel to this, and especially to one item in the schedule, to Low's charge with which he debits Neal Boag's executrix—"To O'Donnell's house property, £600." When I asked the meaning of that item I was informed that John Low sold the house to Neal Boag for £500. I asked where was the conveyance from John Low to Neal Boag. I was told that Lowe had a charge on the house, that O'Donnell was his debtor, and that the property was sold in bankruptcy; and when I asked what evidence there was to clear up the matter, I was told that there was none. I said if such was the case the bankruptcy proceedings should be inspected. This had not been done. However, having required some distinct information, and the case having been adjourned because I would not decide the question without knowing the facts, Mr. Bourke very properly had the matter investigated, and the conveyance was produced: and the recitals in that conveyance and the Accountant-General's account, explained the whole matter. The whole matter was explained by matters of record in the Court of Chancery. I was distinctly informed by counsel in the argument that the conveyance to Neal Boag bore date the 19th of May, 1856. Now it appears that John Low registered a judgment which he had against O'Donnell's house as a judgment mortgage, and in the year 1852 filed a cause petition under the 15th section to sell the house. The house was set up for sale on the 21st April, 1854, and was purchased by Neal Boag for £480. Now, on this very 21st April, 1854, in the item before those in the account before the Master, Neal Boag was charged with £500. However, Neal Boag only paid £380 into Court, and cheques were lodged to the amount of £100. On the 7th June, 1856, £380 was paid out of Court to John Low, and on the same day he gave credit to Neal Boag for £400, so that in effect he charged Neal Boag with £100, and as his purchase-money was £480, and he had paid into Court £380, the charging him with £100 was right. Now, if these matters had been brought before the Master, as they should have been, according to the opinion of Lord Justice Turner, he might have concluded that the book was probably all true if those of its items which were capable of confirmation by independent evidence had been so confirmed, and might have made a special order constituting that evidence which would not otherwise have been evidence, and that order might have been appealed from.

His Honor made the following order:—

On reading the said notice of motion and Master's order, as also the Accountant-General's account in *Low v. O'Donnell*, endorsed with the letter A., and the copy of the conveyance of the 19th day of May, 1856, endorsed B., which said copy was produced to the Court by the solicitor for the appellant, it is ordered that no rule be made on this motion; and it is further ordered that the appellant, Robert Middlemas, as one of the executors of Neal Boag, is entitled to his costs of this appeal motion and order thereon out of the assets of said Neal Boag; and it is further ordered that the deposit be returned to said appellant, John A. Middlemas; and it is further or-

dered that Mrs. Mary Jane Low, the personal representative of said John Low, deceased, do abide her own costs of appearing on this motion, but is entitled to said costs out of the assets of the said John Low.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

**M'KINNEY v. THE IRISH NORTH WESTERN RAILWAY COMPANY.**—April 20, May 12.

**Negligence—Master and servant—Averments in summons and plaint—Duty.**

*The summons and plaint, after stating that defendants were the owners of a railway on which M.K. was employed as a guard, proceeded to aver that it was the duty of the defendants to keep the said railway, and the engines and carriages thereon, in proper and sufficient order and repair for the safe conveyance of the said M.K. as such guard; but defendants not regarding their duty, did not keep the said railway, &c. in such proper and sufficient order, &c., but permitted said railway, &c. to get out of such proper order, &c., whereby an accident happened, and the said M.K. was killed. On demurrer this summons and plaint was held bad (dissentiente O'Brien, J.) as not showing facts from which the duty averred could flow, and as not showing that the defendants were aware of the state of the railway engines and carriages.*

**DEMURRER.**—The summons and plaint stated that the plaintiff, Elizabeth M'Kinney, was the widow of John M'Kinney, who died on the 18th August, 1865, from the injuries thereafter mentioned, and that there was no executor or administrator of the said John M'Kinney; and that the defendants were owners of a certain railway for the conveyance of goods and passengers; and that the said John M'Kinney, the husband of the plaintiff, was employed as a guard upon the said railway. And the plaintiff averred that it was the duty of the said defendants to keep the said railway, and the engines and carriages thereon, in proper and sufficient order and repair for the safe conveyance of the said John M'Kinney as such guard; but the said defendants, not regarding their duty in that behalf, did not keep the said railway and the said engines and carriages in such proper and sufficient order and repair, but permitted said railway and said engines and carriages to get out of proper and sufficient order and repair, whereby, and by reason of the negligence of the said defendants in that behalf, a certain van or carriage of the train in which the said John M'Kinney was travelling as such guard ran off the said railway, and the said John M'Kinney thereby received injuries from the effects of which he afterwards, and within twelve calendar months next before this suit, died. And the plaintiff, as such widow as aforesaid, and for the benefit of herself as such widow,

and of Mary Anne M'Kinney, William John M'Kinney, Patrick James M'Kinney, and Emma Elizabeth M'Kinney, the children and sole next of kin of said John M'Kinney, according to the statute in such case made and provided, claimed £1000 damages against the said defendants. To this summons and plaint the defendants demurred, saying that it did not disclose any cause of action good in substance, because the relation of master and servant was thereby admitted to have existed between the said John M'Kinney and the defendants, and no facts were shown from which it could be inferred that there was a duty on the defendants to the said John M'Kinney to keep the said railway, engines, and carriages in repair; and because it was not shown that the accident therein mentioned was not caused by risk and danger which said John M'Kinney contracted with the defendants to incur; and because it was not shown that any contract existed between the defendants and said John M'Kinney that they should keep the said railway, engines, and carriages in repair; and because the said summons and plaint did not allege that the defendants had notice of the alleged want of repair of said railway, engines, and carriages, or show any personal negligence on the part of the defendants; and because the negligence alleged afforded no cause of action unless upon the assumption that there was a duty on the defendants to said John M'Kinney to keep said railway, engines, and carriages in repair; and because it was consistent with the facts stated in the summons and plaint that defendants might have provided for the safety of the said John M'Kinney to the best of their knowledge, information, and belief.

*Boyd and Dowse, Q.C., for the defendants, in support of the demurrer.*

*J. P. Hamilton for the plaintiff.*

The following authorities were cited:—*Priestly v. Fowler* (3 M. & W. 1); *Riley v. Baxendale* (6 H. & N. 445); *Potts v. Plunkett* (9 I. C. L. R. 290); *Waller v. South Eastern Railway Company* (2 H. & Coltsm. 109); *Sullivan v. Waters* (14 I. C. L. R. 460); *Holmes v. Clarke* (7 H. & N. 949); *Tarrant v. Webb* (18 C. B. 797); *Roberts v. Smith* (2 H. & N. 213); *Voss v. The Lancashire and Yorkshire Railway Company* (2 H. & N. 728); *Williams v. Clough* (3 H. & N. 258); *Griffiths v. Gidlow* (3 H. & N. 648); *Senior v. Ward* (28 L. J., Q. B., 139); *Dynan v. Leach* (26 L. J., Exch., 221); *Lovegrove v. London, Brighton, and South Coast Railway Co.* (16 C. B., N. s., 669); *Morgan v. Vale of Neath Railway Company* (1 Law Rep., Q. B., 149); *Mersey Dock Company v. Penhallow* (7 H. & N. 329); *Paterson v. Wallace* (1 Macq. H. of L. 751); *Brydon v. Stewart* (2 Macq. H. of L. 30); *Bartonhill Coal Company v. Reid* (3 Macq. H. of L. 286); *Weems v. Matheson* (4 Macq. H. of L. 216); *Mellors v. Shaw* (1 B. & Sm. 437); *Vaughan v. Cork and Youghal Railway Company* (12 Ir. O. L. Rep., 297); *Ogden v. Rummen* (3 F. & F. 751).

*May 12.*—*Fitzgerald, J.*—This case was argued before us on the 20th April. The plaintiff, Elizabeth M'Kinney, sued as the widow of John M'Kinney, deceased; and in the plaint it was stated that the defendants were the owners of a certain railway for the conveyance of goods and passengers, and that the

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said John M'Kinney was employed by the defendants as a guard upon the said railway. Having made that preliminary statement the plaintiff goes on:—"and the plaintiff avers that it was the duty of the said defendant to keep the said railway, and the engines and carriages thereon, in proper and sufficient order and repair for the safe conveyance of the said John M'Kinney as such guard;" and it then states the breach of the said duty as follows: "but the said defendants, not regarding their duty in that behalf, did not keep the said railway and the said engines and carriages in such proper and sufficient order and repair, but permitted said railway and said engines and carriages to get out of proper and sufficient order and repair;" and that by reason thereof the accident occurred which led to M'Kinney's death. To that there has been a demurrer filed on the part of the defendants, and the objections were principally—first, that the summons and plaint contained no allegation that the defendants had notice of or were aware of the defects mentioned; secondly, that it was not shown that the deceased was not aware of them; and thirdly, it was alleged that the plaint was deficient on the authority of *Priestly v. Fowler*. The true objection seems to be, that the pleader tries to rest the action on the same foundation as in the case of an injury to passengers carried for hire. Companies are liable for any want of care which results in injury, and they are so liable whether the injury results from their own want of care and skill, or from that of their servants; but in the case of an action by a servant against his master, the master would seem to be liable only for ordinary or gross negligence of his own, but not generally for the neglect of fellow-servants. The plaint seems to have been drawn in the present meagre form to enable the plaintiff to suit to it her proofs as they might appear at the trial. The plaintiff is bound to state in his pleading, with precision, a state of facts from which a subsisting duty arises; and it would be one of the questions to be considered whether the very general duty alleged here arises from the statement that the defendants were owners of a railway on which the deceased was employed as a guard. The relative position of master and servant in such a case as that before us is this: the master is bound to take proper care that the servant is not exposed to more than ordinary risks, while the servant takes his chance of ordinary risks, including those arising from the negligence of his fellow-servants. The cause of action in the present case as to breach of duty is this: "But the said defendants, not regarding their duty in that behalf, did not keep the said railway, and the said engines and carriages, in such proper and sufficient order and repair, but permitted said railway and said engines and carriages to get out of proper and sufficient order and repair," which is precisely the form of allegation proper in an action against a carrier for breach of duty as such, and would be sustained by any proof of negligence on the part of the defendants or their servants. The plaint in the present case is very like the declaration in *Priestly v. Fowler*. After verdict there the judgment was arrested on the ground of the insufficiency of the declaration and on general principles. Lord Abinger says at p. 5 of the report—"If the master be liable to the servant in

this action, the principle of that liability will be found to carry us to an alarming extent." And he points out that it would make the master liable for the negligence of any of his servants. The observation of Lord Abinger was noticed in *Mellors v. Shaw*. There the declaration stated that the defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier in the mine; and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants. That by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew; and by reason of the premises, and also by reason as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff and he was dangerously wounded. The defendants pleaded not guilty. At the trial it was proved that Shaw, one of the defendants, was manager of the mine, and that it was worked under his personal superintendence, and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence. It was held on motion to enter a non-suit that on this finding of the jury Shaw was liable, and therefore the other defendant was liable also; and on motion in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable; and Crompton, J. in delivering the judgment of the Court, says—"Then it is said that the case falls within the principle of *Priestly v. Fowler*, and that class of cases in which an action against the master has been held not maintainable. I have thought that case rather inconsistent with the later cases on the subject; but considering what was said by my brothers in those cases, and seeing, as my brother Blackburn has pointed out, that the declaration in *Priestly v. Fowler* contained no allegation that the defendant knew the defects in the van in which the plaintiff was placed, I conceive that the rule laid down in that case that a servant on entering the service of an employer takes upon himself the risks of the servant, does not apply where there has been personal negligence in the master which causes the injury to the servant." Again, at p. 447, he says—"The principle in *Priestly v. Fowler* is subject to the exception involved in the case which Lord Abinger said, p. 5, the Court was not called upon to decide. If there is personal negligence in the master he is liable; and if he knows the defects which cause the injury, that is evidence of personal negligence. In this case there is some evidence of such knowledge, and therefore this action is maintainable." The next case is that of *Hall v. Johnson* (3 H. & Colts. 589), and deserves attention from its being a decision of the Exchequer Chamber. The marginal note is this:—"Held in the Exchequer Chamber, that an 'underlooker' in a mine, whose duty it is to examine the roof and prop it up if dangerous, is a fellow-labourer with a workman in the mine; and the latter can maintain no action against the owner

of the mine for injury occasioned by the neglect of the underlooker to prop up the roof if the owner has not personally interfered or had any knowledge of the dangerous state of the mine." Now, in the course of the argument of that case Crompton, J. asks a very pertinent question as applicable to the present case. He asks this question, when the case of *The Bartonshill Coal Company v. Reid* was cited: "Suppose a master provided good machinery and tackle, and his workmen omitted to keep them in good order, would the master be liable?" He throws that out as a doubt. And in the course of the judgment Erle, C.J. says—"This case falls within the principle established not only in this country but also in Scotland, Ireland, and America, that a servant, when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, including negligence on the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both." I shall now mention the case of *Tunney v. The Midland Railway Company* (1 Law Rep. C. P. 291) as the last authority on the subject. It was not cited and indeed, I believe, not published at the time of the argument. It deserves particular attention. In it the marginal note says the plaintiff was employed by a railway company as a labourer to assist in loading what is called a "pick-up train" with materials left by plate-layers and others upon the line. One of the terms of his engagement was—that he should be carried by the train from Birmingham (where he resided, and from whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. It was held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his conduct of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment. Now, on a careful consideration of *Priestley v. Fowler* and the other decisions, I have arrived at the conclusion that the plaintiff in this case is deficient in substance. It alleges a duty more extensive than is warranted by the preceding matter, and arrives at the conclusion of liability without sufficient allegation that the defendants had notice of the want of repair of the engines and carriages. The plaintiff is bound to state in his pleading the proposition for which he contends, and which, if sustained in proof, will be sufficient to maintain the action. The plaintiff has not done so here; and he has imposed on the defendant great difficulty in stating his defence in a special plea. I must now allude to the case of *Potts v. Plunkett*, which was decided in this Court in 1859. In that case there are certain propositions laid down which are deserving of attention. It is there laid down that "in general a master is not responsible for injuries occurring to his servant in the course of his employment al-

though resulting from that employment, the servant being supposed to undertake the service subject to all the risks which may occur during its continuance." Where a servant is employed in a work which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be the existence of negligence on the part of the master, and the absence of rashness on the part of the servant." "A servant is bound to exercise his own skill and judgment so as to protect himself in the course of his employment, there being no obligation on the part of his employer to warrant generally his safety." Then there is this also: "Although a plaintiff is not bound to negative in his pleading every matter which would constitute a defence, yet he must shew upon his pleading everything necessary to constitute a liability on the part of the defendant." And the last proposition is this: "Where a party complains of a violation of duty, it is not sufficient to charge generally a violation of duty; the facts from which the duty flows must be averred." There is, I should say, quite sufficient in that case to govern the present one; and from the well considered judgment of the Lord Chief Justice, propositions are to be deduced which are applicable to the present case, and are against the plaintiff. I am, therefore, in this case stating my own opinion alone. I have come to a conclusion in favour of the defendants on the two points—namely, that a duty is stated in terms which does not flow from the preceding facts, and that the breach is stated in such terms as place great difficulties in the way of the defendant's pleading, and do not shew that amount of negligence which would make the defendants as masters liable. It appears to me, therefore, speaking only for myself that our judgment on this demurrer should be given for the defendants.

O'BRIEN, J.—This case is certainly not free from doubt, but on full consideration I think the demurrer should be overruled. As to *Priestley v. Fowler*, it is not, of course, possible to question the general propositions stated in that case; but the application of them to the particular circumstances of any case is to be regulated by the circumstances of that case. In *Priestley v. Fowler* it will be found that the declaration stated not merely general negligence, but the particular circumstances which constituted that negligence. Here the summons and plaint is general. Now, Lord Abinger, after laying down the general propositions, which are, no doubt, correct, says:—"In that sort of employment especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely?" The servant there was in fact the person who actually drove the van. He says—"The master is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief." But he also says—"In truth, the mere relation of the master and servant never can imply an obligation on the part of the master to take more care of the servant

than he can reasonably be expected to do of himself." He refers then to the consequences which would ensue in allowing this sort of action to prevail. I concur with his Lordship while he lays down the principles which have been settled by several cases since; but in saying that a case is ruled by *Priestley v. Fowler* we must bear in mind Lord Abinger's statement that he presumed that the plaintiff knew better than the defendant whether the van was overloaded. After *Priestley v. Fowler* we were referred to several cases. The first which I shall mention will be *Potts v. Plum-kett*. There also the facts constituting the negligence were stated and spread forth on the declaration, and it will be observed that in the judgment given in that case the Chief Justice, at p. 300, after noticing that to render the master liable you must make a case of negligence or wilful default on his part, without rashness or negligence on the part of the person employed by him, then goes on to say, "I must observe also that there are facts disclosed upon the face of these pleadings which show rashness on the part of the plaintiff." I refer to that to shew that whatever may be the general principles laid down in the judgment, the facts of that case are certainly different from those before us. We were referred to *Priestley v. Fowler*, which was said to be the first case on the subject. I shall first notice the three cases in the House of Lords, in the first, second and third volumes of Macqueen's Reports. There were very strong observations there made by the judges and the Lords. Lord Cranworth in 1st Macq. 751, states the law of England and Scotland to be, that "it is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows or ought to know that it is not so; and if from any negligence in this respect damage arise, the master is responsible." And in 2nd Macq., p. 35, he says, "A master, by the laws in both countries, is liable for accidents occasioned by his neglect towards those he employs." And Lord Brougham at p. 38, says he is answerable for the state of the tackle." In 3rd Macq. Lord Cranworth, at p. 288, repeats his observations to the same effect. "When a master employs a servant at a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." Now, I refer to those observations. They were in some cases treated as *obiter dicta*, but we will find that in the English cases, in some of those subsequent, that doctrine was expressly recognised as part of the law of England. For instance, in *Holmes v. Clarke*, Cockburn, C. J. says, "I consider the doctrine laid down by the House of Lords, in the case of *The Bartonshill Coal Company v. Reid*, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely, that where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur." Then with respect to the servant entering the employment he says—"The rule I am laying down goes only to this, that the danger

contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which from the terms of the contract or the nature of the employment, the servant had a right to expect it would be kept." Byles, J., at p. 947 of the report, makes observations to a similar effect. He says—"But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition." He then refers to *Priestley v. Fowler*, as having introduced a new chapter into the law, but he says—"But the principles laid down in *Priestley v. Fowler*, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. It is, in most cases, impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master again is a volunteer; the workman ordinarily has no choice. To hold that the master is responsible to his workmen for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient." In *Mellors v. Shaw* there is also the qualification which is to be collected from the passage already cited. Blackburn, J., at p. 446, speaks of Lord Abinger's judgment in *Priestley v. Fowler* "which," he says, "introduced a new branch of law, viz., that the master is not liable to his servant for the misconduct or negligence of others who serve him." Then he goes on to say—"In *Roberts v. Smith*, in the Exchequer Chamber, however, establishes that where the injury has been caused by the personal interference or negligence of the master, the servant may maintain an action against his master." Now, therefore, is it personal negligence in those whose duty it is to have machinery in proper condition, to allow it to be by their neglect "out of proper and sufficient order and repair," as stated in the summons and plaint. It appears to me that that is a statement which brings the case within the authorities as to duty on the part of the master, and neglect of that duty. A good deal has been said about the non-avowment of knowledge on the part of the defendants. I was at first inclined to think there was a good deal in the objection, but the case which Mr. Hamilton referred us to, put it on the ground that knowledge of the defect is evidence of the negligence, and would be essential to render him liable, but it will be found that the allegation of knowledge on the part of the defendants is referred to and commented on in some of the cases I have referred to. In *Holmes v. Clarke* Cockburn, C. J. says, at p. 945, "I am of opinion that it is only a fact in the case to be taken into consideration by the jury in determining the question whether the plaintiff has himself helped to bring about the accident in respect of which he seeks to charge the defendant." But Cockburn, C. J. in *Roberts v. Smith* in error (2 H. & N. App. 217) also says that the

question is not whether the master believed the machinery was sufficiently strong, but whether he was justified in believing it to be so. Of course it is open to the parties to shew that there should be knowledge on the part of the defendants, but that would come out on the trial and the investigation of the facts, and in that very case of *Potts v. Plunkett*, to which my brother Fitzgerald referred, though the principles were laid down which have been stated, upon looking into the summons and plaint, I find that it contains no averment of knowledge on the part of the defendants, or of ignorance on the part of the plaintiffs. The same question arose in *Vaughan v. The Cork and Youghal Railway Co.* in this country. In that case the accident arose from a wall falling on a passage which the plaintiff had to traverse. The summons and plaint charged that the wall was in a dangerous position, but it did not aver knowledge of the defendants or ignorance in the plaintiffs, and by referring to the judgment of the Chief Baron at p. 303, it will be found that he states that for some time he was under the impression that the summons and plaint was deficient for not alleging ignorance on the part of the defendant; but he goes on to say that he considers the summons and plaint not deficient in that respect, thereby showing that the omission of those statements was not fatal.

It appears to me that most of the English cases arose on new trial motions. It would be open to the defendant here to put in a plea stating that the accident arose from the negligence of a fellow-servant, by whose neglect the accident happened. It will be found in other cases. In *Tunney v. The Midland Railway Company*, the declaration was silent on these points, but the facts appeared on the trial. On these grounds, without differing from the general principles, on which this case should be ultimately decided on the facts before a jury, I think that the summons and plaint is sufficient for the purpose of maintaining the action, and I have come to the conclusion, though not without considerable doubt, that there should be judgment for the plaintiff.

LEPROY, C. J.—In this case I concur with my brother Fitzgerald. With respect to the general rule applicable to cases of this sort, there is no difficulty, but where the general rule has from time to time received qualifications, and those qualifications had from time to time received other qualifications, it is a matter of great nicety and difficulty to say under which of those qualifications the case comes, because if the question were as to coming within this rule, there would be no difficulty; but the difficulty in the case now is to say under which of these qualifications or sub-qualifications a given case comes—that is the difficulty with which we have now to deal. I confess this administration of the law appears to me a very objectionable system. It leads to uncertainty. It leads frequently to litigation, because the question becomes every day more and more difficult; as these qualifications of the general rule increase, it becomes more difficult to ascertain whether the case comes within any and which of them, whether within the original rule, the qualification or the sub-qualification. That is an administration of the law, which I think very unsafe and very injudicious, and it comes within

the observation of Lord Mansfield on another branch of the law, that it is much more important to have the law certain than to affect by sub-divisions and distinctions to meet the justice, or what may be considered the justice, of every particular case; that it is better for the public to have a general rule, and leave the parties to guide their conduct by that, rather than by bending the law to try and reach what may be considered the justice of each case as it arises. Under these circumstances I am very much disposed to hold by that decision which was pronounced in this Court as bearing on the subject, and that decision is one which guides my judgment, and leads me to the conclusion of agreeing with the judgment in this case, which has been pronounced by my brother Fitzgerald.

## Court of Common Pleas.

Reported by J. Field Johnston, Esq., Barrister-at-Law.

[CORAM MONAHAN, C. J., AND KEOGH, J.]

SCHMIDT v. BOYD.—May 19, 20, 24, 28.

*Demurrer—Condition precedent.*

*To an action brought for the non-acceptance of a cargo of sugar, the defendant pleaded that his undertaking and promise were made and given subject to a proviso (which had not been complied with) that the sugars should be shipped in a first class vessel. Held, upon demurrer, that this was a condition precedent, the non-performance of which entitled the defendant to repudiate the contract.*

THE first count of the summons and plaint complained that heretofore in consideration that the plaintiff, at the request of the defendant, would purchase for the defendant in parts beyond the seas, to wit, in Cuba, in the West Indies, certain goods, to wit, sugars, within certain limits as to quantity and price, and of a certain quality then specified by the defendant, and would ship the said goods for the defendant to a port of call and for discharge in the United Kingdom, the defendant undertook and promised the plaintiffs to accept the said goods on the arrival thereof in the United Kingdom, and to pay the freight for the carriage thereof from Cuba aforesaid, and to pay to the plaintiffs all such monies as the plaintiffs should pay for the purchase of the said goods within the limits as to price so agreed on as aforesaid, together with the plaintiffs' commission for and the usual and proper expenses to be incurred by them in and about the purchase and shipment of the said goods in manner aforesaid. And the plaintiffs aver that pursuant to the defendant's said request, and relying on his said undertaking and promise, they did accordingly purchase for the defendant in Cuba aforesaid certain sugar within the limits as to quantity and price, and of the quality so specified by the defendant as aforesaid. And the plaintiffs then paid for the said sugars the price or sum of money at or for which they so purchased the same, and duly shipped the same for the

defendant in a certain ship or vessel called "B. F. Shaw," to a port of call and for discharge in the United Kingdom; and also incurred and paid divers usual and proper expenses in and about the purchasing and shipment of the said sugars. And the said sugars afterwards duly arrived in the United Kingdom ready to be delivered to the defendant, of all which said premises the defendant had due notice; and the plaintiffs were ready and willing and then offered to deliver the said sugars to the defendant; and all conditions were performed and fulfilled, and all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to have the said sugars accepted by the defendant, and to be paid by the defendant the monies so paid by the plaintiffs for the purchase of the said sugars, together with the plaintiff's commission for and the usual and proper expenses incurred and paid by them in and about the purchasing and shipment of the said sugars as aforesaid. Yet the defendant, though he was thereunto frequently requested, did not nor would accept the said sugars or any part thereof, or pay the freight for the carriage thereof from Cuba aforesaid, but wholly refused so to do, and did not or would pay to the plaintiffs any part of the monies paid by them for the purchase of the said sugars, or the plaintiffs' commission for, or the said expenses incurred and paid by them in and about the purchasing and shipment of the said sugars as aforesaid, but wholly refused so to do, whereby the plaintiffs sustained great loss, and were obliged to sell and did sell the said sugars at a much lower price or sum of money than the price at which they had so purchased the same as aforesaid; and were also obliged to pay and did pay the said freight and divers sums of money for insurance and expenses properly incurred in and about keeping the said sugars until such sale, and in and about such sale and incidental thereto, and in forwarding the said sugars to the purchasers thereof upon such sale and by reason of the premises, the plaintiffs were and are otherwise greatly injured, and they claim damages to the amount of £2000. The second count complained that the defendant heretofore retained and employed the plaintiffs as the agents of the defendant to purchase and ship for the defendant, to wit, at Cuba, in the West Indies, in one or two bottoms, under neutral flag, 400 to 500 tons of sugar, say 200 to 250 tons cloyed, No. 12 Dutch standard, at 30s. per cent. of 112lbs. English cost and freight, other numbers, 11 and 13 inclusive, at proportionate rates, and 200 to 250 tons good refining Muscovado at 27s. per cent. of 112lbs. English cost and freight, to a port of call and for discharge in the United Kingdom, by first class vessel or vessels with continental range of ports if practicable, at proportionate rates, upon the terms that the defendant should accept the said sugars on the arrivals thereof in the United Kingdom, and pay to the plaintiffs all such monies as the plaintiffs should pay for the purchase of the said sugars within the limits aforesaid, and the usual and proper expenses to be incurred by them in and about the purchasing and shipment thereof in manner aforesaid, together with the plaintiffs' commission for purchasing the same. And the plaintiffs aver that, as agents for the defendant, they accordingly did purchase for the

defendants in Cuba aforesaid certain sugars in the quantities, of the qualities, and within the prices hereinbefore mentioned and as required by the defendant as aforesaid. And the plaintiffs then paid for the said sugars the prices or sums of money for which they so purchased the same, and duly shipped the same in two bottoms under neutral flag, that is to say, a portion of the said sugars in a first class ship or vessel called the "B. F. Shaw," and the remainder of the said sugars in a certain first class ship or vessel called the "Hebe," to a port of call and for discharge in the United Kingdom, with continental range of ports, at proportionate rates. And the plaintiffs also incurred and paid divers usual and proper expenses in and about the purchasing and shipment of the said sugars in manner aforesaid. And the said sugars afterwards duly arrived in good order and condition in the said vessel respectively in a port in the United Kingdom, ready to be delivered to the defendant, of all which said premises the defendant had due notice. And the plaintiffs were ready and willing, and then offered, to deliver the said sugars to the defendant, and all conditions were performed and fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiffs to have the said sugars accepted by the defendant, and to be paid by the defendant the monies so paid by the plaintiffs for the purchase of the said sugars, and the usual and proper expenses incurred and paid by the plaintiffs in and about the purchasing and shipment of the said sugars in manner aforesaid, together with the plaintiffs' commission for purchasing the same. And the plaintiffs say that the defendant accepted and paid for that portion of said sugars which was shipped by the said vessel called the "Hebe;" but although thereunto frequently requested, the defendant did not nor would accept that portion of the said sugars which was so shipped in the said vessel called the "B. F. Shaw" as aforesaid, or any part thereof, and did not nor would pay to the plaintiffs any part of the monies paid by them for the purchase of the same portion of the said sugars, or the plaintiffs' commission for or the said expenses incurred and paid by them in and about the purchasing and shipment thereof as aforesaid, but wholly refused so to do, whereby the plaintiffs sustained great loss, and were obliged to sell, and did sell, the same portions of the said sugars at a much lower price or sum of money than the price at which they had so purchased the same as aforesaid; and were also obliged to pay, and did pay, the freight thereof and divers sums of money for insurance and expenses properly incurred in and about keeping the same portion of the said sugars until such sale, and in and about such sale and incidental thereto, and in forwarding the same portion of said sugars to the purchasers thereof upon such sale, and by reason of the premises the plaintiffs were and are otherwise greatly injured, and they claim damages to the amount of £2000. The third defence to the first count was as follows: That the undertaking and promise of the defendant in said count mentioned were made and given under and subject to an express proviso and condition that the plaintiffs should and would ship the sugars in the said count mentioned by a first-class vessel or by first-class vessels, and save



as aforesaid the defendant did not undertake or promise as alleged; and the defendant avers that in breach of the aforesaid proviso and condition the plaintiffs did not ship the aforesaid sugars, or any part thereof, in a first-class vessel, or in first-class vessels, but, on the contrary, shipped the same and every part thereof in a certain vessel called the B. F. Shaw in the said count mentioned, which said vessel was not at the time of the said shipment by the plaintiffs a first-class vessel, by reason whereof the defendant, within a reasonable time in that behalf, refused to accept the said sugars or pay for the same, or for the freight, commission or expenses in said count mentioned, as for the reasons aforesaid he lawfully might, which are the non-acceptance and non-payment in the said count complained of.

The fourth defence to the first count was as follows:—And by way of a fourth defence to the said first count the defendant, by like leave, says that the sugars in the said count mentioned and purchased and shipped by the plaintiffs were not within the limits as to quantity specified by the defendant as therein alleged, for the defendant says that the quantity so specified by the defendant as aforesaid, and so to be purchased and shipped by the plaintiff, was a certain small quantity, to wit, a quantity from 200 to 250 tons, and the defendant avers that the quantity of the sugars which were purchased and shipped by the plaintiffs as in the said count mentioned, was a certain very large and excessive quantity, much exceeding 250 tons, to wit, 310 tons, by reason whereof the defendant refused to accept or pay for the said sugars, or to pay for the freight, commission or expenses in the said count mentioned, as for the reasons aforesaid he lawfully might, which are the non-acceptance and non-payment in the said count complained of. To the second count the defendant pleaded, with others, the following defences:—2. And by way of a second defence to the said second count of the summons and plaint, the defendant, by leave of the Court, says that the plaintiffs, in breach of their duty in that behalf, did not ship the sugars in said count mentioned by first-class vessel or vessels, for the defendant says that the plaintiffs shipped a large portion of the said sugars, to wit, the Muscovado sugars in the said count mentioned, in a certain vessel called the B. F. Shaw, which was not then a first-class ship or vessel, and the defendant says that by reason of the aforesaid misconduct and breach of duty of the plaintiffs, the defendant within a reasonable time in that behalf refused to accept the said sugars so shipped as aforesaid from the plaintiffs, or to pay for the same, or to pay for the commission or expenses in the said count mentioned, which are the non-acceptance and non-payment therein complained of; and the defendant says that afterwards and before the acceptance or payment for the portion of the said sugars which was shipped by the vessel called the Hebe, as in the said count mentioned, it was agreed by and between the plaintiffs and the defendant, in consideration of the defendant agreeing to accept and pay for the same portion of the said sugars, notwithstanding the aforesaid misconduct and breach of duty of the plaintiffs, that the said sugars so shipped as aforesaid by the Hebe should be treated by the plaintiffs and the defendant indepen-

dently of the other portions of the said sugars shipped as aforesaid by the said B. F. Shaw, and the same were so treated accordingly, and were accepted and paid for by the defendant with the consent of the plaintiffs as an independent transaction, and without prejudice to the defendant's right (if any) to refuse to accept the portion of the said sugars shipped as aforesaid by the said B. F. Shaw. 3. And by way of a third defence to the said second count the defendant, by the like leave says that the sugars which were shipped by the plaintiffs in the vessel called the R. F. Shaw in the said count mentioned consisted wholly of Muscovado sugars of which the defendant had retained and employed the plaintiffs as in the said count mentioned, to purchase only a certain small quantity, to wit, 200 to 250 tons thereof (as in the said count mentioned), and save as aforesaid the defendant did not retain or employ the plaintiffs as alleged to purchase Muscovado sugars, and the defendant says that in breach of the said retainer and employment the plaintiffs purchased a certain large and excessive quantity of Muscovado sugars much exceeding 250 tons, to wit, 310 tons, and shipped the same to the defendant by the said vessel called the B. F. Shaw by reason whereof the defendant refused to accept the said Muscovado sugars, so shipped in the B. F. Shaw, as aforesaid, or to pay to the plaintiffs the monies paid by the plaintiffs for the same, or any commission or expenses connected therewith, as for the reasons aforesaid he lawfully might, which are the non-acceptance and non-payment in the said count complained of; and the defendant says that afterwards and before the acceptance or payment for the portion of the said sugars which was shipped in the vessel called the Hebe as in the said count mentioned, it was agreed by and between the plaintiffs and the defendant in consideration of the defendant agreeing to accept and pay for the same portions of the said sugars, notwithstanding the premises that the said sugars so as aforesaid shipped by the Hebe should be treated by the plaintiffs and the defendant independently of the other portion of the said sugars so shipped as aforesaid by the said B. F. Shaw and the same were so treated accordingly, and were accepted and paid for by the defendant with the consent of the plaintiffs, as an independent transaction, and without prejudice to the defendant's right (if any) to refuse to accept the portions of the said sugars so shipped as aforesaid by the said B. F. Shaw. 4. And by way of a fourth defence to the said second count the defendant, by the like leave, says that after the retainer and employment of the plaintiffs by the defendant in the said count mentioned, and before any breach thereof it was mutually agreed by and between the plaintiffs and the defendant that the clayed sugars and the Muscovado sugars in the said count mentioned should respectively be separately purchased and shipped by the plaintiffs for the defendant, and should be separately paid for by the defendant to the plaintiffs, and that the respective purchases and shipments thereof should be treated as separate, distinct and independent transactions, and the defendant says that thereafter the plaintiffs, in breach of their said retainer and employment, did not ship the Muscovado sugars aforesaid, being the sugars of which the non acceptance by the defendant is complained of

in the said count to the defendant in a first-class ship or vessel, but shipped the same in a vessel called the B. F. Shaw, which said B. F. Shaw was not then a first-class vessel, by reason whereof the defendant within a reasonable time in that behalf refused to accept the said Muscovado sugars so shipped in the B. F. Shaw as aforesaid, or pay for the same, or for commission or expenses connected therewith, as he lawfully might, which are the non-acceptances and non-payment in the said count complained of. 5. And by way of a fifth defence to the said second count the defendant, by the like leave, says that after the retainer and employment of the plaintiffs by the defendant as in the said count mentioned, and before any breach thereof, it was mutually agreed by and between the plaintiff and the defendant in manner and form as in the last preceding defence is averred, and the defendant says that although he had retained and employed the plaintiffs to purchase and ship a certain small quantity, to wit, 200 to 250 tons, and no more, of Muscovado sugar, as in the said count mentioned, yet the plaintiffs, in breach of their said retainer and employment, purchased and shipped to the defendant, to wit, in a vessel called the B. F. Shaw, a certain large and excessive quantity of the said Muscovado sugars, much exceeding 250 tons, to wit, 310 tons thereof, by reason whereof the defendant refused to accept the said Muscovado sugars so shipped as aforesaid, or to make any payments in respect thereof, which are the non-acceptance and non-payment in the said count complained of. 6. And by way of a sixth defence to the said second count the defendant, by the like leave, says that the sugars which the defendant refused to accept or make any payment in respect thereof were certain Muscovado sugars which purported to be shipped by the plaintiffs in compliance with the defendant's order to the plaintiffs in said second count mentioned to ship from 200 to 250 tons good refining Muscovado sugars at 27s. per cwt., and the defendant says that the sugars which were accepted by the defendant as in said second count mentioned were certain clayed sugars which were shipped by the plaintiffs in compliance with the defendant's order to the plaintiffs to ship from 200 to 250 tons clayed sugars, and which clayed sugars were all shipped on board the vessel called the Hebe in said second count mentioned; and the defendant says the said Muscovado sugars were all shipped on board the said vessel called the B. F. Shaw in said second count mentioned, and no portion thereof was shipped on board the Hebe; and the defendant says that the said vessel called the B. F. Shaw in said count mentioned was not a first-class vessel as therein alleged, and the defendant for the said reason, within a reasonable time in that behalf, refused to accept the said sugars shipped therein by the plaintiffs or make any payments on account thereof, which are the non-acceptance and non-payment in the said count complained of. The plaintiffs obtained leave to reply and demur. The replications severally denied that the pleas demurred to were true in substance and fact. The plaintiffs demurred to the third defence to the first count on the ground that what in the said defence was alleged to be an express proviso and condition was not a condition precedent, and because, having regard to the agree-

ment between the plaintiffs and the defendant in the said first count mentioned, it was immaterial for the purposes of this action whether the vessel called the B. F. Shaw in the said first count mentioned was a first-class vessel or not, and because the alleged breach did not go to the whole consideration for the defendant's promise and undertaking, and was, if anything, a cause of action for the defendant against the plaintiffs, and not an answer to the cause of action in the said first count. To the fourth defence to the first count the plaintiffs demurred, on the ground that it was not shown by the said defence that any substantial difficulty, or any expense, trouble, or risk was or would have been imposed on the defendant by the alleged circumstance that the quantity of sugars purchased and shipped by the plaintiffs exceeded the quantity alleged to have been specified by the defendant, and because the said alleged excess did not authorise the defendant to refuse the whole of the cargo, and refuse to make any payment to the plaintiffs, and because it was consistent with the said defence that the plaintiffs were ready and willing, and offered to deliver to the defendant the actual quantity alleged to have been specified by him, and that the defendants could have accepted that quantity without difficulty, expense, trouble or risk. The plaintiffs demurred to the other defences on similar grounds respectively, alleging in their demurrer to the second defence to the second count that the agreement in the said second count mentioned contained no condition precedent that the vessel in which the said sugars were to be so shipped should be a first-class vessel.

*Andrews* (with him *Law, Q.C.*), in support of the demurrer. 1. That these sugars should be shipped in a first class vessel was not a condition precedent. 2. The difference in the quantity does not excuse the defendant from accepting. 3. The plaintiffs did tender the defendant the very quantity of sugar contracted for. It is a long-established rule that where the non-performance of an agreement on one side does not go to the whole of the other, then the remedy must be by cross-action in the nature of an action for damages.—*Franklin v. Miller* (4 A. & E. 599). It has been held that the Court will look at a question of this kind in a common sense view. A first class vessel either means a vessel rated A 1 at Lloyd's, or it means a first-rate vessel in the sense in which we should speak of a first-rate horse. If the latter, a merchant in Havannah might think a vessel first-class which a merchant at home might not consider to be such. If it means a vessel classed as A 1 at Lloyd's, it might be that one morning, and the next morning it might be unclassified.—*Stavers v. Curling* (3 Bing. N. C. 355). It is not alleged here that any damage or what must occasion damage occurred. [*Monahan, C.J.*—Those are cases in which the party had received certain advantages which he could keep. Here the defendant, by repudiating the contract, has received no benefit whatever.] There is a detriment to the one party here while the other goes entirely free. In the event of the market falling the defendant does get a benefit by having repudiated the contract. As to the defence of a different quantity of sugar, it amounts to this: that because the sugar came in company with sixty other tons of sugar

therefore the defendant refuses it. It is consistent with that defence that we offered the defendant the 260 tons. The defendant might as well say the sugar came along with rice or coffee. He should go on to show that some expense, some risk, or trouble was occasioned. [*Monahan, C.J.*—Where the party has accepted and retains the goods, he must show some damage or loss.] *Bylands v. Whitney* (19 Q.B. N.S., 261) *Levy v. Green* (8 Ell. & Bl. 575, & 1 Ell. & E. 969.) is distinguishable from the present case. It is a different thing if less than the quantity contracted for be sent.—*Shannon v. Barlow* (15 Ir. C. L. R. 478). An agent is not to act for his principal as a machine but as a man having discretion.—Story on Agency.

*Macdonogh, Q.C.*, and *Porter*, for the defendant, cited *Behn v. Burness* (3 B. & Smith, 755); *Ollive v. Booker* (1 Ex. 424.) The warranty is a warranty that the vessel be A 1 at the time, not that she should continue to be so; and the meaning lies in this,—that the rates of insurance are in the inverse ratio. The present case is stronger as being not one of vendor and vendee, but one of principal and agent.

*Law, Q.C.*, in reply cited *Hood v. Grace* (6 Law Times, 360). The dictum in *Behn v. Burness* is confined to a particular class of cases.

The case was adjourned in order to admit of certain suggested amendments of the pleadings being made. The parties having failed to agree as to the amendments, the Court gave judgment on the demurrer.

May 28. *MONAHAN, C.J.* said that both himself and Keogh, J. were clearly of opinion that this was a condition precedent, and that the other defences were good, and therefore there must be judgment for the defendant.

*Judgment for the defendant.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE FITZGERALD, HUGHES, AND DWYER, BB.]

RYAN v. EARL DE GREY AND RIFON.—May 23.

*Demurrer—Action against the Crown.*

*A. demised certain lands to Brigadier-General Fisher in trust for King George III. and his successors, in 1809. The demised lands afterwards vested in her present Majesty's Secretary-at-War, and the rent being unpaid, B., who claimed as assignee of the reversion, brought an action for the rent against the Secretary-at-War, who pleaded that he held only in trust for the Crown. Held, on demurrer to this plea, that the demurrer must be overruled, the action not lying against the Crown.*

THE summons and plaint was as follows:—"Victoria, &c., to the said Right Hon. George Frederick Samuel Earl De Grey and Ripon, Her Majesty's principal Secretary of State for the War Department, greeting.

The Right Hon. George Frederick Samuel Earl De Grey and Ripon, the defendant, is summoned to answer the complaint of Lawrence Ryan, who complains that defendant is Her Majesty's Secretary of State for the War Department, and as such is indebted to him in the sum of £48 Os. 10d. money payable by defendant as such Secretary of State to plaintiff, for that one Christopher O'Beirne being seized in fee of a certain piece of ground called All That and Those the lot or piece or parcel of ground, No. 93 being 2 roods 34½ perches of land on Gallows Hill, near the town of Athlone, in the County Roscommon, demised the same by deed to Brigadier-General Benjamin Fisher, to hold the same as more particularly described in the said deed to the said Brigadier-General Benjamin Fisher, his executors, administrators and assigns, in trust, for and to the use of His Majesty the then King and his successors, and to and for no other use, intent or purpose whatsoever, for and during such time as the exigency of the public service should require it, provided the lessor, the said Christopher O'Beirne, should so long continue to have an interest therein, the said demise or term to commence from November 1, 1809, he, the said Brigadier-General Benjamin Fisher, his executors, administrators, and assigns, yielding and paying therefor and thereout yearly and every year during the continuance of the said demise unto the said Christopher O'Beirne, his executors, administrators or assigns, the yearly rent or sum of £7 sterling of the then currency of Ireland, equivalent to the sum of £6 9s. 2d. British currency, to be paid and payable by two even and equal half-yearly payments, that is to say, on every 1st day of May and 1st day of November in every year; and the said Brigadier-General Benjamin Fisher did thereby for himself, his executors, administrators, and assigns, covenant with the said Christopher O'Beirne, his executors, administrators and assigns, that he, the said Brigadier-General Benjamin Fisher, his executors, administrators and assigns, should and would well and truly pay or cause to be paid unto the said Christopher O'Beirne, his executors, administrators and assigns, the said reserved yearly rent of £7 sterling of the then currency of Ireland, equivalent to the sum of £6 9s. 2d. British, at the days and times appointed for that purpose, and afterwards during the said term all the estate of the said Christopher O'Beirne in the said reversion vested by assignment in plaintiff, and all the estate and interest of the said Brigadier-General Benjamin Fisher in the said lease, which is still subsisting, vested by assignment and by force of the statutes in that case made and provided, in Her Majesty's principal Secretary of State for the War Department, yet after the said lease had vested in the Secretary-at-War, the Secretary-at-War did not pay or cause to be paid unto plaintiff the gales of the said reserved rent, which accrued due as follows, that is to say:—

On the 1st May, 1860	...	£3	4	7
1st Nov. 1860	...	3	4	7
1st May, 1861	...	3	4	7
1st Nov. 1861	...	3	4	7
1st May, 1862	...	3	4	7
1st Nov. 1862	...	3	4	7
1st May, 1863	...	3	4	7

1st Nov. 1863	...	3	4	7
1st May, 1864	...	3	4	7
1st Nov. 1864	...	3	4	7

But the said gales are still due and unpaid to plaintiff.

The second count was similar, save that it averred that the lessor's (O'Beirne's) reversion was a chattel interest.

The third count was similar to the first, save that it referred to another lot, the yearly rent of which was £3 3s. British, of which the same number of gales (10) were due to the plaintiff. The fourth count was similar to the third, save that it averred that the lessor's reversion was a chattel interest. The fifth count was one for use and occupation. The sixth count was one upon accounts stated.

Defence:—"The said George Frederick Samuel Earl De Grey and Ripon, Her Majesty's principal Secretary of State for the War Department, appears and takes defence to the action of the said Lawrence Ryan, and says that heretofore, to wit, on the 20th day of December, in the year of our Lord 1809, the several lots, pieces, and parcels of ground in the 1st, 2nd, 3rd and 4th counts of the summons and plaint respectively mentioned were, and each and every of them was taken by a certain person, to wit, Brigadier-General Benjamin Fisher, in the said counts respectively mentioned, in trust for his late Majesty King George III. for the defence and security of the realm, to wit, the realm of Ireland, for the estate in the said counts respectively mentioned in that behalf, and the said several demises in the said 1st, 2nd, 3rd and fourth counts respectively mentioned were and each of them was made in respect of and for such taking, so as to demise the said several lots, pieces, or parcels of ground for the same terms mentioned in the said several counts in that behalf respectively, and not otherwise, and that before and at the time of the making and passing a certain statute in a session of Parliament held in the 5th and 6th years of the reign of her present Majesty, intituled "An Act to consolidate and amend the Laws relating to the Services of the Ordnance Department, and the vesting and purchase of Lands and Hereditaments for those Services, and for the Defence and Security of the Realm," the said several lots, pieces, and parcels of ground were and each of them was placed under the charge of her Majesty's then ordnance department. And the said defendant further says that the estate and interest of the said Brigadier-General Benjamin Fisher in the said several lots, pieces, and parcels of ground, and in each of them, became and were and was severally vested in defendant solely in his capacity of and by virtue of his office as Her Majesty's principal Secretary of State for the War Department under and according to the statutes in such case made and provided, and not otherwise. And defendant says that he has not at any time claimed, nor does he claim, any individual or beneficial estate or interest in the said several lots, pieces, or parcels of ground, or in any of them or in any part of the same.

And as to the 5th count of the said summons and plaint the defendant says that the sum of money therein mentioned is claimed in respect of the alleged arrears of rent of the said several lots, pieces and parcels of land in the said first, 2nd, 3rd and 4th

counts mentioned, and not otherwise, or for any other account. And as to the 6th count the said defendant says that the money thereby alleged to be found due from defendant to plaintiff was on an account alleged to be stated between them on account of the said arrears of rent last above-mentioned, and not otherwise, or on any other account; and therefore he defends the action.

Demurrer to defence:—Lawrence Ryan, the plaintiff, demurs to the said first defence as insufficient in law, and says that the same discloses no ground of defence good in substance; and plaintiff also demurs to the said second defence as insufficient in law, and says that the same discloses no ground of defence good in substance. And plaintiff also demurs to the said third defence as insufficient in law, and says that the same discloses no ground of defence good in substance.

#### Points of Demurrer.

1. That plaintiff's claim is a proper subject-matter for an action at law, and not for a petition of right.

2. As to each of the defences, that it is bad and insufficient in law as an answer to the action.

*Byrne* (with him *Bell*, Q.C.) for plaintiff, opened the demurrer.—5 & 6 Vict. c. 94, ss. 5, 39, referred to in defence. As to when petition of right is applicable—*Chitty's Prerog. of Crown*, 341, 342, 343; *Banker's case* (14 Howell's State Trials, 77); *Sadler's case* (4 Co. 54, b.) In the Green Book, 191, several authorities are cited. It may be said that as we could not directly reap the fruits of our judgment against the Secretary-at-War that the action will not lie; but for this see *Kendall v. King* (17 C. B. 483). It may also be contended that as the demise is to a trustee of the Crown, the action will not lie; but see *Willett v. Sandford* (1 Ves. Sen. 186); *Doe d. Leigh v. Roe* (8 M. & W. 579).

*Griffith* (with him *Heron*, Q.C., contra, in support of the defences.—5 & 6 Vict., c. 94, ss. 34, 37; 18 & 19 Vict. c. 117; *Macbeath v. Haldimand* (1 Term. R. 172); *Unwin v. Wolcsey* (1 Term. R. 674); *Lord-Advocate v. Lord Dungle* (9 Cl. & F. 212); *Gidley v. Lord Palmerston* (3 Br. & Bing. 275); *Priddy v. Rose* (3 Mer. 86). The demurrer is not properly taken, as it does not state the grounds for demurring.

*Heron*, Q.C., on same side.—*Myrtle v. Beaver* (1 East 134); *Rice v. Chute* (1 East. 578).

*Byrne* in reply.

*Fitzgerald*, B.—I think we are bound to take notice that the estate was only one in trust for the Crown, and therefore we must follow the ordinary rule.

*Judgment for defendant.*

[BEFORE FITZGERALD, HUGHES, AND DEASY, BB.]

EARL OF COURTOWN v. BUTLER.

*New trial motion—Effectment on title—Condition precedent.*

*A., the tenant, made the following agreement with B., the landlord:—"I agree to be bound by the follow-*

ing conditions, viz., to give up the land when you require it; and should you so require it, the incoming tenant to pay me for such crops as shall not at that time have come to maturity; also for manure unused, and land manured by me, gates, &c., the amount to be decided by two arbitrators; one to be appointed by me, the other by the incoming tenant; and if the land be disposed of in this way, the Earl of Courtown (the landlord) to pay me for the drainage." The tenant was not paid for either the crops, &c. nor the drainage; he then refused to give up possession, and the landlord brought an ejectment against him; and the jury, by the direction of the judge, found for plaintiff. Held, on motion for a new trial, that the verdict was right, for that the payment for the crops, &c., was not a condition precedent to the determination of the tenancy, but that the tenancy was expressly made determinable on a demand of possession which had been given and refused.

This was an ejectment to recover the lands of Carrigoneagh, in the County Wexford. Plaintiff claimed title from January 1st, 1866. The case was tried at the last Wexford Spring Assizes before Deasy, B. Plaintiff's counsel put in evidence the following proposal, which had been accepted on the part of Lord Courtown:—

"Banogue, Oct. 17th, 1865.

"James S. Scott, Esq.

"Sir,—In conformity with your suggestions relative to my continued occupancy of Carrigoneagh farm with that part of Carrigoneagh lately held by the representatives of the late Thomas Butler, containing 73a. 2r. Irish measure, or thereabouts, I beg leave to state that I agree to pay the rent fixed by you for the entire holding, viz. £87 per annum, and to be bound by the following conditions, viz. to give up the farm when you require it for the purpose of letting it, with Ballycale mill site. And should you so require these lands or part of them for that purpose, the incoming tenant to pay me for such crops as shall not at that time have come to maturity; also for manure unused, and land manured by me, gates, &c., the amount to be decided by two arbitrators—one to be appointed by such incoming tenant, and the other by me; and if the land be disposed of in this way, the Earl of Courtown to pay me for the drainage. Should my tenancy for Carrigoneagh continue, or that you give me the Banogue portion of Henry Furney's farm, containing about 25 acres, Irish, at 28s. per acre, with the usual lease in lieu of it, I give up my claim for drainage done by me on Carrigoneagh.

"I am, sir, your obedient servant,

"H. BUTLER."

The first witness examined was Mr. Scott, plaintiff's agent. He stated that he had let Carrigoneagh to the defendant; that defendant called at his office on September 29th, and witness arranged with him that he should remain in possession of a portion of the lands of which he had previously been tenant, and should get possession of another portion which had been previously held by Thomas Butler; that the above mentioned proposal had been then sent in and accepted, and a written order to get possession of the

additional lands (which was produced by the witness) was then given by defendant to witness. That witness afterwards made an arrangement to let the mill-site mentioned in this agreement; and on December 7th wrote the following letter to defendant:—

"I have set the mill of Coolnabinch and the farm of Carrigoneagh to the Messrs. Bates; whom will you name to value your crops growing on same?

"Yours truly,

"JAMES S. SCOTT."

"They require immediate possession of the farm." To which on the same day defendant returned the following answer:—

"Banogue, Dec. 7th, 1865.

"J. S. Scott, Esq.

"Sir,—I received your letter informing me that you had let Coolnabinch, mill and Carrigoneagh farm to the Messrs. Bates; and as they require immediate possession, in order to simplify and expedite matters I have made out an account of the drainage, and also of the manure crops, &c., which I enclose; and on receipt of the amount I will hand over possession of the farm to your order. Should any objection be made to my charge for manure, seed, labour, &c., I beg to name Mr. Thomas Barker, of the Yew Tree, Coolattin, to arbitrate for me in the matter. As you claim the full amount of rent as valued by you, which, of course, includes my improvements, I have charged five per cent. interest on the drainage money from the expiration of Carrigoneagh lease to the present time. I am, sir, your obedient servant,

"H. BUTLER."

Witness stated that he subsequently demanded possession on December 11th. This demand was made in the course of a conversation in witness's study at which defendant and Lord Courtown were present, and consisted in substance of an offer made by Lord Courtown to pay £100 in discharge of defendant's claim for drainage if defendant would give up possession. Defendant refused to give up possession. On the cross-examination of this witness it appeared that the defendant had in 1859 executed at his own expense certain drainage works on the lands then in his possession; and Lord Courtown having obtained an advance from the Commissioners of Public Works, had, with defendant's consent, got these drainage works measured and valued, and had been given credit for them in accounting with the commissioners for the advances; but the sum then credited, amounting to about £114, had never been repaid to defendant. An account which had been enclosed in defendant's letter of December 7th was also produced; the amount of the items in it was £207 17s. 5d. It also appeared that defendant had continued in possession of the portion of the farm (about 30 acres) which he held prior to the above mentioned proposal after the expiration of an expired lease, and had paid rent for this portion, so as to make him a yearly tenant of it at the date of the proposal. At the close of plaintiff's case defendant's counsel called on his Lordship to nonsuit plaintiff:—(1.) Because a demand of possession was necessary, and no sufficient demand was proved, none having been made on the lands; and even if a demand of the land would suffice, still there was a question for the jury as to whether the conver-

sation relied on amounted to a demand; but his Lordship held that the demand of the lands was sufficient, and declined to leave that question to the jury. (2.) Because defendant was a yearly tenant under the agreement, and entitled to a notice to quit; and even if he was not a yearly tenant of the whole of the lands, the yearly tenancy which prior to October, 1865, subsisted in the portion he then held, had never been determined; and plaintiff, as to this portion at least, had made no title. (3.) Because payment for the crops and other matters mentioned in the agreement of October 17th was a condition precedent to the determination of the estate created by it; and no sum having been ever paid or tendered, or even ascertained, as provided in the agreement, plaintiff could not recover. His Lordship not having taken this view of the case, defendant's counsel addressed the jury; and defendant deposed to the amount of the drainage expenditure in 1859, and that the expenditure, of which the items were furnished as above mentioned, was *bona fide* made by him on the lands on the faith of the agreement of October 17th, and that the crops, manure, and improvements were now on the lands. He also proved a payment on account of rent in November, 1865; but there was then a dispute as to a few pounds of an old arrear. He stated that he went to Scott's office on December 11th in consequence of receiving the following note:—

"Courtown, Dec. 9, '65.

"Henry Butler,—I shall feel obliged by your being at my office on Monday next, the 11th day of December, at one o'clock in the afternoon, to meet Lord Courtown, and have your drainage claim settled as he may then decide.

"Yours truly,

"JAS. S. SCOTT."

That the interview was taken up in trying to adjust witness's claim; that when they could not agree as to the sum to be paid, Lord Courtown said, "Then you won't give up possession?" To which witness replied that he would do everything he agreed to do. That he afterwards met Scott at the poor-house, and Scott said to him "If I send the bailiff to you on Wednesday, will you give up possession?" In reply to which witness stated he would require a receipt for the rent, and £100. At the close of defendant's case defendant's counsel again called on Baron Deasy to non-suit plaintiff, or direct a verdict for defendant on the same grounds as he did at the close of plaintiff's case. His Lordship declined so to do, but directed a verdict for plaintiff, reserving leave to defendant to move to have the verdict entered for him as to the entire or part of the lands in case the Court should think that upon any of the grounds relied on by defendant's counsel the learned Baron should have directed a verdict for defendant.

J. E. Walsh, Q.C. for defendant, having obtained a rule nisi accordingly,

Harris, Q.C., (with him Purcell, Q.C., and Ryan) showed cause against the conditional order.—The demand of possession need not be on the demised premises.—1 Furlong, 581; *Doe d. Price v. Price* (9 Bing. 357); 1 Co. Lit. Tenant at Will, 55, b. *Doe d. Davies v. Thomas* (16 Exch. 854). The payment

for the crops, &c. was not a condition precedent to the determination of the estate.

J. E. Walsh, Q.C. (with him Hemphill, Q.C., and Lover) contra, in support of the order.—The question to be argued is—Do the words in the agreement amount to a condition for re-entry by the landlord? and if so, is it not part of the agreement that there should be a valuation and payment to the tenant for the drainage, &c.?—*Doe d. Wilson v. Phillips* (9 Moo. 46); *Croker v. Orpen* (6 Ir. L. R. 351); *Doe d. Gardner v. Kennard* (12 Q. B. 244) will be relied on by the other side; but the terms were different there.—*Portage v. Cole* (1 Saund. 320); *Roberts v. Brett* (17 C. B. 534; s.c. 18 G. B. 661; s.c. in Cam. Scas. 6 C. B. n.s. 611; a.c. in Dom. Proc. 11 H. L. C. 327); *Grey v. Friar* (4 H. L. C. 565). Even the grammar of the agreement would show that Butler was not to give up possession till paid; for all three conditions are in the same mood—"To give up possession"—"incoming tenant to pay"—"Lord Courtown to pay." Could it be contended that Lord Courtown might come down whenever he wished, and say to defendant, "You must go out"—the argument of plaintiff's counsel comes to this, [*Fitzgerald, B.*—He is not in a worse position than any other tenant at will. This is not a tenancy at will. [*Fitzgerald, B.*—It is.] *Porter v. Sheppard* (6 Term. R. 665). This is a contract which requires that a demand be made, and the demand must be on the ground.

Hemphill, Q.C. on same side.—In contracts between landlord and tenant the law must be construed most strictly against the landlord.—*Dann v. Spurrier* (3 Bos. & Pal. 399). If the Court allows the cause shown, they will defeat the provisions of 23 & 24 Vict. c. 154, s. 34. The tenant surely would not be so blind as to contract to give up his tenancy without any compensation for emblements, &c. Scott put the same construction on the agreement, that we contend for when he wrote on Dec. 7 to Butler, "Whom will you get to value your crops?" Again, in his letter of December 9 he tells Butler to come to his office, that his claim for drainage may be settled. The "incoming tenant" means the tenant who is about to come in, who is in the act of coming in, not the new tenant, who would be in already. As to conditions precedent, *Morton v. Lamb* (7 Term R. 125). With reference to demand of possession, *John v. Jenkins* (1 Cr. & M. 227). There was no absolute and unconditional demand of possession.

Purcell, Q.C. was not called on to reply.

Fitzgerald, B.—We have only to consider the construction of the instrument. It was an agreement for a yearly tenancy, with an express proviso that the tenancy should determine by a demand of possession by the landlord. This was demanded and refused by the tenant. The only other question we have to consider is, whether the payment for the crops, &c. to defendant by the incoming tenant was a condition precedent to the determination of the tenancy or not; and we are of opinion that there was nothing in the agreement to make it so. The tenancy was made determinable expressly on demand of possession. We must allow the cause shown.

Rule discharged.

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK J.]

RE A SUMMONED TRADER.

*Trader debtor summons—Costs of demurrer—Attempt to use the Court under proceedings in bankruptcy to compel a settlement of claim.*

*Where a trader was brought before the Court upon a trader-debtor summons to compel the payment of a debt composed of the costs of a demurrer to one of the defences filed by the trader as defendant in an action, the issues in fact being still untried; inasmuch as upon the general finding the defendant might be entitled to have the costs of the demurrer set off against the costs of the verdict, or there might be a verdict for the defendant, and the proceeding being evidently taken with a view of enforcing payment of an improper claim, the Court dismissed the petition with costs.\**

THE trader in this case was summoned before the Court under the 105th section of the Bankruptcy and Insolvency Act in order to enforce payment of a debt alleged to be due, or in default to make the party bankrupt. The usual affidavit was made stating that a debt of £50 4s. 8d. was due, and that particulars of demand and notice for immediate payment had been served on the trader.

*Sidney, Q.C.* appeared to dispute the debt and to show cause against the present proceeding, which he alleged was instituted to compel the payment of an illegal claim under the dread of exposure or being made bankrupt. The claim consisted of the taxed costs of a judgment on demurrer awarded by the Court of Queen's Bench against the trader. It appeared on referring to the pleadings that the demurrer had been taken by the plaintiff to one of the several defences filed by the trader, which demurrer was allowed by the Court. The other defences, on which issue had been joined, covered the entire of the plaintiff's claim. It was contended on the part of the trader that the proceedings should fail, inasmuch as the costs of the demurrer constituted the claim. Counsel said that there were two grounds upon which he relied; first—that a judgment on demurrer was, under the circumstances, only an interlocutory judgment, and one on which no execution could issue until the other issues had been disposed of. It was possible that the defendant might get a verdict on one of these issues, and under section 60 of the Common Law Procedure Act of 1853 it was held that costs of issues in law or in fact should follow the finding and be deducted from the costs of any issues found for the opposite side. Secondly, the action was one in which, even if the plaintiff got a verdict, it would not carry costs. In the case of *M'Govern v. M'Namara* (12 Ir. C. L. Rep. app. p. 15), it was held that where a plaintiff

obtains a verdict for a sum which entitles him to no more costs than damages, such damages determine the amount of costs he is to receive in respect of the entire suit, including those of a demurrer, upon which he succeeds. Counsel also submitted that the proceeding was instituted not for the purpose of making a defaulting trader amenable to the Bankrupt Court who was perfectly solvent and could pay the demand that instant if due, but was done for the purpose of exposure, and with a view to extort payment of an unjust claim.

*Kernan, Q.C.*, for the summoning creditor, contended that a judgment on demurrer gave his client the right to take the present proceedings. There was a debt absolutely due on foot of the taxed costs, and the Court ought not to interfere with the rights of a creditor clearly given to him by the statute on the mere supposition that something might occur that would make him liable to refund the costs.

JUDGE BERWICK said he was clearly of opinion that the Act of Parliament did not apply to a case like the present. The costs of the demurrer in the present stage of the proceedings were merely costs upon an interlocutory judgment, upon which the creditor could not issue an execution or make a levy. Those costs were to be paid only on a contingency that might never happen; and the creditor had acted improperly in endeavouring to make a bankrupt of the trader under such circumstances. He believed that the proceedings were had recourse to for the purpose of enforcing the payment of a claim that ought to be recovered in a different way. To mark his disapprobation of what had been done he would dismiss the trader debtor summons, with costs to the trader.

[BEFORE LYNCH, J.]

RE KILMARTON.

*Act of bankruptcy—Petition for arrangement—Protection order granted.*

*Where a trader presents his petition for arrangement obtains his order of protection and lodges the money required by the Court, this will not prevent a creditor obtaining an adjudication in bankruptcy, upon an act of bankruptcy committed by the trader before he filed his petition for arrangement.*

*Mr. Larkin*, solicitor, applied in this case for an adjudication in bankruptcy upon a declaration of insolvency which the trader filed before he presented his petition for arrangement.

*Levy* opposed the application, or rather asked to have the application to adjudicate adjourned until after the first private meeting of creditors, and let them judge what was best to be done under the circumstances. The trader had honestly and fairly submitted his case to the Court; he presented a true account of his assets; he offered a composition far more than the assets would pay if the case went into bankruptcy; he lodged fifteen pounds in court to

\* The above case was tried in the after-sittings of Trinity Term, 1866, when all the issues in fact were found for the trader by the jury, the result of which is, that the plaintiff's alleged claim for costs has been altogether extinguished, and the alleged creditor has become a debtor for the costs of the suit.



meet the costs of the official assignee; and all he asked was, that there should be no adjudication until after the first private meeting, when the creditors could decide what should be done.

*Lynch, J.*—If the creditor insists on bankruptcy I don't think I can refuse to adjudicate.

*Levy* believed the Court had an equitable jurisdiction over its own proceedings, and that there was nothing to prevent an adjournment until the opinion of the creditor would be taken before the Court.

*Mr. Larkin* said he insisted on bankruptcy.

*Lynch, J.*—Is it admitted that the declaration of insolvency was filed before the petition for arrangement?

*Levy* said it was; and the thing was done to shut out executions and preserve the property for creditors.

*LYNCH, J.*—I have no option in the case. I cannot refuse to adjudicate. The trader was declared bankrupt.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

**MASSEY v. HAYES.**—May 10; June 23.

*Husband and wife—Devise to trustees for sole use of wife—Interposition of trustees—Effect of.*

*J. E., by his will made in 1818, reciting that he was possessed of certain lands, which he held under an agreement for a lease of 999 years, called "Waters' lot," devised same to trustees, in trust, "for the sole use of my daughter, H. E. (then unmarried) and her assigns." H. E. after the making of said will, married (said premises not having been put into settlement); her husband, after J. E.'s death, had a lease made to him and his executors, &c., of said Waters' lot, for the residue of said term of 999 years; said husband died in 1864, leaving his said wife, him surviving, and having by his will previously devised said premises away from her to other parties in his will mentioned. Held—distinguishing the case from *Gilbert v. Lewis* (1 De Gex J. & Sm. 38) that J. E. having interposed trustees in the devise of said Waters' lot, for the sole benefit of his daughter, H. E., such interposition was sufficient to exclude the marital right of H. E.'s husband.*

*And Held therefore that said husband, in taking said lease, was a mere trustee for his said wife, H. E.*

THE petition in this case, was presented by John Massey, committee of the estate of Hannah Adams, a lunatic, and by said Hannah Adams. The petition prayed that the respondents, Thomas Edward Hayes, James Kearney, Frederick Joseph Rowen and Elizabeth, his wife, and Eliza Rowen, the only child of said Elizabeth Rowen, may be restrained from proceeding with the several actions at law, instituted by them against the tenants of certain premises, called 'Waters' lot,' now known as 'the Terrace,' being part of the lands of Bohercrowe, in the County of

Tipperary, and from instituting any other proceedings at law against said tenants, or any other tenants of said premises, and that it may be declared that a certain lease made on the 14th of December, 1858, was taken by one Thomas T. Adams, since deceased, the husband of said Hannah Adams, in trust for her; and that the respondents or such of them as the Court shall direct, may be ordered to execute to the petitioner John Massey, as the committee of the estate of the petitioner, Hannah Adams, a conveyance of the said lease of the 14th December, 1858, of the premises thereby devised for the residue of the term therein mentioned; the petition also prayed for a reference to the Master to approve of a proper conveyance for that purpose. The facts of this case as disclosed in the cause petition are few and are shortly these:—By agreement of the 28th January, 1801, one John Clarke, the owner in fee-farm of the lands of Bohercrowe, in the County of Tipperary, agreed to demise same to Joseph Evans, petitioner's father, at the yearly rent of six guineas; said Joseph Evans entered into possession of said lands under said agreement, but no lease was made to him in pursuance of said agreement. The petition stated that in the month of May, 1822, the petitioner, Hannah Adams, who was the daughter of said Joseph Evans, intermarried with her late husband, Thomas Travers Adams; that previous to said marriage an indenture of settlement dated the 22nd of May, 1822, was executed for and in consideration of said then intended marriage, whereby all the property of said Thomas Travers Adams, and a portion of the property of said Joseph Evans were settled as therein mentioned; but the premises called "Waters' lot, or the Terrace," were not included in said settlement or affected thereby. That said Joseph Evans duly made and published his last will, dated 15th April, 1818, of which he appointed James Roe and Hugh Baker trustees; and Robert Potter, James Reardon, and his daughter, Hannah (petitioner) executors; and thereby among other matters, after reciting that he was possessed of all that and those the several holdings in Bohercrowe, held from said John Clarke, Esq., commonly called "Commins' and Waters' lot" and Andrews' and Buchanan's field, he devised the said premises and also others, subject to certain life annuities which have since determined to his daughter (petitioner, Hannah Adams) in the words following—"my will is that the said James Roe and Hugh Baker (the trustees therein mentioned) and the survivor of them, his heirs, executors, and administrators, shall stand seised thereof, and of my several and respective interests therein, in trust, for the sole use of my daughter, Hannah Evans and her assigns, subject however to the said annuities charged thereon." Said Joseph Evans died in 1823, and thereupon petitioner, Hannah, and her husband, Thomas Travers Evans, and the trustees on her behalf, entered into possession of the premises called "Waters' lot," and so continued up to the death of Thomas Travers Evans in 1864. Hannah Adams being so entitled to the said premises to her sole use, and the said Thomas Travers Adams being in possession and management thereof as her trustee; the said Thomas Travers Adams applied for a lease thereof in pursuance of

said agreement of the 28th January, 1801; and by indenture of the 14th of December, 1858, made between the Rev. John Cooke, in whom the interest of John Cooke the elder, party to said agreement, had become vested of the one part, and Thomas Travers Adams of the other part; he the said Rev. John Cooke demised the said premises called "Waters' lot," to said Thomas Travers Adams, his heirs, executors, administrators, and assigns, for the residue of the term of years, at the yearly rent of six guineas.

The petition then charged that said Thomas Travers Adams, when obtaining this lease from said Rev. John Clarke falsely represented himself as the person entitled to have said lease made to him under said agreement of 1801: said Hannah Adams having become a lunatic, the circumstances of her property having been brought under the notice of Master Brooke; the Master in this lunatic matter, by his report dated 8th of August, 1865, found "that said 'Waters' lot'" was the property of the lunatic, and also found that at present it was not necessary to take any proceedings touching the lunatic's property unless resistance should be made to the assertion of her rights as found by the report, which report was confirmed on the 16th of August last. That John Massy as such committee of the estate of the lunatic, went into the receipt of the rents of said "Waters' lot," and received the rents which have accrued thereon since the death of Thomas Travers Adams. The petition then stated that immediately previous to his death Thomas Travers Adams made his will, dated 24th November, 1863, whereby he bequeathed said "Waters' lot" to Elizabeth Rowen; of the town of Tipperary for her sole and separate use for her life, and after her death remainder to her first and other sons in tail male, and in default of such issue male, then to the daughters of her marriage with Frederick J. Rowen, with several remainders over; and the said testator appointed said Frederick J. Rowen and his wife, Elizabeth Adams, otherwise Rowen, James Kearney, and Thomas Edward Hayes, executors and executrix of his said will. Eliza Mary Anne Rowen, one of the respondents, is the only child of said Frederick J. Rowen and Elizabeth Rowen. By leave of the Court the respondents Thomas E. Hayes, James B. Kearney, and Frederick J. Rowen, as executors of Thomas Travers Adams, issued their several writs of summons and plaint against the several tenants on the lands of "Waters' lot," some of whom held under leases made by said Thomas Travers Adams, and others as tenants from year to year for the rents due, out of their respective holdings, up to the 29th of September last, which rents have been already paid to petitioner (Massy) as committee of the estate of the lunatic, Hannah Adams. That said writs were all served in the month of December last, and that the plaintiffs therein as such executors, by virtue of the legal estate so acquired by Thomas Travers Adams, by said lease of the 14th December, 1858, will proceed to judgment under execution, unless restrained by the injunction of this Court. The petition then submitted that said Thomas Travers Adams must be held to be a mere trustee for his wife (the lunatic) petitioner here under the terms of the will of the said Joseph Evans.

The point of controversy then in this case

was, whether said Hannah Adams was or was not entitled to said premises under the will of Joseph Evans, the petition insisting that her husband was a mere trustee for her, and that the devise to the trustees of said will to her sole and separate use gave the beneficial interest in the lands wholly, solely and entirely freed from the control of her husband to said Hannah; and, therefore, the lease made to him must be held as aforesaid to be in trust for his wife. The respondent on the other hand insisted that the premises were not the sole and separate estate of said Hannah, under the terms of the will of Joseph Evans, and that therefore Thomas Travers Adams might, during the joint lives of himself and his wife have aliened and assigned the premises called "Waters' lot;" and that he might have conveyed same to a trustee for himself; and that the taking of the lease of the 14th December, 1858, to himself also, was a clear indication of an intention on the part of said Thomas Travers Adams to become the sole owner of said premises, and was in truth a reduction of said interest into his sole and exclusive possession; and further, that he had full power alone and independently of his wife to deal as he pleased with the interest, and that said husband, agreeably to the ordinary rule of law, could deal as he pleased by any act *inter vivos* with the chattels real of his wife, and therefore the respondents contended the petition ought to be dismissed with costs.

*Sherlock, Q.C., and Robert Ferguson* were heard in support of the petition.—It is well settled that a bequest to a woman of a fund to be vested in trustees for her sole use and benefit will give the capital for her sole and separate use—*Adamson v. Armitage* (10 Comw. 283); *Ex parte Ray* (1 Mad. 199); a settlement on a lady, about to marry, to her sole and separate use was held to give a separate estate—*Linsdale v. Thacker* (12 Sim. 178); *Inglefield v. Coghlan* (2 Coll. 247); *Ex parte Kilbeck* (3 Mont. Deacon & De Gex. 480). The words of the will in the case now before the Court are, that the trustees of the testator's will should stand seized of the premises "in trust for the sole use of my daughter Hannah Evans." Now the case which bears exactly on this is *Archer v. Rorke* (7 Ir. Eq. 478) where the marginal note is as follows—"A bequest of chattels real to a *feme sole* to her sole and separate use and benefit, vests the property in her, exclusive of marital control, and her husband is in equity, as mere trustee for her, and a receiver will not be appointed over the property on the petition of the judgment creditor of her husband;" it is long established that such a devise to a woman, she being married at the time of the devise, gives her a separate estate in the property so devised; an endless chain of cases might be cited to shew that the words of this will gave the sole estate to the wife. The latest case on this subject is *Tarney's trusts* (Weekly Notes, March 3, p. 88). [*The Lord Chancellor* inquired what was the meaning of the expression in the will "to the sole use of Hannah Evans and her assigns?"] This lady never assigned her right to any person at all.

*Brewster, Q.C., Ryan, and William O'Brien* were for the respondents.—Hannah Adams never entered into possession of "Waters' lot," but her husband as is stated in the petition entered into possession, but cer-

tainly not as trustee for his wife; and we deny that Hannah Adams ever was entitled to said premises for her sole use, inasmuch as it does not appear that Hannah Adams by any contract entered into by Thomas Travers Adams, nor under the terms of the will of her father Joseph Evans, was ever entitled to a separate estate in said "Waters lot." This case is within the ordinary rule that a husband can deal as he pleases by any act *inter vivos* with the chattels real of his wife; and that in taking out this lease he took it to himself absolutely, and could not be held to be a trustee for his wife. The entire question here is not what the testator by the phraseology of the limitation had intended to do, but what he had actually done, it is not enough to shew a probable intention to exclude the *jus mariti* from the property of the wife: the language used must be sufficiently strong to prevent the possibility of its attaching, the object being to deprive the husband of his legal rights by creating a separate beneficial interest in the wife as if she were acting *sui juris*. No particular form of words it is true is necessary, but the expression must amount to a total exclusion of the husband.—*Stanton v. Hall* (2 Russ. and Mylne, 175.) In *Tyler v. Lake* (2 Russ. and Mylne, 183), "lands were settled upon trust after the death of the settlor to sell the same and distribute the proceeds among all the settlor's children *nominatim*; and as to the shares of two who were married women, the trustees were directed to pay the same 'into their own proper and respective hands, to and for their own use and benefit;' but in case they then be dead, to pay their shares to their respective husbands, for their own use and benefit. Held, that these shares did not vest in the married women to their separate use."—*Fenner v. Taylor* (2 Russ. & Myln. 190). Those cases may be said to have been long since decided, viz., in 1831; however, the case of *Gilbert v. Lewis* (1 De Gex. Jones & Smith, 38) decided only in 1862 is in point: the marginal note in that case is as follows—"A mere devise to a woman for her sole and separate use and benefit, does not sufficiently indicate an intention to limit the devised property to her separate use." *Massey v. Parker* (2 Mylne & K. 174) is an authority to shew that this expression in the will would not be strong enough to exclude the marital control. A gift or bequest to a woman "for her own use and benefit"—[*Kensington v. Dollond* (2 Mylne and K. 184); *Wills v. Sayers* (4 Mad. 409); *Roberts v. Spicer* (5 Mad. 491); 2 Roper on Legacies by White, ch. 21, s. 5, pp. 371 and 372]—has been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband; for although the money is to be paid into her own hands, or to her own use, yet there is nothing in all that inconsistent with its being subject to the husband's marital rights.—1 Story Eq. Jurisprudence, sec. 1383. *Lewis v. Matthews*, a case just reported in the number on the 5th of May, 1866, of the *Weekly Notes*, p. 155, is in point. There a testator in New South Wales, being seised of real and personal estate, devised to his dearest friend Hannah Walker, her heirs, executors, administrators, and assigns, certain estates "for her and their own sole absolute use and benefit;" a suit having been instituted for the administration of the

assets of the person making this will, a question arose as to the person in whom the legal estate under the above will was vested: and the Vice-Chancellor is reported to have said "that the words 'sole and absolute use and benefit' being referable not only to Hannah Walker, but also to her heirs, executors, administrators, and assigns, did not create a separate estate in her." Now the words of the testator in the case under consideration were—"to the sole use of Hannah Evans and her assigns," so that the case just cited is *quatuor pedibus* in point.

THE LORD CHANCELLOR.—This is a very short question indeed. This petition here is filed by Mrs. Hannah Adams against whom a commission of lunacy has issued, and the finding, by that commission of Mrs. Adams as a lunatic, is now in force; Mr. J. Massey, then her committee is the active petitioner here. The facts of the case are few, and they are these:—Mrs. Massey's father was entitled under an agreement to have a lease made to him by a Mr. John Clarke of the land called "Waters' lot;" being so entitled he made his will dated the 15th April, 1818, and he thereby devised to trustees those lands in trust for the sole use of his daughter then unmarried, the present petitioner Hannah Adams, otherwise Evans, now a lunatic. She was married, as the petition states, in the month of May in the year 1822, to one Thomas Travers Adams, and her father died in the same year without having altered the will he had made years before. It appears that at the time of Mr. Evans making this will he was in possession of the lands of "Waters' lot" under an agreement for a lease for 999 years, dated some time in the year 1801 after the date of this will; and shortly before his death a settlement was made on the marriage of his daughter with Mr. Adams, and by that settlement a considerable portion of the property of Mr. Evans was put into settlement, but Waters' lot; which Mr. Evans was entitled under the agreement I have just spoken of, was not put into settlement, and of this lot Mr. Evans who died in 1823, disposed in these words by his will—"My will is that James Roe and Hugh Baker, (the trustees in the will named) and the survivor of them, his heirs, executors, and administrators, shall stand seised thereof,"—that is of Waters' lot—"and of my several and respective interests therein in trust for the sole use of my daughter Hannah Evans and her assigns." Well, of this land known as Waters' lot a lease was made in 1858 to Miss Evans's husband, the said Thomas Travers Adams, and he died in 1864, having in 1863 made his will whereby he bequeathed this lot "Waters' lot" to Elizabeth Rowen, and he dealt with it in this will in such manner as has been described in the cause petition, into which particulars it is unnecessary now to enter. The real question for our consideration is, had Thomas Travers the power of dealing with this lot which Mr. Evans had devised to trustees for the sole use of his daughter; that then brings us back a step farther, and the one narrow point here is—what is the meaning of this devise, is Mr. Adams a mere trustee for his wife who is now unhappily a lunatic, or is he not? I have considered this case most attentively, and I shall grant an injunction to restrain the respondents from proceeding with their several actions at law, and

I am of opinion then that Thomas Travers Adams must be held to be a mere trustee for his wife, and that she took the property devised to her to her sole use, free from any control of her husband. The devise here is to trustees. In *Gilbert v. Lewis* (1 De Gex. Jones & Smyth, 38) it was held that a mere devise to a married woman for her sole use and benefit does not sufficiently indicate an intention to limit the devised property to her separate use. But, in *Adamson v. Armitage* (19 Ves. 416), where money was directed to be vested in trustees, and the income arising therefrom to be for the benefit of a woman then unmarried, "for her sole use and benefit," the Master of the Rolls (Sir William Grant) held that this direction was sufficient to vest the property in her exclusive of the marital rights. I think the rule of construction, from which I see no reason to depart, is correctly laid down in *Inglefield v. Coghlan* (2 Coll. 247); there a bequest of £1000 stock to a married woman "solely and entirely for her own use and benefit," was held to be a bequest to her for life to her separate use. There is no interposition of trustees there, but the meaning of the word "sole" she being married, was clearly equivalent to "separate." In *Tarsey's Trusts* (1 L. Rep. Eq. Ser. 561), a distinction is taken between cases where the devise is directly to the person that is intended to be benefited, and where trustees are interposed as in the case before us; the interposition of trustees, that they should stand seised of the lands for "the sole use and benefit" of the testator's daughter, means clearly that all that time that they were to stand seised, therefore they should do so for her separate use: the interposition of trustees is sufficient then to take it out of the marital control and power. Now the devise here is to trustees to her sole use she being unmarried, as she was when the will was made, and this will being made before the Wills Acts demonstrates that the property would be hers solely and absolutely, and would be freed from the marital right. The distinction is plain,—the distinction between *Gilbert v. Lewis* (De Gex. J. Sm. 38) and this case is manifest; in the case before us trustees were interposed, in *Gilbert v. Lewis* they were not; a gift to a woman to her sole use means an absolute gift to have the property in her and her heirs, and on her marriage becomes the husband's, but where the gift is to trustees to hold for her sole use, clearly their only duty is to keep it for her sole use independent of and separate from her husband's property. I must then grant the prayer of the petitioner, and decide that this lease of the 8th of December, 1858, was taken by Thomas Francis Adams in trust for his wife, the petitioner Hannah Adams. The respondents to execute such conveyance as in the form to be approved of by the Master.

### Rolls Court.

Reported by H. W. B. Mackay, Esq., Barrister-at-Law

**M. F. HALL v. WILLIAM J. HALL, ROGER HALL, AND OTHERS.**—Apr. 19; May 30.

*Apportionment of rent—Landlord and Tenant Act, 1860, s. 49.*

*Where a testator, being a landlord, dies between two*

*gale-days, the rents payable by his tenants are by the Landlord and Tenant Act, 23 & 24 Vict., c. 154, made apportionable as between the executor and devisee, and the prior apportioned part is personal estate.*

*Semble, the prior apportioned part could not be made to pass to the devisee except as personal estate, and liable accordingly.*

THE petition in this case was filed for the administration of the personal estate of the late Roger Hall and the carrying out of the trusts of his will. The petitioner was the sole acting executor. Under the will certain lands stood limited to trustees who were respondents in this cause, to the use of the trustees for the term of 500 years upon trust, and subject to the trust term to the use of the petitioner for life, remainder to the use of the respondent, Wm. J. Hall for life, remainder to the use of the respondent, Roger Hall, eldest son of the respondent, W. J. Hall, in tail male, with divers remainders over. A reference having been made to the Master to take an account, Master Litton in his order declared that there should be an apportionment of the gale of the rent of the lands devised, which became due on the 1st November, 1864, being the gale day next after the death of the testator, Roger Hall, and that the executor was entitled to a proportionate part of the said gale of rent, from the 1st day of May, 1864, being the gale day next preceding the death of the said testator to the 20th September, 1864, being the day of his death. From this order the respondents now appealed.

*Brewster, Q.C.*, for the appellants, said the question turned on the language of the forty-ninth section of the Landlord and Tenant Act, 23 & 24 Vict., c. 154. He contended that this Act was intended to put an end to the question on the construction of the Wills Act where the estate is continuing and did not diminish the power of devising the whole estate including the gales to a devisee given by the Wills Act. The other side must contend that this Act was an implied repeal *pro tanto* of the Wills Act, although never mentioned in the schedule, while it expressly repealed the Statute of Apportionments, 4 & 5 Wm. 4, c. 22, ss. 2, 3. A devise of the rents will carry the land—*Ashton v. Adamson* (1 Dr. & War. 210)—and a devise of the land ought to carry the rents. Again, suppose tenant *pur autre vie* at a rent makes lease for years, and dies, having devised his estate, the devisee must pay the whole head rent without apportionment, and yet according to the construction contended for he will only have a share of the rent reserved on the lease for years. The general scope of the intention of the Legislature did not affect to control the power of a tenant in fee, and it was on this ground that the statute of 4 & 5 William, 4, chap. 22, was not understood to apply in that case according to *Beer v. Beer* (12 C. B. 60); *Campbell v. Campbell* (7 Beav. 482); *Brown v. Amyot* (8 Hare, 173). But in this case it was not necessary to go so far; it was sufficient to insist that there should be no apportionment as between the devisee and the personal representatives. The case of emblements was an analogous one. They did not belong to the executors against the devisee, although

they did against the heir (1 Williams on Exec. 634, 5th ed.)

*Harrison, Q.C. contra*, said the section was meant to reduce to one rule the anomalies of the pre-existing law of apportionment. One of these was that there should be no apportionment unless the rent was reserved by an instrument in writing.—*In re Markby* (4 M. & Cr. 484); *In re Alexander* (4 Ir. Ch. 257). Counsel did not contend that the testator might not have devised the whole gale to the devisee, but he would then have taken the apportioned part up to the death as personalty. He had not, however, done this; he had shown no intention of taking away the statute, and it must therefore operate. The other side had contended before the Master that the devisee came within the meaning of the word "assigns" in this section, because it could have no other meaning, but it might be understood to mean the legatee of the prior apportioned part of the rent as personalty; and if not it would be better to suppose it introduced by mistake, than that the policy of the Act should be frustrated. The cases decided on the 4 & 5 Wm. 4, c. 22, were referable to the wording of that Act, which only applied to a determining interest in a continuing subject.—1 Hayes Conv. p. 336, 5th edit.; *In re Clulow's estate* (3 Kay & J. 689) *Plummer v. Whiteley* (Johns. 585); *St. Aubyn v. St. Aubyn* (1 Dr. & Sm. 611); *Cutley v. Arnold* (1 Johns. & Hem. 651).

*Reeves followed.*

*Warren, Q.C., in reply.*—According to the general principle, such a construction must be put upon the sect. as will give some meaning to the word "assigns." That word cannot mean assigns by act *inter vivos*, for such an assign is the person designated as "landlord," nor can it mean a legatee of the apportioned part of the rent as personalty, for the language of the Act is, "executors, administrators, or assigns," so that the assign is contradistinguished from the executors, and consequently cannot claim through them. Therefore, the word must mean the devisee, and he will be entitled to the prior portion of the rent, not as legatee, but as "assign," claiming in opposition to the executors, *i.e.*, as devisee, and will therefore take it as realty.

**THE MASTER OF THE ROLLS.**—I think Master Litton was perfectly right. The law prior to the statute was that if a person was seised in fee, and died, having made a lease, there was no apportionment of the rent as between the heir and executor. The heir took the whole. Perhaps it was not quite reasonable. The object of the Legislature was to alter the law as between the executor and the heir, so far that if the landlord, "being tenant in fee, or for any lesser estate shall die before the day on which the rent reserved in any lease or other contract of tenancy, or on any parol tenancy from year to year, shall have or shall become payable, and such lease, contract, or tenancy shall have continuance notwithstanding such death, the rent shall be apportioned in such manner that the executors, administrators, or assigns of such landlord shall be entitled to a proportional part of such rent, according to the time during which the said rent was accruing due before such death, including the day on which such death shall have happened." The

Legislature intended to alter the law as it was decided in 3 Hare, 173, by making the rent apportionable between the real and personal representatives. Does that apply to a devisee? The testator might, by his will, say, "I devise my estate to A. B. for his life, and I intend that he shall take the whole of the gale." No doubt the devisee would take the whole gale in such a devise, but the question is whether he would take it under a simple devise in general terms. The testator is to be assumed to have framed his will subject to the existing rules of the statute law, and I apprehend it would be contrary to sound construction to say, where there is nothing in the case but a devise in general words, by which the heir-at-law is excluded, that that is a devise of the whole gale. I think it is very plain that the devisee is in the same position as the heir, and though I admit that a testator may imply an intention to give the gale, yet a general devise will not imply such an intention, assuming that every testator knows the law, and frames his will in reference to it. The Master has decided according to the grammatical construction of the Act, and I do not see how I can overrule his decision. The notice is framed to raise the point whether the statute applies to a devisee; but when that point fails, they catch at the word "assigns." But if he takes it as an assign, he takes it as personal estate, and I do not see any reason for saying, that being a devisee he is to be construed to take also as assign. He is a devisee of real estate only, and subject to the right of the executor, under the express words of the Act of Parliament, to an apportionment of the rent, and I will not say that he is to sustain the double character of devisee of the real estate, and assignee of the prior apportioned part of the gale.

On May 30th, His Honor made an order dismissing the appeal with costs.

LOCKHART'S TRUST; EX PARTE, LADY LOCKHART.

LOCKHART'S TRUST; EX PARTE, LORD JERVISWOOD.

May 3, 4. 29; June 11.

*Scotch law—Affidavits of foreign jurist—Construction—"Presently"—Domicile—Costs under Trustees Relief Act.*

*Where a minor having made a Scotch "matrimonial contract" on her marriage, the validity of which was doubtful, afterwards became a widow and entered into the enjoyment of her jointure under it, the Court preferred holding it to be confirmed as there was no evidence of the Scotch law on that subject.*

*The Court was of opinion that a Scotch deed containing apt words may operate as a marriage so that an interest limited to vest on marriage may pass by the marriage according to the Scotch law, although it could not pass unless vested. "Presently" held to mean "immediately," or "soon after."*

*Semble—the opinion of a Scotch advocate on a question of Scotch law is not to be received in evidence unless expressed in the form of an affidavit and in general terms, not pointed at the circumstances of the particular case.*

*Quære—Whether proceedings for service as heir in Scotland, in which the ancestor's domicile is stated, be admissible as evidence of that domicile.*

*Although the change of domicile depends on intention, this intention must be capable of being inferred from the acts of the person at the time of changing her domicile; and an affidavit stating such an intention filed during the trial is not sufficient.*

*Where a lady whose husband died a domiciled Scotchman, and who retained property in Scotland, but whose family residence passed to another by her husband's death, left Scotland soon after and lived at various places in England with her infant daughter, occasionally visiting relatives in Scotland, and attained her age and died a few months afterwards abroad. Held, that the domicile of the daughter was Scotch.*

*Costs of appearing at the argument by counsel are not allowed to a trustee who has brought in the fund under the Trustee Relief Act, where all the parties beneficially interested are free from disability, and the case has been fully argued on their parts, although the English practice is contra, but costs of lodgment and of the motion for costs are given.*

THE question in these cases was the right to a sum of £2756 14s. 7d. new three per cent. stock, now standing to the credit of this matter. This sum was the produce of £1000 late currency, the portion of the late Lady Mary Ross, and of some dividends accrued since the execution of the suit. Lady Lockhart, who was the daughter of Lady Mary Ross, claimed in the first place the whole of the stock under the marriage settlement of her mother, insisting that it had not passed to her own late husband, Sir Charles Lockhart, on her marriage, either by the settlement or by the marriage itself. Secondly, if it had passed to her husband she claimed one fourth part of the stock, on the ground that her husband having died intestate, domiciled in Scotland, one moiety had passed to each of their two daughters by the law of Scotland; that their younger daughter, who had since died intestate, was at the time of her death domiciled in England, and that a moiety of her moiety had consequently passed to her (Lady Lockhart) by the law of England. Thirdly, if it had passed to her husband she claimed the whole as his administratrix. Lord Jerviswoode claimed the whole for himself and Lady Lockhart as trustees of the marriage settlement of the Hon. Mrs. Moreton, the elder daughter of Lady Lockhart, on the ground that it had passed to Sir Charles Lockhart on his marriage with Lady Lockhart, either by the settlement or by the marriage; that on his death one moiety had passed to each of his daughters; that the younger daughter, who had since died, was at the time of her death domiciled in Scotland, and that the whole of her share went to her sister by the law of Scotland, and had so become vested in the trustees of the settlement. He also disputed the right

of Lady Lockhart, as her husband's administratrix, to have the stock paid out of court to her while those who were beneficially entitled were opposed to it.

The facts were as follow:—On the marriage of the late Lady Mary Ross with Sir Charles Ross her portion, amounting to £1000, late currency, was vested in trustees in trust as to the interest for her husband for life, remainder for her for life; and as to the principal, after the death of the survivor, to the daughters and younger sons of the marriage, in such shares as the husband, or after his death the wife, should appoint, and in default of appointment equally among them, to be vested in younger sons on their attaining twenty-one, and in daughters on their attaining that age or marrying, with provisions for bringing advancements into hotchpot. There were issue of the marriage five daughters, of whom Lady Lockhart was one, but only one son. One of the daughters died an infant and unmarried. Sir Charles Ross died without having executed his power, and Lady Mary Ross died without having exercised her power except by the partial advancement of one daughter. Lady Lockhart, while still a minor, and in the lifetime of her mother, married the late Sir Charles Lockhart; and on the occasion of her marriage entered into a matrimonial contract (Scotch marriage settlement), expressed to be with the consent of her mother and of her three surviving curators, but signed by one of them only. In this deed it was recited that the parties did thereby accept of each other for lawful spouses and promise to solemnize their marriage with their first convenience, and by it Lady Lockhart granted to her husband all her monies, and all debts owing to her by general words, the construction of which formed the principal question of Scotch law in the case, it being uncertain whether the £2500, late currency, passed or not. A jointure was also secured by this settlement to Lady Lockhart; after her husband's death she entered into the enjoyment of it. Sir Charles Lockhart died intestate in 1832, before the death of Lady Mary Ross, and Lady Lockhart took out administration to him in this country. The only issue of this marriage were two daughters, Mary Jane and Emilia Olivia, and to these the property of their father passed on his death—a domiciled Scotchman—in 1832. Mary Jane married the Hon. Mr Moreton in 1837, and by her settlement assigned her property, including that which should accrue during the coverture to trustees, in room of one of whom Lord Jerviswoode was afterwards appointed, the only other surviving trustee being now Lady Lockhart. Emilia Olivia died at Nice in 1850, and Lady Lockhart filed an affidavit in this matter with the view of showing that at the time of her death her domicile was in England. It appeared by this affidavit that Emilia Olivia Lockhart was born in 1828. That on the death of Sir Charles Lockhart deponent went on a visit to her mother near Lanark, and to her brother in Rosshire, which visits occupied about thirteen months. That after these visits, having no longer had any residence of her own in Scotland since the death of her husband, she determined to make England her home, and to take up her permanent residence there. That she accordingly took a house in London early in the spring of 1834 for about six months, where she

resided with her younger daughter, Emilia Olivia, and subsequently lived at Brighton and other places, and remained altogether in England until May, 1835. That she then went to visit Lady Mary Ross near Lanark, and afterwards with her daughter to stay for about six months at Largie House, afterwards again to visit Lady Mary Ross, and then to Edinburgh and other places until the spring of 1837, when she returned to England, and came again to London in August, 1837. That she then remained in London and the Isle of Wight till the autumn of 1839, when she and her younger daughter went on a visit to Largie for about five months, and then on a visit to Lady Mary Ross for about three weeks, and returned to London in the spring of 1840. Then went to visit at Largie, and returned to London in the spring of 1841. Then again to Largie in the autumn, and to London in the spring of 1842. Then again to Largie in the autumn, and was detained in Scotland by illness till June, 1845, when she went to various places in England for her health. After this she resided with her younger daughter in England, principally in London and the Isle of Wight, until November, 1849, when they went to Nice, where her younger daughter died, in January, 1850, having attained her age a few months before. That from the autumn of 1851 deponent was not in Scotland until 1859, nor for the last fourteen years, except four visits of about five months long each. A corroboratory affidavit by a servant of Lady Lockhart was also filed. On the part of Lord Jerviswood an affidavit was filed, made by one William R. Kermach, stating that the Hon. Mr Moreton, nephew of Miss Emilia Olivia Lockhart, had presented a petition to the Sheriff of Chancery in Edinburgh on the 12th April, 1865, praying to be served as heir to her, and referring to the proceedings, by which as well as by the affidavit, it appeared that the decree on this petition had *inter alia* declared her "ordinary or principal domicile" at the time of her death to have been in Scotland. This affidavit further stated that she had considerable landed property in Scotland at the time of her death. These proceedings in Scotland were not commenced until after the present questions had arisen and the money had been paid into court. In consequence of the marriage and the settlement of Lady Lockhart being Scotch, the opinion of Scotch advocates had been taken on the question—whether her interest in her mother's portion had been transferred to her husband, viz. that of Mr. Kinnear, on behalf of Lady Lockhart, and those of Mr. Patton and Mr. Clarke on behalf of Lord Jerviswood. There were two opinions by Mr. Kinnear filed. The first was in general terms, and was verified by a separate affidavit, and identified at the foot by the Commissioner extraordinary. The second was in the form of an affidavit and sworn as such, but was couched in terms referring to the specific case. The questions of English law were the admissibility in evidence of these opinions, the admissibility of the affidavit of R. W. Kermach, the right of the administratrix to payment out of court notwithstanding the opposition of those beneficially interested, and whether Miss Emilia Olivia Lockhart was at the time of her death domiciled in England or in Scotland.

Kelly, Q.C., and J. Fallon, for Lady Lockhart.

Longfield, Q.C., and Finch White for Lord Jerviswood.

On the questions of evidence, the affidavit of Mr. Kinnear verifying his separate opinion was read; and the opinion verified by it was put in, but objected to on behalf of Lord Jerviswood. Counsel in support of it cited *Wise v. Wise*, (not reported). The other affidavit of Mr. Kinnear was also put in and objected to, on the ground that it advised on questions of construction which properly belong to the Court here after it has been informed of the meaning of technical words, and the questions of law, and peculiar rules of construction relevant to the case.—*Duchess di Sora v. Phillips* (10 H. of L. Cas. 624). The affidavit of Kermach, and the proceedings in the Scotch case, were objected to as having been obtained *ex parte*, and because the petition in that case had been filed after the present question had arisen, and *Drevon v. Drevon* (34 L. J. N. S. Ch. 139) was cited. On the other side that case was distinguished as depending on the absence of proof of domicile in the judgment there referred to, and it was remarked that the 10 & 11 Vic. c. 47, Sch. A. requires the domicile of the ancestor to be stated in the judgment.

As it appeared that, according to Mr. Kinnear's opinion, the interest of Lady Lockhart, under her mother's marriage settlement, would pass to her husband if indefeasibly vested at the time of her marriage, but not otherwise, counsel on her behalf cited *Lee v. Olding* (26 L. J. N. S. Ch. 580) and *Vishart's trust* (Wkly. Notes, 107), to show that it was liable, not merely to be apportioned, but to be defeated altogether by the exercise of the power which overrode it. It was also contended that the law of Scotland, so far as it was not proved to be different from the common law, must be presumed to be the same, and that the property in question being excluded by the settlement did not pass by the marriage, because *expressio unius est exclusio alterius*, and *expressio facit cessare tacitum*. On the other side the following cases (which consider what property is bound by a covenant in a settlement to assign after-acquired property to the trustees) were cited:—*Blythe v. Granville* (13 Sim. 190); *Ex parte Blake* (16 Beav. 463); *Graffey v. Humpage* (1 Beav. 46); *Maclurcan v. Lane* (6 Jur. N. S. 56, a.)

On the right of the administratrix to draw out the fund, notwithstanding the opposition of those beneficially entitled, no cases were cited.

To show that during the minority of Miss Emilia Olivia Lockhart her mother's domicile was here, and assuming her mother to have changed, hers had changed also.—1 Burge Col. & For. Laws, 39; Phillimore Domicile, 37, 45; *Pottinger v. Wightman* (3 Mer. 67), considered conclusive evidence by Lord Campbell in *Johnson v. Beattie* (10 Cl. & Fin. 138). *Pottinger v. Wightman* was also relied on by the other side to show the probability that the domicile of origin had revived on her attaining her age, and leaving England for Nice. To show that Lady Lockhart's domicile of origin remained, it was insisted that to change it she must (in a social point of view at least) have divested herself as far as she could of her native country according to the doctrine in *Moerhouse v.*



*Lord* (10 H. of L. Cas. 272); *In re Capdevielle* (33 L. J. n. s. Ex. 337, b.); *Aikman v. Aikman* (3 Macq. 854); and the following cases were also cited—*Hodgson v. De Beauchessne* (12 Moo. P. C. 285); *Munro v. Munro* (7 Cl. & Fin. 842, 876); *Jopp v. Wood* (11 Jur. N. S. 53; 34 L. J. n. s. Ch. 212); *Attorney General v. Countess de Wahlstatt* (3 H. & C. 374). On the other side, Story's Confli. Laws was relied on that a floating intention to return does not present the acquisition of a new domicile. Counsel also cited *Drevon v. Drevon* (34 L. J. n. s. Ch. 129), and *Bruce v. Bruce* (2 Bos. & Pul. 229, note), and the definition of an acquired domicile given by Kindersley, V. C., in 4 Drury, 376, but disapproved on appeal in D. P., 10 H. of L. Cas. 285), and the animadversion of Pollock, C. B., in 34 L. J., n. s., Ex., 316-17, on that disapproval. That the domicile may be more easily changed from Scotland to England than from the United Kingdom to a foreign country, 1 Burge Col. & For. Laws, 55, and *Whicker v. Hume* (7 H. of L. Cas. 159), were cited 1 Burge Col. & For. Laws, 41, was also referred to on the definition of "domicile." It was insisted on behalf of Lord Jerviswoode that Lady Lockhart's affidavit was inadmissible, so far as it stated her intention to change her permanent residence at the time of leaving Scotland.

May 29.—THE MASTER OF THE ROLLS, after stating the facts of the case, continued:—It is a doubtful point whether the contract made on the marriage of Lady Lockhart is binding on her, having been a minor. Counsel on behalf of Lord Jerviswood has made this point, that the matrimonial contract of a minor is valid by the law of Scotland if the curators of the minor are parties to its execution. But I am not informed by the affidavit of the Scotch lawyer whether by the law of Scotland the contract is valid when signed by a majority of the curators, and in this case, though it is expressed to be signed by all three, the signatures of two only appear in the copy put in evidence, and the original is not forthcoming. However, if the contract is capable of confirmation, there can be no doubt it was confirmed, for Sir Charles having died in 1852, Lady Lockhart has ever since received her jointure under that contract. It would be therefore better for me to hold that it was confirmed under the settlement. On the marriage of Lady Mary Ross, Lady Lockhart became entitled to one-fourth part of the £1,000 thereby put in settlement. That one-fourth was to vest in her on her attaining her age of 21 years or day of marriage. It is said that at the date of the execution of that settlement she was under age and unmarried. That even independently of this the share was not vested by the law of Scotland, it being subject to be divested, and that consequently it did not pass by the marriage, and that the language of the settlement was not sufficient to make it pass by that marriage. To this it was answered that the deed itself constituted a marriage, as the parties thereby took one another as their lawful spouses. My own belief is that the latter hypothesis is the correct one, as marriage is in Scotland a mere civil contract. With respect to the construction of the contract, it will be necessary to mention the case of *The Duchess di Sora v. Phillips* (*ubi supra*).

With reference to the rules by which its construction is to be governed, Lord Cranworth remarks at page 633, "Where a written contract is made in a foreign country and in a foreign language, the Court in order to interpret it, must first obtain a translation of the instrument." That is here unnecessary.—"Secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist in the foreign law." By the matrimonial contract of the 8th of September, 1820, made between Sir Charles and Lady Lockhart, Lady Lockhart assigns and makes over unto the said Sir Charles Lockhart, and his heirs and assigns, "all and sundry debts, real and personal, stock in the public funds, provisions, and sums of money presently belonging or due and owing to her, or to which she has right in any manner of way, with the whole ground and instructions thereof, and all action, diligence, and execution competent to follow thereupon, interrogating and substituting the said Sir C. M. Lockhart and his forefathers in her place and full right of the premises." Unless the word "presently" includes the charge, it cannot pass by the contract, notwithstanding the consideration. There is nothing to show the meaning of the word in Scotch deeds. In Johnson's Dictionary it is stated to mean "at present, at this time, now." He also states it to be obsolete in this sense, and afterwards gives as a second meaning, "immediately, soon after." It seems to me that in the absence of any evidence as to the meaning of the word in Scotch conveyances, the word seems sufficient to pass the interest. I think I should act upon the opinion of Mr. Patton and Mr. Clarke, the Scotch advocates. The next question which arises is, whether Miss Emilia Olivia Lockhart the younger was at the time of her death domiciled in Scotland, and whether Lady Lockhart has a right to her share of her property under the Statute of Distributions. It is laid down in Story on the Conflict of Laws, s. 46, that "the widow retains the domicile of her deceased husband until she obtains another domicile." The domicile of her husband was Scotch. Lady Lockhart however, insists that she changed her domicile, and that her domicile became English. She alleges that she at the same time changed the domicile of her daughter. The case of *Pottinger v. Wightman* (3 Mer. 67) shows that she may change the domicile of her infant daughter, provided there was no fraudulent motive for the change. But fraud, as it seems, may be presumed where no reasonable cause appears for the removal. Now, I will assume that *Pottinger v. Wightman* is an authority in her favour. But I think it is scarcely reasonable to assume that the Court could decide on an allegation of an intention to change her domicile, unless such an intention could be reasonably inferred from her act. Although Lady Lockhart had not a residence in Scotland, yet she had property in Scotland, namely, a "life-rent of locality," which "life-rent" I understand in Scotland constitutes an actual estate in the land. She says she intended from the death of her husband to make Scotland no longer her home, but to take up her permanent abode in England. Although the intention is very important to

be considered, still there is no case which holds that a widow, after her husband's death, can change her domicile, and that of her infant daughter by a mere secret intention to do so. She took a house in London for six months, where she resided with her younger daughter, and afterwards lived at Brighton and other places, and remained altogether in England until May, 1835. [His Honor then read the remaining allegation in Lady Lockhart's affidavit, and proceeded]—This did not establish a change of domicile. Lady Lockhart and her younger daughter had no settled residence in England, for they spent their time in travelling about from place to place. Lady Lockhart had an estate in Scotland, her life rent of locality. Under these circumstances the facts establish no intention to change the domicile. I shall not decide on a declaration of intention; the rule with respect to declarations *post litem motam* involves, in my opinion, a principle which extends to this case. It will scarcely be necessary to add more than a reference to some of the later authorities. I have cited Story's Conflict of Law, and I shall now refer to the case of *Moorhouse v. Lord* (10 H. of L. Ca. 272), Lord Cranworth there says—"It is not enough that you really mean to take another house in some other place, and that on account of your health, or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. That does not signify; you do not lose your domicile of origin or your resumed domicile merely, because you go to some other place that suits your health better, unless indeed you mean either on account of your health, or for some other motive to cease to be a Scotchman, and to become an Englishman, or a Frenchman, or a German. In that case if you give up everything you left behind you, and establish yourself elsewhere, you may change your domicile." And again Lord Chelmsford says in page 286, "In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a character as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved. What was said by my noble and learned friend, Lord Wensleydale, in *Aikman v. Aikman* (3 Macq. 877), lays down the rule on this subject very clearly—"Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. The change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts the change." There is, no doubt, an observation of some of the judges in *Re Capdevielle* (33 L. J. N. S. Ex. 306). Chief Baron Pollock there says—"I think that my learned brothers are correct in saying that the opinions expressed by the noble and learned lords who decided the case of *Moorhouse v. Lord* are calculated to convey the notion that the definition of Mr. Justice Story is not correct, and that a new definition of 'domicile' may be given and acted upon in this country. However, a judgment of the House of Lords is only binding so far as it necessarily determines some certain proposition. It is not binding as to the reasons

given by each of the noble Lords, even though they should all concur in giving the same reasons." But I cannot understand what right he had to make these observations on the judgments of the Lords. They are judgments applicable to the exact state of facts in the case before them. I shall act upon the statement of the law in the House. I think the change must be *animo et facto*. Lady Lockhart wishes to have it decided that she has changed her domicile without ever taking up a permanent residence in England at all. It is by the acts that the intention must be ascertained. There is not a particle of evidence of an intention to change the domicile.

HIS HONOR afterwards remarked that he entertained some doubt as to the admissibility in evidence of the proceedings for service of Mr. Moreton as heir to Miss Emilia Olivia Lockhart.

After judgment had been delivered,

Hemphill, Q.C. said he appeared on behalf of the Duke of Leinster, who was tenant for life of the estate, subject to the trust term for 400 years, by which the fortune of Lady Mary Ross had been secured. The survivor of the trustees was dead, and had no personal representative. The Duke of Leinster was anxious to exonerate the estate, and had consequently paid off the incumbrance, with the exception of the part of it to which the present suit related, which he had brought into Court under the Trustee Relief Act. Counsel now applied for the costs of lodgment, and for the costs of appearing on these petitions. The practice in England was settled. Counsel cited Morgan on Costs, 212, 214; *Erskine's trust* (1 K. & J. 312); *Headington's trust* (27 L. J. Ch. 175).

MASTER OF THE ROLLS.—My own practice is the other way. I do not mean to lay down as an universal proposition that a trustee never need apply for costs, because in a minor matter it might be different. But here I have had a full *bona fide* argument, and you have no interest.

Counsel then asked for the costs of lodgment, which the Master allowed, as also a small sum as costs of the motion for costs.

June 11.—The following order was made:—

"It is ordered that no rule be made on the petition presented by Lady Lockhart, and it is further ordered that the Accountant-general of this Court do transfer to the credit of this matter, and the separate credit of "the Hon. Charles Baillie, Lord Jerviswood, and Dame Emilia Olivia MacDonald Lockhart, trustees in the matrimonial contract of the Hon. Augustus Henry Moreton and Mary Jane Moreton" the sum of £2,803 1s. 2d. Government New Three per Cent. Stock now standing in the Bank of Ireland to the credit of the matter, and do also draw on the governor and company of the bank in favor of the said Lord Jerviswood and of the said Dame Emilia Olivia MacDonald Lockhart for the dividends which have accrued due on said stock; and the Court doth declare that said Lord Jerviswood is entitled to the costs of his said petition, and of the proceedings properly and necessarily incurred thereunder, and of this motion and order, the said costs to be taxed as trustees' costs, and with respect to the said petition presented by

the said Dame Emilia Olivia MacDonald Lockhart claiming to be entitled beneficially to the fund in Court, and not as co-trustee with Lord Jerviswood, on which petition the Court has made no rule, it is ordered by the Court (the counsel for Lord Jerviswood not objecting) that the said Dame Emilia Olivia MacDonald Lockhart be paid the costs of the said petition and the proceedings thereunder, save and except the costs incurred by the appearance of the counsel and solicitor for the said Dame Emilia Olivia MacDonald Lockhart in Michaelmas Term, 1865, and Hilary Term, 1866, the case not having been then argued, by reason of no evidence having been then given or affidavits filed enabling the case to be proceeded with, and the solicitor for the said Dame Emilia Olivia MacDonald Lockhart not having been justified in setting down the petition until Easter Term, 1866, and the Court doth decline to act on the consent of the solicitors that further costs should be paid, but the Court doth make this order without prejudice to the parties beneficially interested in the funds ordered to be transferred signing a consent personally to allow further costs than those mentioned in this order; and it is further ordered that the said Dame Emilia Olivia MacDonald Lockhart is entitled to the costs properly and necessarily incurred in taking out administration in this country to Sir Charles MacDonald Lockhart; and it is further ordered that it be referred to one of the taxing masters of this Court to tax said several costs; and it is further ordered that His Grace the Duke of Leinster is entitled to £20 costs, and upon the said stock being transferred to the separate credit as aforesaid, it is further ordered that said accountant-general do transfer to Messrs. William Read and Thomas K. Crawford, solicitors of the Duke of Leinster, or either of them, so much of said stock as will at the price of the day be equivalent to said sum of £20, and to Mr. Richard Atkinson, solicitor for Lord Jerviswood, so much, &c., and Valentine Blake Dillon for Lady Lockhart.

[*Note for reference.*—The clearest statement of the English Practice as to trustees' costs, is in Lewin on Trusts, 4th ed. p. 267, note.]

#### **HAINES v. PURCELL AND OTHERS.**—*June 4-6.*

##### *Priority of creditors—Landlord's rights.*

*A head landlord cannot obtain costs incurred in ejectment out of a fund in court standing to the credit of a cause in which his immediate lessee is respondent, his claims being opposed by an unpaid incumbrancer.*

This was a motion that so much of the stock standing to the credit of the cause as should be equivalent to £30 17s. 8d. should be sold, and the proceeds to be paid to George Mayberry or his solicitor, being

costs incurred in ejecting the undertenants who were themselves no mark for costs. Mr. Mayberry was head landlord, and the respondent, Purcell, was his tenant, and had sublet the lands. A great part of the stock in question was the produce of the rents. The motion was opposed on behalf of Sir Denham Norreys, the first unpaid incumbrancer, whose rights had been ascertained by the Master's report.

*Murphy moved and cited Harding v. Coethorn (1 Esp. 57).*

*Exham, Q.C., for Sir Denham Norreys, cited Harris v. Shea (8 Ir. Eq. 571).*

THE MASTER OF THE ROLLS said the landlord's claim for rent might be paramount to the claims of the creditor, but that was not what was asked here. The landlord, in regard to his claim for costs, stood in the position of a creditor, and as such was puisne to Sir Denham Norreys. The practice was perfectly settled. He would refuse this motion with costs.

His Honor then made an order, on 6th June, refusing the motion, with costs, it being contrary to the settled practice of the Court to pay the head landlord his costs incurred in proceedings in ejectment out of the fund lodged in Court.

#### **RE THE CATHOLIC UNIVERSITY.**—*June 6, 11.*

*Trustees for charity—Romilly's Act, 52 George III. c. 101.*

*Trustees for charity permitted to sell land on lease, the subject of the trust, though subject to a covenant to expend £3000 in building; but rights of the landlord saved, and this not forced on an unwilling purchaser on account of the covenant.*

THE prayer of the petition was that the petitioners, the Most Rev. Paul Cullen, the Most Rev. Joseph Dixon, the Most Rev. Patrick Leahy, as trustees of the Catholic University might be declared at liberty to sell the lands and premises of Clonliffe West, purchased by them in trust for that university, in pursuance of an agreement made with the Dublin Trunk Connecting Railway Company; and that such sale might be ordered accordingly; and that it might be referred to one of the Masters to inquire and report whether it would not be for the benefit of the said "Catholic University" that the said lands should be sold. It appeared from the petition that the premises were held by lease for 1000 years at a rent from the surviving trustees of the Blessington Estates Private Act, under that Act and in pursuance of an order of the Lord Chancellor in the cause of *Gardner v. Blessington*. That the lease contained a covenant by the lessees to expend £3000 in buildings within five years, and to keep same in repair. That the lease was held under a tacit trust for the Catholic University. That an agreement had been made for a sale of the lease to the Dublin Trunk Connecting Railway Co., who had raised objections on account of the covenant to expend £3000 on building, and on the ground that they were affected with notice of the trust.

*Flanagan, Q.C.*, (with *Woodlock*) moved in accordance with the prayer of the petition, and remarked that the views of courts of equity as to the possibility of permitting the sale of trust estates under circumstances like the present had undergone a change. The cases on both sides of the question, with their dates, were as follows:—*Re Park's Charity*, 1841 (12 Sim. 329); *Suir Island Charity*, 1846 (3 J. & Lat. 171); *Overseers of Eccleishall*, 1852 (16 Beav. 29); *Lyford's Charity* (ib.); *Ashton's Charity*, 1856 (22 Beav. 288); *North Shields Old Meeting-house*, 1859 (7 W. R. 541).

*F. W. Walsh, Q.C.*, and *Richey*, for the Dublin Trunk Connecting Co.

*Norman, Q.C.* for the trustees of the Blessington estates (the landlord.)

THE MASTER OF THE ROLLS said he would not make any order which would in the slightest degree affect the rights of the landlord or those of the railway company, but would in other respects accede to the motion.

June 11.—The following order was made:—

It is ordered that the petitioners, the surviving trustees, be at liberty, if they shall be so advised, to sell their estate and interest in the lands and premises demised by the indenture of lease of the 7th May, 1862, in the said petition mentioned. This order to be without prejudice to Robert Fowler, Esq., the lessor of the said lease, bringing an action on the covenants in said lease if same shall not be performed or an action of ejectment; and also without prejudice to the Dublin Trunk Connecting Railway Co. insisting that they are not bound to perform the agreements in the petition mentioned, on the ground that a good title cannot be made to them of the said lands and premises, or on any other ground upon which the said company may rely. And it is further ordered that said company do abide their own costs of appearing on this matter; and the Court doth declare Robert Fowler, Esq. entitled to his costs of appearing on this motion out of the trust property in the cause of *Gardner v. Blessington*. And it is further ordered that the receiver in said cause do pay said costs when taken and ascertained, and have credit for same.

## Court of Criminal Appeal.

Reported by William Woodlock, Esq. Barrister-at-Law.

THE QUEEN v. FANNING.—November 18, 1865; April 17, May 3, 1866.

[BEFORE LEFROY, C.J., MONAHAN, C.J., PIGOT, C.B.; KEOGH, O'BRIEN, CHRISTIAN, FITZGERALD, AND O'HAGAN, JJ.; AND HUGHES, FITZGERALD, AND DRAKE, BB.]

*Bigamy—Validity of second marriage—Representa-*

*tions of prisoner—Statutes 19 G. II., c. 13 (Ir.); 24 & 25 Vic. c. 100, s. 57.*

*F.*, a Protestant, was legally married. While his wife was still living he was married by a Roman Catholic clergyman to a Roman Catholic woman. At the time of the second marriage he represented himself to the woman and the officiating clergyman as a Roman Catholic. He was indicted for bigamy. The above facts were proved, and also that *F.* was a professing Protestant within twelve months prior to the time of the second marriage. The jury convicted him. Held (dissentientibus—Monahan, C.J., Pigot, C.B., Keogh, J., and O'Hagan, J.)—that the conviction was wrong and should be reversed.

THIS was a case reserved by Keogh, J. The case stated was as follows:—

The prisoner was indicted at the Commission held in and for the County of the City of Dublin, on the 25th of October last, for that he, on the 4th day of October, in the year of our Lord 1858, at St. Peter's Parish Church, in the County of the City of Dublin, did marry one Mary Stewart, spinster, and her the said Mary then and there had for his wife; and that the said Thomas Fanning afterwards, and whilst he was so married to the said Mary aforesaid, to wit, on the 23rd day of April, in the year of our Lord 1865, at the Roman Catholic Church in Westland-row, in the County of the City of Dublin aforesaid, feloniously and unlawfully did marry and take to wife one Catherine Brien, and to her, the said Catherine Brien, was then and there married, the said Mary, his former wife, being then alive; against peace and statute.

Prisoner pleaded not guilty, and was defended by Mr. Curran.

First witness, Abraham Stewart, deposed—That he was a witness to the marriage in St. Peter's Church, Aungier-street, in the City of Dublin, on the 4th of October, 1858, of Mary Anne Stewart and the prisoner; they were married by the Rev. Mr. McSorley, a clergyman of the Established Church; he believed Fanning to be a Protestant; he represented himself to be a Protestant; Mary Anne Stewart was and is a Protestant, and is still alive; she is here in Court at present.

Second witness, Catherine Brien, proved—She knows the prisoner twelve months last Sunday; on the 23rd of last April he was married to her in Westland-row Chapel; he told me he was a Roman Catholic; from the time she knew him he professed himself to be a Roman Catholic; they were called three times in the Roman Catholic Church; she lived with him after the marriage, believing him to have been a single man previously to the marriage.

On cross-examination, and in reply to the question, did he ever tell you he was a Roman Catholic? Oh yes, several times, both before and after the marriage; he never told me he had a wife and children before; didn't know that till the time he was arrested; the prisoner lived in Donnybrook, and before we were married he used to come and see me at Merriem Market; he never stayed all night before we were married; he went to chapel with me the night before we were married, and the day we were married; it is

usual for Roman Catholics to go to the chapel the day before they are married.

And in reply to the question when the clergyman asked him, was he a Catholic? didn't you say he was an ignorant Catholic, and knew nothing at all? she replied, No; when the clergyman asked him was he a Catholic, he answered and said he was.

This closed the case for the Crown.

First witness for the prisoner, James Fanning, proved—He is the prisoner's father, and a Protestant; the prisoner is a Protestant; was baptized and reared a Protestant; never in his life knew him to be a professing Roman Catholic; he has come to church with witness; and on cross-examination he proved he had a son who went with the prisoner to church within the last twelve months; and last Christmas morning witness went with him to the Protestant church at Simmons' court; and that on other occasions within twelve months witness had seen him go into the Protestant church.

Second witness, Thomas Scantlin, proved—Since he knew the prisoner he believed him to be a Protestant; I know him about eleven or twelve years; never saw him go to church; by his expressions knows his religion; by expressions to witness believed him to be a Protestant; about six, or eight, or ten months ago, he told me he was a Protestant in ordinary conversation.

Third witness, Thomas Goff—Knows the prisoner since he was born; he is a Protestant; witness is a Protestant; was with him in church very often; is unable to say whether he was in church with him these six months, but witness has been in church with him within the last twelve months.

Mr. Curran, on behalf of the prisoner, submitted that it had been proved the prisoner was a Protestant, or professed to be a Protestant, within twelve months before the second marriage, and that under the Act of Parliament the second marriage was void.

The Court called for the production, as a witness, of the clergyman who performed the second marriage ceremony.

The Rev. Mr. Barry, Roman Catholic clergyman, thereupon proved that he is one of the clergymen of Westland-row Chapel, and married Thomas Fanning and Catherine Brien on the 23rd of April last; can identify Catherine Brien, but cannot swear to the prisoner; and in reply to the question—Are you able to state whether you asked him whether he was a Roman Catholic? witness replied, he presented himself as a Catholic, and therefore I asked him no questions touching his religion; he came in the ordinary course to be married; the banns were taken down, and the names published in the usual way.

At whose request were the names published, or the banns taken down? At the request of the parties themselves. The banns were taken down by the Rev. Mr. Meyler. I asked the man no questions as far as I remember.

And thereupon the Rev. Robert Meyler proved—I am one of the clergymen of Westland-row Chapel. [Banns produced]; I took down that document at the request of the parties themselves, Fanning and Brien; I could not identify either the man or the woman. Are you able to state whether the parties

from whom you took down the matter that composes that document stated anything about religion? I am sure they did not; they came in the ordinary way as Catholics; as a matter of course, I took them to be Catholics, and I asked no questions of them; but I am sure I asked the man was he married before, and that he said he was not.

And, at the request of the jury, Catherine Brien was recalled, and in reply to the question—Did the prisoner tell you how long he was a Catholic before he was married? replied, he always told me he was a Roman Catholic from the first hour we were acquainted; I asked him what religion he was; he said he was a Roman Catholic; I never knew he was a Protestant.

I charged the jury, and in reply to questions of mine, the jury stated that the prisoner was a professing Protestant within twelve months prior to the time of the second marriage; and further, that they believed the prisoner had held himself out to the clergyman who married him as a Roman Catholic, and that he had stated to the woman that he was a Roman Catholic.

And I thereupon told the jury, that if they believed the prisoner had been a second time married, his first wife being still alive, as proved in evidence, they ought to convict him; and the jury found the prisoner guilty.

I sentenced him to five years' penal servitude.

I submit, for the consideration of the Court of Criminal Appeal, the legality of that conviction.

WILLIAM KEOGH.

*Molloy*, for the prisoner.—There is no authority for the conviction in this case. If the first marriage, and not the second, had been celebrated as the second was here the case would, beyond all doubt, be clear in favour of the prisoner.—*The Queen v. Chadwick* (2 Cox C.C. 319); *Bruce v. Burke* (2 Ad. 471). I submit that to constitute the crime of bigamy the second marriage must possess all the requisites of a valid one, except the ability of a party to contract it by having a former wife or husband alive. The words "shall marry," in 24 & 25 Vic. c. 100, s. 57, must have the same meaning as the words "being married" in the earlier part of the section. Here the second marriage was absolutely null and void. Marriages between Roman Catholics and Protestants were forbidden by statutes 3 Wm. 3, c. 3; 2 Anne, c. 5; 8 Anne, c. 3; 12 G. 1, c. 3; 9 G. 2, c. 11. St. 19 G. 2, c. 19, makes marriages between Protestants and Catholics, celebrated by a Catholic priest, absolutely null and void to all intents and purposes. Statute 23 G. 2, c. 10, removed any doubt as to the priest celebrating such a marriage being guilty of felony. Statute 32 G. 3, c. 21, and 33 G. 3, c. 21, removed the prohibition against marriages between Protestants and Catholics, but left standing the law as to such marriages being celebrated by Catholic priests. The second marriage in this case is exactly in the same position as if it had been celebrated by a mere layman. The penalties against the priest were removed by 3 & 4 W. 4, c. 102, but the marriage remains invalid. See also 7 & 8 Vic. c. 81. *Orgill's case* (9 C. & P. 80) will be cited to show that the prisoner was estopped by his representations; but

that case has been doubted in *Darcys minors* (11 Ir. C. L. R. 298) and *Thelwall v. Yelverton* (14 Ir. C. L. R. 188). *Hanley's case* (Carrington's Cr. Law, 259) is open to the same observation. The latter case has been observed upon also in *Flaherty's case* (2 C. & K. 782). *Brawn's case* (1 C. & K. 144) is a strong authority for the Crown; but there, at all events, the clergyman had the power of celebrating the marriage, although under 5 & 6 Wm. 4, c. 54, the marriage itself was void as the parties were within the forbidden degrees. In *The Queen v. Millis* (10 Cl. & Fin. p. 689) Tindal, J., expressly says that the second marriage, to constitute bigamy, must, on the plain construction of the Act then in force, which was in the same terms as statute 24 & 25 Vic. c. 100, s. 57, mean a marriage of the same kind and obligation as the first. In *Burt v. Burt* (2 Sw. & Tr. 88), which was a petition for divorce on the ground of bigamy, the Court held that to prove bigamy there should be proof of such a ceremony as but for the former marriage would have constituted a valid marriage. There are several cases in which it was considered material to inquire as to the validity of the second marriage. *The King v. Wilson* cited in Hamilton Smythe's report of *The Queen v. Millis* (p. 211); *The King v. Robinson* (ib.); *Drake's case* (1 Lew. C. C. 25); *Graham's case* (2 Lew. C. C. 97); *The Queen v. Povey* (1 Dears. C. C. 32).

*J. E. Walshe, Q. C., Barry, Q. C., and Heron, Q. C., for the Crown.*—The word "marry" in the second member of the 57th section of 24 & 25 Vic. c. 100 cannot possibly mean a good, valid, and binding marriage. The marriage is always null to all intents and purposes by the existence of the first. What, then, does it mean? The true meaning of it is given by Lord Denman in *The Queen v. Brawn*, where he says that the prisoner's offence "consisted in going through a ceremony of marriage and appearing to contract that which was a legal and binding union at a time when she knew she had a husband living." In that case the second marriage was null and void, yet Lord Denman held the conviction good. In *The King v. Penon* (5 C. & P. 412) the banns of the second marriage had been published in a false name, and the marriage was, under Lord Hardwicke's Act, null and void. Gurney, B. says—"That applies only to the first marriage. The parties cannot avoid the consequences of their offence by contracting concertedly an invalid marriage." Neither of these cases has ever been doubted; and they are both—especially *The Queen v. Brawn*—direct authorities on the present case. *Orgill's case* shows the importance to be given to the prisoner's representations. The statute 23 G. 2, c. 10, is a legislative declaration that though a marriage contracted under the circumstances of the second marriage in this case is null and void as a marriage, yet it is good for the purpose of making the priest who celebrates it punishable. In the same way it may be good to constitute the felony of bigamy. *Brawn's case* is cited as law in all the text books. See especially Russell on Crimes, vol. I. p. 307, last edition. As to *Burt v. Burt*, that was a decision on the English Divorce Act, and has nothing to do with the criminal law. In *The King v. Edwards* (Rus. & Ry. C. C. 283) it was held on a

trial for bigamy, that if the prisoner wrote down the names in a publication of banns, he is precluded thereby from saying that the woman was not known by the name he delivered in. There is a curious discussion on the law of bigamy in the *Duchess of Kingston's case* (20 St. Tr.)

*Molloy* replied.

*Cur. adv. vult.*

May 3.—O'HAGAN, J. stated the facts of the case and proceeded:—The question in the case arises substantially upon the construction to be given to the provisions of the statute 24 & 25 Vic. c. 100, s. 57, in connexion with the facts which appeared in evidence. They seem to have made it plain that the prisoner, who was a Protestant, was legally married to Mary Stewart, and that subsequently he went through the ceremony of marriage with Catherine Brien, who was a Roman Catholic. That marriage was solemnized by a Catholic priest; the prisoner professed himself to be a Catholic. The ceremony had all the incidents of a valid marriage, and would have been a binding marriage but for the fact of the prisoner being a Protestant. Therefore the marriage was rendered by the Act of G. 2 null and void. And it was contended that because it was a nullity the prisoner committed no legal offence when going through the form of marriage and perpetrating the fraud which he did. The charge against the prisoner is properly that of polygamy, not bigamy. Bigamy properly is where a man either marries a widow, or after the death of his first wife marries a second time; and the aim of the statutes with which we have to deal is to prevent anyone entering into a second marriage while the first wife is living. Originally this was only an offence of ecclesiastical cognizance; and it was only the statute 10 Chas. 1, sess. 2, c. 21 (Ir.) that made it cognisable by the civil tribunals. The provisions of that Act continued with little alteration down to the statute under which the indictment before us was framed. All the Acts for purposes of construction may be read together. The Act of Charles I. is entitled "An Act for the restraining of all persons from marriage until their former wives and former husbands be dead." It recites that "Forasmuch as divers evil disposed persons, being married, run out of other of his Majesty's realms or dominions into this realm of Ireland, or out of one county into another, within the said realm of Ireland, or into places where they are not known, and there become to be married, having another husband or wife living, to the great dishonour of God and utter undoing of honest men's children and others;" and then the enactment is—"that if any person or persons, being married, or which hereafter shall marry, do at any time after the end of the session of this present Parliament marry any person or persons, the former husband or wife being alive, then every such offence shall be felony." The offence as stated both in the 10 Car. 1, and 24 & 25 Vic. c. 100, s. 57, is that of a person who, being married, shall marry any other person, the former husband or wife being alive. Upon these words and upon the recital and the terms of the original Act of Charles I. arises the controversy before us. On the one side it is contended that the second marriage being void

there can be no conviction. On the other hand it is said that it having all the outer character of a religious ceremony, and being avoided only by the fact which was concealed by one of the parties, it is a crime. All the authorities are comparatively of recent date. Two of them at least are certainly in point; and if they put a true construction on the statute the conviction cannot be sustained. In *Rex v. Penson* (5 C. & P. 412) the prisoner was indicted for bigamy. It appeared that the prisoner in 1828 had married Anne Wooton, and during her lifetime—in 1832—he married Eliza Brown by the name of Eliza Thick. The second wife swore that she had never gone by, or been known by, the name of Thick; and she had assumed it when the banns were published that her neighbours might not know that she was the person intended. For the prisoner it was contended that upon this evidence the indictment could not be supported. In order to constitute the offence of bigamy the second marriage, it was said, should possess all the requisites for a valid one, except the ability of the party to contract it by having a former wife or husband living. To constitute a valid marriage it was necessary that the parties should be married in their right names, or by such as they were commonly known by; and that was not so here, as the second wife had stated that she had never passed by the name in which she was married. This marriage therefore, it was contended, was void *ab initio*; and there being then no valid marriage, the offence of bigamy had not been committed. Gurney, B. however, who tried the case, overruled this argument, saying—"That applies only to the first marriage; and I am of opinion that parties cannot be allowed to evade the punishment for an offence by contracting a concertedly invalid marriage." That case appears to me undistinguishable from the present. There, as here, the second marriage was null and void; and the argument used here by the prisoner's counsel, and the construction of the statutes contended for by him, were pressed on the Court. The decision, *quantum valeat* is strictly in point. So is the case of *Regina v. Brawn*. Jane Brawn, a married woman, in the lifetime of her husband, married Thomas Webb, a widower, who had been the husband of Jane Brawn's deceased sister. They were indicted for bigamy; and it was argued that as the marriage of a woman with the widower of her deceased sister was null and void by Statute 5 & 6 W. 4, c. 54, s. 2, the crime of bigamy had not been committed. Lord Denman however, held otherwise, and said: "I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify: for the woman, having a husband then alive, has committed the crime of bigamy by doing all that in her lay by entering into marriage with another man." This also, *quantum valeat*, is an express authority. There, as here, the second mar-

riage was null and void; and if, notwithstanding the conviction was right, it is impossible to say that the conviction here ought to be reversed. As bordering upon the same point, I may also refer to *Rex v. Allison* (R. & R., C. C., 109), and *Rex v. Edwards* (R. & R., C. C., 283). The substantial question is—were the cases of *Rex v. Penson* and of *Rex v. Brawn*, rightly decided? After much consideration, and not without serious doubt, I have come to the conclusion that those decisions should be sustained. They are, it is true, the decisions of single judges, delivered on circuit, and not decisive on this court of appeal; but I see reason to hold that they are justified by established rules of construction as applied to the bigamy statutes and a due regard to public policy. First, though they are the decisions of single judges, those judges were men of great ability and of large experience. Secondly, the decisions were made in the only cases in which the question before us seems to have been distinctly raised. There are other cases, but I have not discovered that any of them strictly bears on the question. Thirdly, the rule in *Penson's* case was made thirty-four years ago, the rule in the other case twenty-three years ago; and I do not find that they have ever been called in question, while I do find that in the last edition of Russell on Crimes, the judgment of Lord Denman in *Brawn's* case is adopted in its entirety, without doubt, as giving the true construction to the Acts which we are discussing. Of course, there is nothing conclusive in this, but it is an indication of the opinion of the profession. For these reasons it seems to me that the decisions are clothed with more authority and entitled to more respect than decisions made on circuit often are; but still, if they have construed the statute wrongly, we are not to be bound by them. But were they wrongly decided? What meaning are we to ascribe to the words of the statute 25 & 26 Vic. c. 100, s. 57? Are we at liberty to give the same words in the two parts of the section different meanings? The first words, "being married," must mean a real legal marriage. Must the second words, "shall marry," be so likewise, and mean the same thing? It is impossible, for the second marriage was always null and void to all intents. Now, I think the construction derived from the inherent invalidity of the second marriage is right. But I do not see why we should be bound in every case to attach to words the meaning which they first have always with the manifest result of giving impunity to a crime. The word "marry" in the second part of the section must in ordinary cases be held to import not a real but a pretended marriage. Why should it not be held also in other cases to apply to a ceremony having all the outward marks of validity, but void from some other reason than the existence of the first marriage. We must have regard to the statute of 10 Car. I. From what marriage was the restraint to be? Not from a real or legal marriage, because this was impossible; it must have been from a pretended marriage—a marriage with the form of reality, but without the substance—a delusion and a sham. And when the statute says, "become to be married," it does not contemplate that the parties do so in reality, but that they go through the form. It seems to me, therefore, that the construc-



tion of the Crown is not unreasonable; and then, when we consider the aim and object of the statutes, the argument for the Crown is greatly aided. Sir Samuel Romilly in the passage cited in the note to the *Duchess of Kingston's case* (20 St. Tr. 862), describes the crime of bigamy as "that of a fraudulent and most aggravated seduction, effected under colour of law, with all the solemnities of religion, and under such circumstances that no prudence or caution could guard against it." Now, I repeat, we may look to the title and preamble of the statute to get at its true construction; and it appears to me that the offence here effected under the colour of law, and with all the solemnities of religion, was not less to the dishonour of God and utter undoing of innocence than if the Act of George 2 had never existed, and the marriage had been void only from the existence of the previous one. The case is plainly within the mischief intended to be provided against. It would be a grave reproach to our law if for so many generations it had left such a wrong without punishment; and I confess I revolt from such a construction as would enable a scoundrel to indulge his cupidity and lust by possessing himself of the person and fortune of a woman if he shall only take the precaution of declaring himself a Protestant within twelve months, and this not publicly, but secretly. But on the view presented by the prisoner he may avoid the penalties if to the fraud and treachery of every bigamy he adds the accumulated baseness of professing as falsely and clandestinely a form of faith different from that which he really holds. Of course we have to deal with the law as it stands; but I confess it is to my own mind satisfactory that I am able to avoid a construction which would lead to such lamentable results. A number of cases were cited for the prisoner, but it does not seem to me that by any of them the cases I have referred to were overruled. The judgment of Tindal, C.J. in *The Queen v. Millis* has been referred to; but there the judges having come to the conclusion that the first marriage was null and void, of course they were bound to hold that the offence of bigamy had not been committed. That was the matter decided; and though Tindal, C.J. goes on to say that the words "being married" in the first clause, and the words "marry any other person" in the second, must of necessity point at and denote marriage of the same kind and obligation, that was without foreseeing such a case as this; of a marriage apparently good, but rendered invalid by a statute. The opinion, though entitled to all respect, is not decisive on a question which was not present to the mind of the judge at the time; and it decides only that a marriage *per verba de presenti* could not subject a person to capital punishment. I do not think that contravenes the opinion of Lord Denman, who was present at this judgment—the very year after the decision in *The Queen v. Brawn*. The concluding passage of Lord Denman's judgment in *The Queen v. Millis* is worthy of attention, as showing that he still entertained the same opinion. He says—"If the first marriage is good for any purpose it is good for the purpose of rendering him who commits the vicious and cruel act of deserting one wife and deceiving another woman by the pretence of marriage a criminal in the eye of the law. The offender takes his chance

whether his first contract will be held a marriage, and whether his second marriage will be held a crime; and not more ignorant of the consequences than many of the offenders, he must abide by them." Lord Denman evidently considered that the guilt in the eye of the law was the deluding a woman by pretence of a marriage. Two other cases were cited from the report of *The Queen v. Millis* in the Queen's Bench in Ireland, and many of a similar kind will be found which show that the judges have ordinarily required proof of the validity of both ceremonies of marriage. And it was right, because the pretence of marriage must be the pretence of a valid marriage though it may be legally void. And such a marriage must be proved or there is no criminality. Inquiry must be made as to the character of the second ceremony, for every contract cannot be considered as making the contract of husband and wife. In none of these cases, however, was there any mooted question of a ceremony like this. The same observation applies to the case of *The King v. Povey* (1 Deas. C. C. 32), and *Burt v. Burt*. In neither of these was there any question discussed like that before us. In *Burt v. Burt* the Court said—"There must be proof of such a ceremony as but for the former marriage would have constituted a valid marriage." Such it generally is; but the judges had no occasion to consider what would be the effect of such a second marriage of as much apparent validity as the former, but invalid for a different reason than the existence of the former one. In all the English and Irish cases cited for the prisoner it merely appears that some proof was required of the validity of the ceremony according to the local law. But in none was there any consideration of the incompetency of the party celebrating the second marriage as bearing upon the bigamy statutes. I have not referred to the case of *The Queen v. Orgill* (9 C. & P.), because it is, I think, distinguishable from the case before us. There the prisoner, at the time of the second marriage, stated he was a Catholic; and Alderson, B. said—"If the prisoner at the time of his marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his protestation as a defence to the charge." That has been disapproved of in *Darcys, minors*, and in *Thelwall v. Yelverton*. I concur with those authorities. I do not think that the doctrine of estoppel can be applied against a prisoner in such a case. I observe that in *Yelverton v. Yelverton*, in the House of Lords, Lord Wensleydale doubts *The Queen v. Orgill*; and I do not rest my judgment on it. I rest my judgment on the reasons given by Baron Gurney and Lord Denman; on the authority of those cases; on the construction of the statutes; on the impossibility of carrying to its consequences the argument of the prisoner: on the meaning of the words "married" and "shall marry." My opinion is, that the conviction was legal and should be sustained.

DEASY, B.—I have come to a different conclusion from my brother O'Hagan. The question is whether this conviction of the prisoner can be sustained, and I think it cannot. The fact of the first marriage is not disputed. The second marriage was celebrated by a Catholic priest, and the prisoner was a professing Protestant. By the 19 G. 2, c. 13, it was enacted

"that every marriage that shall be celebrated after the 1st day of May, 1746, between a papist and any person who hath been or hath professed him or herself to be a Protestant at any time between twelve months before such celebration of marriage, or between two Protestants, if celebrated by a popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." In any civil or criminal Court the second marriage has none of the qualities of a marriage. The issue would be illegitimate even if the first marriage had never existed. It cannot be regarded as a marriage within the stat. 25 & 26 Vict. c. 100, s. 57. The words of that are—"Whosoever being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, shall be guilty of felony"—the same as the 10 Car. 1. The meaning of the words "being married" in the first part of the section is not disputed; and the question is as to the meaning of the words "shall marry" in the second part. What was the object of the Act? Was it not to punish the entrapping of innocent persons into a marriage which they had reason to believe valid; but the reason for making that a criminal offence does not apply to the performing of a ceremony which the parties must be presumed to have known was void. Independently of authority, I should come to the conclusion that the ceremony relied upon by the Crown cannot be considered by a criminal Court otherwise than as it should be considered by a civil Court. Two cases have been cited, namely, *The Queen v. Penson* and *The Queen v. Brown*, and in each of them the ceremony of marriage, which was null and void, was held sufficient to constitute the crime of bigamy. These, however, were both decisions made on circuit by single judges. But there are other cases in which the validity of the second marriage was held important. Thus in *Drake's case* (1 Lew. C. C. 25) it was proved by a person who was present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment; but there was no other proof that the woman in question was in fact Hannah Wilkinson. Parke, J., held the proof to be insufficient, and directed an acquittal. The learned judge subsequently expressed his decided opinion that he was right, and added that to make the evidence sufficient, there should have been proof "that he was then and there married to a certain woman, by the name of, and who called herself Hannah Wilkinson, because the indictment undertakes that Hannah Wilkinson was the person; whereas, in fact, there was no proof that such was her name, or that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid." So that that eminent judge was of opinion that the invalidity of the second marriage was to be considered as a defence. Again, in *Graham's case* (2 Lew. C. C. 97) the prisoner was indicted for having married a second wife at Gretna Green, in Scotland, his first wife being still alive. The first marriage was proved, and that the woman whom he had married was still

living. The innkeeper and his wife proved that part of the marriage ceremony was read out of the Book of Common Prayer, and that the parties, when they came, were sober enough for the business they had in hand. Co-habitation was also proved. A Scotch writer to the Signet was also called, who gave evidence that according to the law of Scotland the assent of both parties must be distinctly and clearly proved in order to render the contract a valid one, and Alderson, B., being of opinion on the whole evidence that the assent of the second wife was not "distinctly and clearly proved," directed the jury to find the prisoner not guilty. So that he must have been of opinion that the intrinsic validity of the second marriage was essential to constitute the crime. Again, in *Reg. v. Povey* the second marriage was in Scotland, and the Court of Criminal Appeal held that some one conversant with the law of Scotland should have been called to prove that according to that law what took place in Scotland constituted a valid marriage, and there not being such evidence, the prisoner was acquitted. *Burt v. Burt* is an authority to the same effect. The Act establishing the Divorce Court makes bigamy one of the grounds for dissolution of marriage, and it defines it as "marrying a second husband or wife in the life of the former." In that case bigamy was one of the grounds on which a divorce was sought. Proof was given that the respondent went through a ceremony of marriage in Australia—that many persons married there according to that form, and lived together as husband and wife, and a certificate of marriage was offered in evidence, but there was no proof of the Australian law. The Court held this insufficient, and said that there should be proof of such a ceremony as but for the previous marriage would have constituted a valid marriage, and that in the absence of formal proof of the law of Australia, they could not consider the bigamy proved. That case cannot be distinguished from the present one, for the definition of bigamy on which that case was decided is the same as that in the Act on which the prisoner here has been convicted. Then we have the authority of Tindal, C. J. in *The Queen v. Mills*, where he thus expresses himself, after answering the question as to the validity of the first marriage:—"Independently altogether of the answer we have given to that abstract question, and admitting for the sake of argument that the law had held a contract *per verba de presenti* to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are—"If any person, being married, shall marry any other person during the life of the first husband or wife"—words which are almost the very same as those in the original statute of James I. Now, the words "being married," in the first clause, and the words "marry any other person," in the second, must of necessity point at and denote marriage of the same kind and obligation." These expressions indicate plainly that that eminent judge did not consider that a marriage ceremony or contract which was of no obligation, but absolutely null and void to all intents and purposes, would be

sufficient to constitute the crime of bigamy; and the words of the Act which he referred to are identical with those of the Act under which the present indictment is framed. These authorities, I think, outweigh those cited for the Crown, and fortify the opinion which independently of authority I would have formed upon the words of the two Acts, 19 G. 2, c. 13 (Ir.) and 24 & 25 Vict. c. 100, namely, that a marriage which is expressly made null and void by the former does not constitute the crime of bigamy within the meaning of the latter. There is another ground relied upon by the Crown to sustain this conviction, namely, that the prisoner having on the occasion represented himself to the priest who married him and to the woman whom he married as a Roman Catholic, he is estopped from setting up the fact of his Protestantism, and in support of that view *Edwards's case* and *Reg. v. Orgill* have been relied upon. In the former case the prisoner was indicted for marrying Anna Timson in the lifetime of his first wife, and the evidence was that on the occasion of the second marriage he signed the note for the publication of the banns and the register of the marriage, and that on both the woman was named Anna Timson. Her father proved that his daughter's name was Susannah, and that he never knew her to be called Anna till the act of the marriage to the prisoner by that name. The prisoner was convicted, but the Common Serjeant doubted whether the evidence proved the indictment as to the second marriage to Anna Timson, and whether the indictment should not have charged that the prisoner was married to Susannah Timson by the name of Anna Timson, and upon this he reserved the case. Ten judges held that the prisoner having signed the note for the publication of the banns of himself and Anna Timson, and having signed the register of his marriage with her by that name, he should not be permitted to defend himself on the ground that he did not marry Anna Timson, though such might not be her name. They were right. The interpretation I put on their decision is that the acts of the prisoner furnished evidence as against him that the time of the marriage the woman was called or known by the name of Anna, and that would sustain the conviction, although according to the evidence of her father her right name was Susannah. If that be so, it is no authority for the proposition that the prisoner here, by reason of having represented himself as a Roman Catholic on the occasion of his second marriage, is precluded from relying on the fact founded by the jury in answer to a question to them by the judge without objection on the part of the Crown, that he had within twelve months before the marriage professed himself a Protestant. *Reg. v. Orgill* is more like the present case. There the second marriage was by a Roman Catholic priest in Ireland, and the prisoner represented himself to the priest who married him to be a Roman Catholic. Alderson, B., who tried the case said—"If at the time of the second marriage the prisoner declared himself to be a Roman Catholic, it is a good marriage as against him. The law on this subject was much considered by the Privy Council in *Swift v. Swift*. If the prisoner at the time of the marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he

cannot now set up his protestation as a defence to this charge." In that case there was no counsel for the prisoner. The attention of the learned judge was not directed to the stat. 19 G. 2, c. 13 (Ir.) which makes a profession of Protestantism within twelve months absolutely annul the marriage, and no evidence of the prisoner ever having been a Protestant was offered. The only evidence was that he was married by a Roman Catholic priest, to whom he said that he was a Roman Catholic. The observation of the learned judge that the prisoners could not set up his Protestantism as a defence was entirely extrajudicial. But that observation is opposed by the decision of O'Grady, C. B. in *Rex v. Hanley* reported in the note to *Reg. v. Orgill*, in which he left the question to the jury, and it was disapproved of by Monahan, C. J. in giving the judgment of the Court of Common Pleas in *Darcys, minors*, and by Christian, J. in the judgment in *Thelwall v. Yelverton*. I cannot therefore consider that dictum of Alderson, B., as an authority to be followed, even if it had any application to a case like this, where evidence of the prisoner's Protestantism was given, and a question as to it left to the jury without objection, and found in his favour. The statement of the prisoner at the time of his marriage that he was a Roman Catholic is, no doubt, evidence against him, but whatever might be its effect in a civil proceeding in the Ecclesiastical Court between him and his wife, I do not see it can be considered in a Criminal Court as precluding him from proving that he was a professing Protestant within twelve months, in order to relieve himself from a criminal charge. I concur with O'Hagan, J. as to the dangerous and mischievous consequences of this state of the law. But that is for the Legislature; we have only to declare the law, and in my opinion the law is clear that the second marriage being null and void by the statute, it does not constitute the crime of bigamy. Therefore, whatever may be the consequences, I am bound to hold that the conviction here cannot be sustained, and that the prisoner ought to be discharged.

FITZGERALD, J.—It is with reluctance that I have brought my mind to concur with Deasy, B., and the reasons given by him form mine. O'Hagan, J., has stated that his mind would revolt from coming to a conclusion such as Deasy, B. has announced, and I am not surprised, and I should rather say that the state of the marriage law and of the criminal law, which coerces us to come to such a conclusion, and which enables a malefactor to commit a gross outrage with impunity, is discreditable, but the law is clear.

HUGHES, B. concurred with Deasy, B., and for the reasons given by him.

FITZGERALD, B.—In this case the prisoner was indicted for bigamy under st. 24 & 25 Vict. c. 100, s. 57. The first marriage was solemnised in Peter's Church, Dublin, in 1858; the second marriage was celebrated at the Roman Catholic Church, Westland-row, Dublin, by a Roman Catholic clergyman, in 1865. By the Irish statute, 19 Geo. 2, cap. 13, s. 1, it is enacted that "every marriage that shall be celebrated between a papist and any person who hath been or hath professed him or herself to be a Protestant at any time within twelve months before such

celebration of marriage, or between two Protestants, if celebrated by a popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." The jury found that the prisoner was a professing Protestant within twelve months prior to the time of the second marriage, but they also found that the prisoner had held himself out to the clergyman who married him, and that he had stated to the woman that he was a Roman Catholic. By direction of the learned judge he was found guilty, and he was sentenced to five years' penal servitude. On the part of the prisoner it is alleged that this sentence cannot be sustained, because the fact of professing Protestantism within twelve months before the second marriage, rendered the second marriage a nullity, the consequence of which is said to be that the prisoner was not married a second time within the meaning of the statute under which he was convicted. There can be no doubt that the fact that the prisoner was a professed Protestant within twelve months before the second marriage would of itself be sufficient to avoid that marriage absolutely, and there can be no doubt that the fact was established; if the actual truth of that fact was a material inquiry the jury have found it. The conviction has been supported on two grounds—first, that the question of the absolute invalidity of the second marriage, in a case in which a ceremony apparently complete of celebration of marriage has been proved, is immaterial, inasmuch as every such second marriage must necessarily be invalid; and as authorities for this position *Rex v. Benson* and *Regina v. Brawn* were cited; and secondly, that the prisoner's representations, as found by the jury, precluded him from relying on the fact which would have avoided this second marriage; and for this *Regina v. Orgill* and other cases were referred to. The former position, it was admitted, would apply only to the case of the second marriage in a charge of bigamy; the latter appears to apply as well to the case of the first marriage. The former position raises a question on the construction of the statutes under which the prisoner was convicted; the latter raises a question on the law of evidence as applied to criminal cases. The words of the statute 24 & 25 Vict. c. 100, s. 57, are—"Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony." The question is as to the meaning of the words "shall marry." Both sides agree that the words "being married" mean a marriage *de facto*, and are not satisfied by a marriage null and void, however perfectly celebrated as to ceremony: the prisoner contends that the words "shall marry" must be construed in the same way, and mean a marriage *de facto*, which, considered by itself, would not be null and void. For the Crown it is contended that as a person being married cannot contract a valid marriage, the words "shall marry" cannot mean a valid marriage—the words must be understood as of form, and not as of substance. By the common law, bigamy, or, as it is more properly called, polygamy, does not appear to have been an offence cognisable in the temporal Courts. In this country it was

first made a felony by st. 10 Car. 1, sess. 2, c. 21, corresponding with the English Act, 1 James 1, c. 11. But from the earliest period polygamy was forbidden in both countries, and a second marriage contracted in the life of the former husband or wife was absolutely null and void. What is forbidden in any case can only be rightly understood by considering what the state of things would have been if the matter had not been forbidden. Polygamy is the having at least two lawful wives or two lawful husbands, and when bigamy in the case of a husband is forbidden, what is forbidden is the having two lawful wives. If polygamy were allowed polygamy would not exist in the case of two marriages, unless both marriages were valid according to the law of the country allowing polygamy. In the case of a husband, if one marriage were valid and the other void, the case would be one of wife and concubine, not of two wives. Now, when polygamy is forbidden, the thing forbidden is not the having of a wife and concubine, but the having of two wives, which therefore must mean the having of what would be two lawful wives if polygamy were not forbidden. In forbidding polygamy, the law cannot be understood as forbidding a second void marriage, but as itself introducing a cause of invalidity which would not have existed but for that law. The law would be wholly unnecessary in the case of a second marriage, which was such in form only, but which independently of the law was a nullity. But this, though a most important consideration, is not necessarily decisive on the construction of a statute which makes a second marriage criminal in a country where polygamy was before forbidden. It is a most important consideration, because if the object of the Legislature in the criminal statute was only to make criminal that polygamy which the antecedent law forbade, then the words by which the statute described the second marriage not only may, but must, mean a marriage which would have been valid if polygamy had not been forbidden. It is not necessarily decisive, because in a country in which polygamy is forbidden, the Legislature may deem it expedient to make criminal not only what is polygamy in its strictest sense, but also that which has an appearance of, or is an approach to it. But it clearly shows, as it seems to me, that the mere fact that the second marriage would by the antecedent law be void as such, would not prevent our construing the second marriage described in the statute as marriage which would have been valid but for the antecedent law. It shows on the contrary that in the absence of any evidence of the legislator's intention to do more than make that thing criminal which had been antecedently forbidden, this would be the natural construction of the criminal statute. This will be found to affect directly the reason of the decision in the case of *Regina v. Brawn*. To me the language of the statute seems with great care adapted to the case of polygamy in its strictest sense: the case, that is, of two marriages, each of which considered by itself, and without reference to the other, must be a valid marriage. The very same words "being married," "shall marry," are used to denote each marriage; the act which constitutes the felony is called "the second marriage," and the relation arising from the first marriage is referred to as

that of "former husband or wife," exactly as it would be on the supposition that both marriages were in all respects valid. Surely, if the Legislature had a further intention, some words would have been used to indicate such an intention; the words "apparent marriage," "ceremony of marriage," or some such language would have been employed, from which it could be satisfactorily collected what essentials of marriage the act which is made felony might want other than that which is necessarily implied in the antecedent law, which forbade and avoided it as a second marriage. Up to this moment I have heard no satisfactory statement of what are the qualities of marriage which the second marriage may want. I know that it must be a void marriage by reason of the former marriage; that is a necessary implication from the antecedent law; but what else it may want—for a marriage in some sense it must be—I can gather neither directly nor by necessary implication from the statute. Now, considering that the second marriage is the act made felony, I am, I confess, forced to conclude that the second marriage must have all the elements of a valid marriage, except that which is necessarily excluded, that is to say, the capacity to contract arising from freedom from a prior subsisting marriage. Section 57 of st. 24 & 25 Vict., c. 100, gives no assistance by any recital. The statute however, it must be remembered, is a consolidation Act. The same observation applies to the previous statutes, 10 G. 4, c. 24, s. 26, relating to Ireland and 9 G. 4, c. 31, s. 22, relating to England. Considering this, and how closely the language of the original statutes which made bigamy felony has been followed in those Acts, it does not seem to me amiss to refer to the recitals of the mischief aimed at in the original statutes. The Irish statute was passed thirty years after the English Act, 1 Jas. 1, c. 11. The recitals in both are substantially the same, but as that in the English Act is somewhat shorter, I take it. It says, "Forasmuch as divers evil disposed persons, being married, run out of one county into another, or into other places where they are not known, and there become to be married, having another husband or wife living, to the great dishonour of God, and utter undoing of divers honest men's children and others. The evil contemplated is evil arising from a second marriage; the dishonour of God plainly points to that polygamy which is forbidden by the law of his Church, and although, no doubt, unless the second marriage was void, the evils mentioned would not arise, yet so far as those evils arise from its mere nullity, they would have followed equally from any void marriage. Is it not plain, then, that what the Legislature aimed at was evil arising from a marriage void only by reason of a former marriage, from a nullity which ignorance of the former marriage might possibly prevent parties from guarding against, and not from any nullity which must be guarded against in the case of every marriage. It was observed by Mr. Wallace in his argument in *The Duchess of Kingston's case*, that history gives no account of this Act, or the occasion of passing it. One might conjecture that the union of the two crowns, and the influx into England of strangers from a country whose marriage law was so different from its own as was that of Scotland, may have had some-

thing to do with the matter. But however this may be, the exceptions in the statute are not immaterial. Remembering that a Court of Law must hold every marriage *de facto* valid, and that it exclusively belonged to the Court Christian to avoid such as were voidable only, it will be found that the exceptions are either cases of polygamy in the strict sense, or cases in which the inquiry into the existence of polygamy in that sense are precluded by the sentence of a competent Court. The exceptions are somewhat different in the late statutes, but the same observation applies to them. The language, then, of the statute before us in describing the offence, is in its most natural sense applicable to polygamy properly so called, and the excepted cases are cases of the same kind. Unless coerced by authority, I am unable to resist the conclusion from all this, that the second marriage, which is felony, must be the one which, but for the subsistence of the first would have been a valid marriage. Each of the decisions relied upon by the Crown is the decision of a single judge, and sitting here, I feel myself at liberty to consider the reasons on which they rest. The first case is *Rea v. Pearson* (His Lordship stated the facts of that case, and the judgment of Gurney, B., and continued)—I may observe that *Rea v. Inhabitants of Titheshelf*, referred to in the note to *Rea v. Pearson*, arose under an act of Parliament repealed at the time of the second marriage in *Rea v. Pearson*. The Marriage Act then in force was 4 G. 4, c. 76, and under it it was held in *Rea v. Inhabitants of Wrocton* (4 B. & Ad. 640) that in order to invalidate a marriage for want of banns, it must have been contracted by both parties with a knowledge that no due publication of banns had taken place. This, doubtless, makes Gurney, B.'s observation as to concert very material, as it shows that the marriage could not have been a valid one, and prevents any explanation of the case on the ground that it might have been valid consistently with the Act. The case, therefore, appears to me to be a decision for the purpose for which it was cited; but it rests only on the authority of the judge, for which no reason is given. I venture to think that there must have been some misapprehension of the nature of the crime by Gurney, B., if by his last observation he meant to suggest that the enormity of bigamy is enhanced when the second marriage is invalid to the knowledge of both parties to it. I have called attention to some of the particulars of this case, because in citing some other cases the counsel for the Crown did not seem sufficiently to attend to this, that where the marriage was under 4 G. 4, c. 76, this undue publication of banns must, in order to avoid it, have been with the knowledge of both parties, and that even under Lord Hardwicke's Act, supposed misdescription might be accounted for, and that statements of the prisoner would always be evidence against him of the truth of facts tending to account for such misdescription. Thus, that he had called a woman by a particular name, would be evidence against him that she was known by that name. The next case is *Regina v. Brown*. (His Lordship stated the facts of that case, and the judgment of Lord Denman, as reported in Car. & Kir. and in 1st Cox C. C., stating that there seemed to be no substantial difference between the two reports.) Now, it

is perfectly true that unless the second marriage was null and void, the crime of bigamy could not be committed; but the act which is made felony must nevertheless have some of the elements of a valid marriage. It is only described in the statute by the words "shall marry," and the question is, what right has the judge to exclude any element of validity, save that which is excluded by the provision itself; *ex vi terminorum*, the second marriage must be a sufficient marriage to satisfy the description, notwithstanding the particular incapacity to contract arising from the former subsisting marriage; that element, therefore, you must exclude, but where is the authority for excluding any other? The objection to the second marriage is not merely that it is void, and therefore not a marriage, by reason of an incapacity other than that arising from the former marriage, which incapacity is the only one necessarily excluded from the marriage described as such by the statute. I think I have already shown that as a mere question of construction the words "shall marry" not only may mean a marriage valid but for the existence of a former one, but that having regard to the antecedent law, this is their natural meaning. It appears to me that such expressions as "doing all that in her lay," "appearing to contract a legal and binding marriage," are merely calculated to conceal the fallacy which underlies the argument. They assume that the second marriage must have some essentials, the want of which would prevent the act done from being a marriage within the meaning of the statute. In their vague generality they just appear to allow some meaning to the words "shall marry," but leave us wholly in the dark as to the means of discovering from the statute of what the supposed essentials consist. How can we discover from the statute when a prisoner has "done all that in him lay," or what are the appearances to contract a legal and binding union? The statute says nothing of this. It says "shall marry;" and surely the only safe course is to say that that means a marriage having every element of validity except that which the statute itself shows must be excluded. It may at first seem easy to say that marriage has according to law two sorts of essentials, matters which are by the law of nature of its essence, and matters of ceremony rendered essential only by positive law; and that if a marriage be complete as to these matters of ceremony, it will be the second marriage required by the statute; and this would be intelligible if in matters of ceremony are included all essentials required by positive law only. But, then, *cadit questio*, for the essential which the second marriage in this case wants is one required by positive law only. And the moment you come to distinguish between matters of ceremony and matters not of ceremony in the essentials required by positive law only, you are at sea again. Will it be said that matters of ceremony are such as the law makes essential with a view to publicity? It will be hard to say, then, upon what ground the essential in the case of *Rex v. Penson* was excluded; and even if the matters of ceremony are still further limited to such as are required for the purpose of publicity at the very time when consent is given in words, then how are the cases of Scotch marriages to be dealt with where there are none such? I might

perhaps add the cases of Roman Catholic marriages in this country, though indirectly it may be said the presence of a priest is made essential by the decree of the Council of Trent; but can it be said that any apparent interchange of promises in Scotland will be a sufficient second marriage without reference to the law of the country as to whether it would or would not amount to a valid marriage; but in truth these distinctions are merely arbitrary and unwarranted by the statute. Even without authority on the other side, I should be unable to acquiesce in these two decisions; but I do not think the case is void of authority. Previous to these two decisions I find no trace in any text writer of an opinion that the law was as there laid down. I do not find it stated in terms that each marriage considered by itself must be a valid marriage; but except in the matter of the competency of the second wife as a witness, I can find no distinction made between the proofs requisite in the case of each marriage. Sir Edward Coke was Attorney-General when the Act of James I. was passed. In 3rd Institute, p. 88, he says on the words "being married:" "This extendeth to a marriage *de facto* or voidable by reason of a pre-contract, or of consanguinity, or of affinity, or the like; for it is a marriage in judgment of law to be avoided, and therefore, though neither marriage be *de jure*, yet they are within the statute." This seems to treat both marriages as in the same predicament as to proof. All that he says on the other words, "do at any time marry," is that this second marriage is merely void, "and yet it maketh the offender a felon." This would seem to indicate greater caution as requisite in the proof of the second marriage than of the first; and, indeed, though it has been attempted to prove the first marriage by cohabitation and reputation, I am not aware that it was ever attempted in the case of the second marriage. If *Regina v. Brawn* is law, it appears to me impossible to account for the number of cases in which the validity of the second marriage was discussed; such as *Rex v. Orgell*, *Drake's case*, *Rex v. Allison*, *Rex v. Edwards*, *Graham's case*, *Regina v. Povey*, and others. *Graham's case* and *Regina v. Povey* indeed appear to be authorities on the very point. In *Regina v. Graham Alderson*, B. acted on the evidence of the professional witness, and held that a necessary element of a valid marriage according to the law of Scotland had not been proved. *Povey's case* is another express authority. There the second marriage was in Scotland. To prove it a woman was called who proved that she was present at a ceremony performed in her own private house by a member of a congregation, but whether of the Kirk or not she could not say; that she herself had been married in the same way, and that people in Scotland always married in private houses; and she also proved cohabitation. It was objected that there was not sufficient evidence of the validity of the second marriage according to the Scotch law. It was left to the jury to find the prisoner guilty if from the facts they would presume a marriage valid according to the Scotch law. In the judgment upon the case reserved Jervis, C. J. says—"The question reserved for the consideration of the Court is, whether the evidence given at the trial was sufficient to justify the finding of the jury, and whe-

ther some witnesses conversant with the law of Scotland should not have been called by the prosecution to say whether the facts given in evidence constituted a valid marriage according to the law of that country. . . . There may be certain cases perhaps in which it may not be necessary to have a lawyer to give evidence; but the Court is clearly of opinion that some witness conversant with the Scottish law of marriage should have been called on the part of the Crown. With regard to the case before us, what the witness who was called says—even supposing her a competent witness in such a matter—does not amount to any proof of a marriage in fact.” This seems precisely in point; and, on the whole, I think that the Crown have failed to establish their first position, that the question of the invalidity of the second marriage is immaterial. The second position of the Crown is, that the representation made by the prisoner that he was a Roman Catholic precluded him from relying on the fact which would invalidate the marriage. I think it clear that with one exception the admissions of a defendant in a criminal suit are evidence against him in the like manner as the admissions of a defendant in a civil suit. The exception arises from the necessity of showing that the admission, when it amounts to a confession of guilt, was wholly voluntary. The ordinary use of admissions of a party is simply to establish the actual truth of the fact which is the subject of the admission. When simply used for this purpose they are never conclusive. No doubt, however, in some cases effect in the nature of estoppel is sometimes given to admissions and representations, and also to acts of a party to a suit amounting to admissions or representations; but, then, as in other cases of estoppel, the admissions, &c., are not simply as evidence of the actual truth of the facts, but as rendering the actual truth of the facts immaterial. In the present case there can be no doubt that the prisoner’s representations were evidence against him of the actual truth of the fact that he was a Roman Catholic; but it is plain that in substance the use sought to be made of these is to render immaterial the inquiry, not the actual truth of that fact. I am not aware that an effect of this kind can ever be given to admissions, &c. except upon questions arising between the parties whose admissions, representations, or acts they are, and some party who has acted on the faith of them; and this cannot be applied here between the Crown and the defendant. If *Regina v. Orgill* decides the contrary I cannot concur with it; it would be applying to criminal cases a rule not applicable to civil ones. But I am not satisfied that *Regina v. Orgill* does decide the contrary. I apprehend that when in an indictment for bigamy the prosecutor shows any fact which would render either marriage void unless there were the concurrence of some other fact, he must proceed to give evidence of that other fact. As all Irish marriages by a Roman Catholic priest are void except between those of persons of his own religion, it may be that if the prosecutor shows a marriage to be solemnized by a Roman Catholic priest he must proceed to show that the persons married were both Roman Catholics; and if he does not, an objection on that ground must succeed. But the prisoner would be precluded from making that objection if it

was shown that he had admitted himself to be a Roman Catholic, since that would be evidence of the fact. As far as I see, that is all that was determined in *Regina v. Orgill*, and not that the prisoner was precluded from showing by substantive evidence that he was a Protestant. Upon the whole, I am of opinion that the conviction should be reversed.

O’BRIEN, J.—I concur in the opinion that the conviction was erroneous. If the first marriage of the prisoner had been contracted under circumstances similar to those of the second, and if a second marriage had then been contracted, it is clear that the second marriage would not have constituted the crime of bigamy. I concur in the opinion that the true rule to be adopted is that laid down by Tindal, C.J., in *The Queen v. Millis*, namely—that the second marriage must be one that but for the first would be valid and legal. In the case before us the second marriage is not of that character. I also concur in the regret expressed that the state of the law is such as to produce the result of this conviction being reversed; but being of opinion that the statute should receive this construction, I do not feel myself at liberty to adopt a different one in order to prevent results which would more properly be prevented by the Legislature.

CHRISTIAN, J.—I am also of opinion that this conviction ought not to be sustained. The case depends upon one simple question, and that is—in what sense the verb “to marry” is used where it occurs in the definition of bigamy, as given in section 57 of the 24 & 25 Vic. c. 100. That is the question. It occurs to me that we have nothing to do with the criticism upon the difference between the meaning of the words “bigamy” and “polygamy,” or with what meaning the term “bigamy” may have borne at the early period of our law. This Act of Parliament—the 24 & 25 Vic. c. 100, s. 57—has defined the offence, and has thought proper, correctly or incorrectly, to call it “bigamy.” Now, as to the sense in which the word “marry” is made use of in the first branch of the definition, that is to say, “whosoever being married,” there is no controversy. All are agreed that as used there, by the words “being married” nothing else is meant than a perfect, complete legal solemnization; and it is furthermore admitted that such expressions as those attributed to Lord Denman in *Brawn’s case*, that “the validity of the second marriage does not affect the question,” and “it is the trying to contract a marriage, the going through the ceremony, that constitutes the crime,” have no application at all to the first marriage in this case. Moreover, it is admitted by the counsel for the Crown that if the circumstances which affected the second marriage in this case had affected the first, the first branch of the definition “being married” would not be fulfilled, and that this prosecution must fail. Therefore we start with this: that “being married” in the first branch of the definition of bigamy means united by a ceremony perfect in all points; and the ceremony we are dealing with here admittedly does not answer that description. Well, then, what is next to be considered? It is what does the same word “marry,” used in the next branch of the same sentence, mean; what is its meaning in “shall marry any other person”? Well, *prima facie*, one would say the word in both branches



of the sentence must mean the same thing. *Prima facie*, one would say that any defect in the ceremony which would incapacitate it from constituting the state of being married under the first branch of the definition would equally prevent it from being a marriage within the second. That seems to me tolerably clear. However, it is said that that is not so, and that there is a vital difference between the meaning of the word as used in the two branches. As I understand the argument I take it to be this: By necessity the definition of the second ceremony must mean a ceremony which, no matter how perfect, must fail of effect. It cannot make the woman a wife. It cannot constitute a marriage; and then it is said, that being thus inherently void, it follows that all nullifying enactments of whatever sort or kind they may be—whether as regards the publication of banns or the prohibited degrees, or such an act as we are dealing with in the present case—that all these wholly lose significance as applied to the second ceremony; that they are mere *brutum fulmen*, because in fact you cannot nullify a nullity. Now, that is the argument if I understand it at all. Well, I confess, to my apprehension, this line of reasoning fails, if we are at liberty to apply a logical test to a case of the kind at all. No doubt, the definition given by the Statute involves in it this: that the existence of the first will not prevent the second marriage from constituting a case of bigamy. But does that warrant you in dispensing with any other statutable or legal requirement to the marriage where the language of the Statute has made use of the word “marry” involves them all, and where there is not in the second case any more than in the first any words in the Statute indicating that any legal requirement could be dispensed with? How does it follow that because the Legislature, from the very necessity of the case in correcting crime, has dispensed with one requisite of the validity of the second marriage, it has therefore dispensed with every other legal requisite of marriage, although every one of them is pointed at and included in the word “marry” which is made use of; and there is not a particle, either of expression or implication, intimating an intention to dispense with any of them. If you yield to the argument of the Crown in the one instance, how can you stop short of what was pointed out by my brother Fitzgerald early in the argument—namely, that you may strip off, one by one, every statutable requirement, every law by which the State has fenced round this institution of marriage, till you come down to what we may call the primary element of marriage—the bare *consensus*; and then the saying of two people who meet in a room, “Let us from this time forward consider ourselves as husband and wife,” will, if there happens to be a previous marriage, constitute the guilt of bigamy. I confess it appears to me, on the best construction I am able to give this Act of Parliament, that the essence of the crime it constitutes is this,—the abusing of a legal ceremony of marriage, that is—the ceremony which the law has ordained for matrimony, by using it while a previous use of it is still in force. I think the crime consists in the abuse of a legal ceremony; and therefore that if the ceremony used be not a legal one from the want of any one legal essential, by whatever other name

the offence may be called the crime of bigamy, as defined by this Statute, is not committed. When once the legal ceremony is completed, if there be nothing which prevents that legal ceremony from constituting a valid matrimony but the fact of the previous marriage, then in my opinion it is committed; and I cannot, for my part, understand how, if the Legislature had intended anything else than that, it would have used these simple words, “shall marry any other person,” and not have introduced such words as my brother Fitzgerald adverted to, “shall pretend to marry another person,” or something to that effect. This would be my opinion upon the construction of the Act of Parliament itself, supposing the question was an entirely new one. But a difficulty is raised by the cases, and of course it is incumbent on us to be extremely careful that we do not disregard authorities by which we ought to be bound, if any such there be, and therefore I am under the necessity of saying a few words on the cases. Now, the case nearest to the present one, beyond all question, is *The Queen v. Orgill*. That was decided on the very statute we are dealing with here; it is the case which was relied on by the Crown at the trial, and it is the case which is absolutely and directly in point with the case now before this Court but for the one circumstance of an express finding of the jury in this case of the profession of Protestantism within twelve months. I say in point, because I must say that I cannot follow at all the suggestion which was made, that there is any substantial difference between the representations of the prisoner here to the priest, and to the woman and those of the prisoner in *Orgill's case*. If there be anything clear, it is, in my opinion, that in degree and in kind the representations in both cases are absolutely the same. Well, then, how is *Orgill's case* to be disposed of? It is to be subjected to a review which perhaps may be considered, having regard to the constitution of the Court, more authoritative than any it has yet been subjected to, and therefore it is necessary that the case should be considered. How, then, if it be in point, is this case to be met? In my opinion, in the first place, supposing the case to be rightly ruled by Alderson, B., it is removed from all application to the present case by the express finding we have of the jury as to the profession of Protestantism by the prisoner twelve months before the marriage. Assume *Orgill's case* to be rightly ruled by estoppel, the man was held to be a Roman Catholic within the twelve months before the ceremony; but here there is a finding that the prisoner was a Protestant within the twelve months, by which the Statute was as completely violated as if he never ceased to be a Protestant at all. But I do not wish to rest upon that. I confess I cannot assent to *Orgill's case* at all; and it appears to me that Alderson, B., when he rested his decision in that case on the ground of estoppel, was not aware of the nature of the Irish Act he was dealing with, and that probably with the history and the text of that Act he was unacquainted. I must say that I adhere, after full consideration, to what I incidentally threw out in the case of *Thelwall v. Yelverton*; and I think we should be taking an extremely inadequate view of this Act of Parliament if we regarded it in the same light with the other Acts of

Parliament which the English judges had to deal with in *Brown's case* and the other cases referred to,—Acts of Parliament merely regulating what I may call marriage procedure in relation to banns, prohibitory degrees, and matters of that description. When we are pressed by an authority upon which it is said this Statute is to be dealt with in reference to the personal estoppel of an individual, I think it is incumbent on us to look a little into the origin and policy of the Statute. Well, what was it in its origin? At the time it was passed it was part of a great political code enacted for the purpose of carrying out a great state policy of the period; and although that policy has been condemned, and although that code itself has been wiped out of our law, yet the Legislature has thought proper when repealing that code—for what purpose I know not, whether wisely or unwisely it is no province of mine to consider—deliberately to retain this Act of Parliament. Well, I am of opinion that, sitting here as we are, not as legislators or moralists, but sitting as common law judges, not susceptible, I trust, of a merely sentimental view in this case or in any other case, it is our duty, when we are called on to override a Statute of this kind by the estoppel of an individual, to consider what its object and its policy were. Now, as to the policy. The policy of the Acts, of which this was but one, at the time when they were passed was to denounce under the direct penalty any intermeddling by a Roman Catholic priest with the marriage of a Protestant; and although that has been so far altered that the priest cannot now be punished, I feel myself constrained to hold, from the fact of the Legislature having deliberately thought proper when repealing the rest of the code to retain this Statute as a matter of legal policy, that the action of a Roman Catholic priest by the marriage of a Protestant shall be worthless for all purposes whatever, either civil or criminal,—shall be, in fact, as a thing which never had existence. Well, then, what is the consequence of that? A question of public policy is at once introduced; and no matter what you may think of that policy, no matter how you may condemn it, no matter that your feeling is that it is obsolete and out of time in this day, I am of opinion that, sitting here in a court of law, you cannot allow that Statute to be trammelled in its operation by the personal estoppel of an individual; and that it is impossible to say that estoppel or evidence created against himself can prevent a prisoner from bringing under the notice of the Court that that with which he is charged is the very thing which this act of public policy has prohibited and declared shall be null and void,—as void for creating bigamy as for creating matrimony. My view of the Statute is, that when once it is proved that the prisoner was a Protestant, a Protestant in the sense which I endeavoured to explain in *Thelwall v. Yelverton*—and I may observe in passing that the view which was then taken by Keogh, J. and myself with respect to the meaning which the law attaches to this profession of Protestantism, has since been approved of by Lord Wensleydale in *Yelverton v. Longworth* in the House of Lords—when once it is shown that the man is a Protestant in that sense, by proof of direct outward act, and that for the purpose of imposing on the priest and the wo-

man to bring about this sham ceremony he made certain false statements to those individuals, that circumstance is absolutely without any value whatever, and I think the jury ought to be told so, and to pay no regard whatever to it. If the statements of the prisoner were of no value—if they never had been made—the question, the only question of importance or difficulty in the case, would exist precisely as it does—that is, the question raised by *Brown's case*, *Penson's case*, and the other cases which have been referred to. Passing then from *Orgill's case*, to which I attach no weight for the reasons given, I will say a few words on the other cases. As to *Brown's case*, I confess I am disposed to attach somewhat more weight than appears to be attached by the other members of the Court to the distinction pointed out between that case and the present one. In *Brown's case* the ceremony was complete—perfect in everything which the law required; and the only thing that prevented it being a valid marriage was the circumstance that the parties were within the prohibited degrees; but in the case before us the defect is in the ceremony. There is no ceremony at all, or there is worse than no ceremony, because there is that which is condemned to nullity by a law of public policy. In *Brown's case* the ceremony was perfect; in this case there is, as I said, no ceremony at all; and I can quite understand the distinction taken, though I do not say it is so, that in *Brown's case* a complete legal ceremony had been performed; that a state of marrying in that case within the definition of bigamy in the Act of Parliament had been completed; and the offence so constituted, even although by reason of some disability personal to the party, a valid marriage did not follow. But whenever any of the legal essentials to the ceremony itself are wanting, then the state of marrying within the meaning of the Act of Parliament has not been perfected. If there be that distinction, *Brown's case* would be strictly right; and the very language of Lord Denman, who says that it is the ceremony which constitutes the crime of bigamy, would be strictly right; and so also in the case put during the argument, by which, I confess, I was more embarrassed than by any other, the case suggested by Hughes, B., of a double bigamy. If it were shown that at the time of the second marriage both parties were already married, could the man defend himself from a prosecution of bigamy on the ground that the second marriage was void by reason of the previous marriage of his wife. Can he defend himself by pleading that his wife was as guilty as himself; in other words, is neither of them to be held guilty because both are guilty? Well, I confess I see no way out of it unless there is the distinction I have been taking, or an apparent distinction taken by some members of the Court, and which might be thought sufficient to sustain the conviction in the present case. However, I say nothing on this matter. The case will of course meet its solution whenever it arises. I merely say that probably if the ceremony be complete as a ceremony, the act of marrying may be taken as complete, although it fails of its legitimate effect by reason of some personal disability of the party. Upon that, however, I express no opinion. I only express my opinion on the case before us, that where the Legislature has thought proper to say, upon

grounds of public policy, rightly or wrongly, that the second marriage in this case shall be null and void to all intents and purposes whatsoever, we are bound to hold that it is what the Legislature has called it, and that it is as impotent to create crime as it is to confer civil rights. With respect to *Penson's case* and *Edward's case*, I feel more difficulty in dealing with them than with *Brawn's case*. The distinction which I have suggested is not applicable to them. There the defect appears in relation to the ceremony—the publication of banns—which, however, I would not hold to be part of the ceremony, but preliminary to the ceremony. But unless those cases are distinguishable from the present case upon the broad distinction between the statutes in England dealing with matters of marriage procedure and the statute here, which is one of public policy, I do not see how the cases can fairly be distinguished. But I hold myself at liberty, sitting in this Court, to decline to be bound by them if I cannot approve of them; and accordingly, for the reasons mentioned by Fitzgerald, B., I cannot concur in those authorities, and I decline to be bound by them. With respect to the cases cited for the prisoner, I only say this—that the opinion of Tindal, C.J. in *The Queen v. Millis*, so far as it goes, is strongly in favour of the prisoner; that that opinion is approved of by Lord Lyndhurst in the same case, and that it receives further countenance in the case of *Burt v. Burt*. However, I do not place any great reliance on that case having regard to the broad distinction between the purview of the statute under which it was decided and the statute under which the present prosecution was brought forward,—the one a statute for divorce, the other a statute for the punishment of crime. I am, therefore, of opinion that this conviction cannot be sustained; and I shall merely add that I should deeply regret the decision which will be pronounced to-day if I did not feel convinced that the Act of Parliament in question will not long survive that decision. It will now for the first time be promulgated as the opinion of the first court of criminal judicature in this country, that this Act of Parliament is there; that it is capable of being resorted to by the profligate and the base with perfect impunity as a means of fraudulent seduction; and when the case is brought to that, I trust I may hope that the time which shall elapse between the decision of this Court and the repeal of the Act of Parliament will not be greater than is rendered absolutely indispensable by the necessary delays of legislation.

I made an observation to the effect that the priest is no longer punishable. What I meant by that was that the statutes making the offence a felony had so far been repealed; but I did not advert to the last Irish Marriage Act which, by a general enactment not specially applicable to Roman Catholic priests, makes the celebration of an illegal marriage punishable.

KEOGH, J.—I am of opinion that this conviction should be upheld, though I need not say that I must have considerable doubt as to my opinion owing to the judgments which have been pronounced. The ambiguity which exists as to the question arises in my opinion from taking too contracted a view of it. I think also it arises very much from our being disposed to run these statutes into one another without asking what was the object of the Legislature when each of

them was passed. The first Act I shall refer to is that of Charles I. which, though repealed, is not without bearing upon this question. Now, what is the great evil that is spoken of by that statute? It is the "becoming to be married" by persons having "another husband or wife living," to "the great dishonour of God and utter undoing of divers honest men's children and others." How was that effected? Not by contracting a legal marriage a second time, because, the first subsisting, that was impossible. It was to be effected by the pretence of a marriage—by the going through a ceremony of marriage which never was to be valid but always invalid; it was by this that the injury to society was to be accomplished, and the dishonour of God effected. These were the evils against which all the Bigamy Statutes were directed. Suppose that at the time of the passing of the Statute of Charles a prisoner had been indicted as this man was and the same evidence given against him, there can be no doubt he would have been properly convicted. Such a conviction would have been valid down to the 19 G. II., c. 13 (Ir.). Suppose, now, Fanning was validly married in Dublin by a Protestant clergyman to a Protestant woman; that he subsequently went to Paris, and was there married by a priest to a Catholic woman, there can be no doubt that he could be indicted here and found guilty of bigamy notwithstanding the statute of George II., because the 24 & 25 Vic. c. 100 expressly uses the words—"Whether the said second marriage shall take place in England, Ireland, or elsewhere." We now come to the Act of 19 G. II. The object of the Act of Charles I., as of all the Acts against bigamy, was the preservation of society and the protection of the children of divers honest men and others; and it gives that protection by making the party guilty of felony who goes through what is merely a ceremony of marriage, but which can never constitute a valid marriage. Is that the object of the Act of 19 G. II., c. 13, or of the other Acts of which it is one? The 19 G. II., c. 13, recites that the law in force to prevent Popish priests from celebrating marriages between Protestants and Papists has been ineffectual, and enacts that after its passing, marriages by a priest between Papists and Protestants, or parties professing Protestantism within twelve months before the marriage, shall be null and void to all intents and purposes. Has that anything to do with bigamy? What marriage was it to prevent? The first marriage—a marriage which but for the Act would be good. Marriages which interfered and conflicted with the political views of the persons who wanted to establish Protestantism in this country and utterly root out what they called "Popery;" but the Legislature in passing this Act never dreamt of affecting the statutes against bigamy. The statute was never intended to apply to such a case as this which we are discussing. Why? There could be no doubt that the second marriage was bad; and if the second marriage took place between a Roman Catholic and a Protestant—no matter how it took place—whether by a Protestant parson or a Catholic priest, it was equally invalid. Therefore it seems to me that looking into the scope and object of these Acts of Parliament they can both be given their full and legitimate effect without controlling the one by the other. Then

we come to consider the question of authority. I confess, when I remember who Lord Denman was, and what a judge he was, and how his frame and colour of thought were adapted to the consideration of questions of this enlarged nature, I cannot lightly pass away from his decision. If *Regina v. Brawn* was a decision governing this Court, we should hold with Lord Denman that the conviction here was good. My brother Christian has drawn attention to the fact that here there is a question of ceremony, whereas in *Brawn's case* it was a question of personal disability; and that is so. But how is this marriage bad for the purposes of conviction by reason of a defect in the ceremony. The statute here makes the marriage invalid by declaring that a particular thing being wanting, or the ceremony being performed in a particular way, the ceremony shall be null and void to all intents and purposes. *Brawn's case* is governed by exactly the same principle. In *Penson's case* the objection was to a matter of ceremony, the invalidity of publication of banns; yet there too the conviction was held good. There cannot be clearer or more coercive language than that used by Lord Denman in *Brawn's case*. That decision was made in 1843, and has never since been questioned. I think it proceeds on a true reading of the whole of these statutes, and I think that the mistake of those whose opinion leans to the other side arises from an idea that the word "marry" in relation to the second marriage used in the statutes against bigamy involves that the second marriage must be identical with the first, whereas that is an impossibility. The second must be always null if the first is good; and then we must conclude that what was in the mind of the Legislature was that the party should be guilty of felony who went through the form or ceremony, so far as he was concerned, constituting a marriage, but which differed from the first marriage in this,—that while it was a real marriage the second was a sham. On principle, if there were no decisions I should be of that opinion. I rejoice very much that I arrive at that conclusion, fortified by the two great authorities that have been cited, and especially by that of Lord Denman. If I am in error—and I must believe I am when a majority of this high Court is deciding the other way—I can only say I shall have no compunctious visitings, because in this case I have erred with Lord Denman.

PRIGOT, C.B.—I concur in the judgments pronounced by my brothers O'Hagan and Keogh. I shall not attempt to add to their argument, as I think any attempt to sustain them would only serve to damage that perfect chain of reasoning we heard from O'Hagan, J. I shall therefore only say a few sentences on one portion of the case. That any judge under the circumstances of being one dissenting from a majority of the Court in such a case as this should express an opinion otherwise than in doubt and hesitation, would be not only presumptuous, but most unreasonable. I certainly consider the case one of very great difficulty, and I have no hesitation in saying that one of the greatest difficulties I had to encounter was that single topic which was presented with such force and clearness by Fitzgerald, B., that of the infirmity of the ceremony, it being prohibited by law that a Roman Catholic priest should solemnize a marriage under

a condition of things at which the statute 19th Geo. 2 was aimed. I however relieve myself from that difficulty by the consideration that after all it is only removing a stage further what is in truth and in fact a disability of the party. The prohibition to the priest to marry a professing Protestant—one who professed Protestantism within a specified time—to a Roman Catholic, arises out of the *status* and condition of one of the parties; the priest will perform an invalid ceremony in entire ignorance that the ceremony which he is performing is not perfectly valid and good. In truth, therefore, the infirmity of the ceremony arises out of the *status* of the parties, and is not in substance and in fact a matter which arises from the mere act of the priest. That is all that I think it necessary to say upon that subject. With respect to the authorities cited, I wish to add a few words. As to *Drake's case*, I confess it appears to me to be decided not upon grounds which can render it an authority against the opinion I am now upholding. I do not take that case to be decided on the ground of an invalidity in the marriage that was then under consideration. I take the decision to be distinctly and specially applied to what was so familiar, particularly before the statutes of amendment, to all who were conversant with the criminal law, namely, that the crime as alleged was not the crime as proved. The charge was that the prisoner had married a woman bearing a specified name; the proof was that the prisoner married a woman who did not bear that name, and who did bear another name; and Parke, B., in dealing with the question of variance, had of necessity to consider whether that variance was or was not material; and he adverts to the manner in which the name was used under the Marriage Act in England for the purpose of proving the materiality of the very distinction. Therefore, I consider that decision to be nothing more nor less than this, that the proof did not sustain the allegation, and it did not sustain the allegation because it failed in a material particular: the particular in which it failed was the correspondence of the name, and that variance was material because it affected the procedure of the ceremony as required by the Act of Parliament. That appears to be the decision in *Drake's case*. As to *Graham's case*, *Povey's case*, and *Burt v. Burt*, they all appear to me to be decided upon one and the same ground that there was defective proof of the ceremony, the passing through which, according to the view that governed Lord Denman's decision, was the essential attribute of the crime of bigamy. In each there was defective proof of that second marriage which in each case was alleged. We are all perfectly familiar with the Scotch law upon the subject of marriage after the discussions in the *Mountgarrett case* and in *Thelwall v. Yelverton*. According to the Scotch law, where the contract is by parol, it must appear clear to the tribunal that is to determine on the validity of the marriage, that there was complete consent. In one case, from a defect in that proof, the Court held that the marriage ceremony was not proved according to the law of Scotland. Well, now, as to *Burt v. Burt*, that is no decision. In that case a divorce was sought on two grounds under the Act of Parliament—one an alleged bigamy, the other adultery, coupled with desertion, the party claiming

the divorce being a woman, and the desertion being proved: no argument is reported, no reasons are offered, no authorities cited, no such question raised as that now before us. What the Court say is this—"We cannot in this case consider the bigamy as proved. There must be proof of such a ceremony as but for the former marriage would have constituted a valid marriage. In the absence of formal proof of the law of Australia, we cannot say this is the case." And then they go on to give their judgment, which proves that the previous matter was not necessary to be considered with any care or fulness, and which, indeed would rather indicate that the previous matter was an extra judicial opinion upon the case, for they found their judgment in this way—"But without putting our decree on the ground of bigamy"—that is, in other words, declining to decide the question—they think there was sufficient upon the other grounds to warrant the decree for dissolution. The absence of the proof of the ceremony on the existence of which *Brown's case* was decided, prevailed in *Burt v. Burt*, and in that view it appears to me that *Burt v. Burt* does not conflict with *Brown's case*. I do not want to add a single word to the expressions which have fallen from Christian, J., in reference to this Act of Parliament. It seems to me perfectly conclusive that this Act of Parliament is not to be treated as one which we can at all deal with as in *pari materia* with the criminal statute, on which we are to determine what is the *status* of a marriage that being inconsistent with a previous marriage constitutes the crime of bigamy, and not what is its *status* in relation to a divorce for bigamy. The Act of Parliament with which we have to deal must be considered in a different view, and I think it has been rightly considered by O'Hagan, J. and Keogh, J. With respect to one topic which has been very much urged, I wish to be considered as not expressing any definite opinion on the subject; I mean the contention that the prisoner was precluded by his own act at the time of the solemnization of his marriage from asserting that it was an invalid marriage by reason of the statute. I quite concur in the view that as a general rule that which would be an estoppel between party and party will not be an estoppel between the Crown and the subject; but I am not prepared to affirm that where a transaction arises, a transaction to which criminality is attached by the law, a responsibility may not arise from conduct in the transaction against which the penal law is levelled, that would disentitle the party to say he did not hold the character which for the purpose of effecting a crime he professed to hold. The case of *Regina v. Orgill* has been canvassed as the solitary authority on that point, and I think it is easy to affirm that some such conclusion as that may be applied to a criminal with respect to an act of his which is impugned as criminal having regard to the principle of the decision and the language of the judges in *Edwards's case*. These are the only observations with which I think it right to trouble the Bench or the Bar, and I only fear that in making them I have impaired the strength and continuity of the arguments which have been used by my brethren who preceded me, who entertained the same opinion that I do, and in whose judgments I entirely concur. Hold-

ing this opinion of this case, I am not perhaps called upon to express any opinion upon the statute 19 G. 2, c. 13; yet I cannot refrain from stating my concurrence in the opinion so forcibly enunciated by Christian, J., that the time which should elapse between the undoing of the effect of that statute and the pronouncement of the judgment of this Court, ought to be as short as is consistent with the sobriety of legislation.

MONAHAN, C. J.—I need not say that differing, as I do, from the majority of the Court, I entertain great diffidence as to the propriety of the conclusion to which I have come, but in a case of such importance as this I deem it my duty to state exactly the opinion which I have formed, and the reasons for it. I feel that we are called on to put the true construction on the statute, and I admit there is no authority to preclude this, the highest Criminal Court in this country, from giving its opinion as to what is that true construction. The words of the present Act, 24 & 25 Vict., c. 100, are nearly the same as those in the earlier Acts, and from the nature of the thing it is clear that the first marriage must be valid, for unless it was, the relationship of husband and wife would not be contracted between the parties. The offence, therefore, is, that the man being married by a valid marriage to a woman shall marry another. The question then is as to the construction of the words, "shall marry another." From the very nature of the case, polygamy or bigamy having been with us an actual nullity in creating the relation of husband and wife, these words cannot mean "shall enter into a legal marriage with another woman." If, then, I am prohibited from giving that construction to the word "marry," I feel myself free to give it that construction which will best effect the object of the Legislature in prohibiting and punishing the crime which it is intended should be punished. What is that crime? It is this—A man already having a wife going through a ceremony of marriage with another woman, and it appears to me that I would be straining the words of the statute if I added to it that "shall marry" after "being married" must mean a ceremony which would be valid but for the existence of the previous marriage. There are no such words in the statute, and I do not feel myself bound to put them in, in order to help a man who has, in the eye of God, and I think in the eye of the law, been guilty of a serious offence, to escape the punishment awarded to that offence. I think, therefore, that irrespective of authority, I would come to the conclusion that Lord Denman came to in *Brown's case*. I cannot see any distinction between that case and the present one. That case was decided in 1843; it was reported almost immediately afterwards; it is cited and referred to in all the text books, and has been always considered an authority in England. It is referred to as an authority in the last edition of Russell on Crimes, where the very words used by Lord Denman are given as the reason for the decision. In the cases relied upon by the prisoner's counsel all the proof actually required was this—evidence to show that the parties were married *prima facie* validly according to the law of the country where the marriage was celebrated. So I think here there should be evidence that the second mar-

riage was *prima facie* valid according to the common law of the country by being celebrated by a priest in orders. That evidence we have. A statute introduces a certain matter that renders it null and void just as the statute relied on in *Brown's case* did in England. Both marriages were null and void, but Lord Denman held the conviction good, and if I am wrong, as my brother Keogh said, it is a satisfaction to me to err in such company. I do not think we have enough to overrule the express decision of Lord Denman, and I adopt as my own the judgment of O'Hagan, J., and concur in every word that he uttered. I will merely add that I do not think the present case fairly distinguishable from *Regina v. Brown*, that I consider that case as an authority that should on reason and principle be followed, though not binding, and I therefore am of opinion that this conviction should be affirmed.

LEFROY, O. J.—In this case I wish I felt myself at liberty to concur with the minority of the Court, but I feel myself, as one of my learned brothers has said, coerced by what appears to me a higher authority than that which constrained him to arrive at the opinion which he has come to. I found my opinion upon the opinion of all the judges of England, including Lord Denman, on the opinions of the judges of England given in answer to questions put by the House of Lords, and adopted by the House in the case of *The Queen v. Millis*. Founded, as our judgment must be, on the Act of Parliament, I put upon it the construction which the judges of England put upon it in that case, that is, that the word "marry," when it occurs a second time in the Act, must have the same construction as when it occurs the first time. That is the judgment of all the judges of England in the House of Lords. The opinion of the Law Lords was taken; Lord Denman was a member of the House, and was present at the judgment, and he did not interpose to support the decision which he had given in *Brown's case*, and which, if we upheld the conviction in this case, we would be setting up against *The Queen v. Millis*. We all know, beyond a doubt, that if the first marriage be not valid, the offence of bigamy cannot be committed, and therefore as the word "marry" must have the same meaning in both parts of the Act of Parliament, to constitute the offence in this case there must have been what, but for the existence of the previous marriage, would have been a valid marriage. Now, in this case the second marriage which has occurred was one that by the Act of Parliament was null and void, and that Act of Parliament, as has been well observed, though portion of a system, the main parts of which have been removed, has itself been left standing. How does that Act deal with the second marriage in this case? It provides in the most express terms that a marriage, celebrated as this has been, must be to all intents and purposes null and void; and if, therefore, the second marriage must have the same elements of validity as the first, it is impossible that in this case the conviction can be sustained, and under these circumstances, however mischievous the result, we must in my opinion reverse the conviction. For a long time I thought very anxiously how that mischief could be avoided, but I feel myself bound by an authority such as that which I

have stated, received and acted upon by the highest authority, to reverse the conviction.

*Conviction quashed.*

[BEFORE LEFROY, C.J., MONAHAN, C.J.; FIGOT, C.B.; KEOGH, O'BRIEN, FITZGERALD, AND O'HAGAN, JJ.; AND HUGHES, DEASY, AND FITZGERALD, BB.]

THE QUEEN v. HUGH STINES.—April 17; May 3.

*Larceny—Laying property.*

*K., the treasurer of a county, drew a cheque in favour of H. S., a road contractor. Another H. S. (the prisoner), also a road contractor, coming to the office to be paid for work done by him, the treasurer said he had a cheque for him, and produced it; and believing him to be the H. S. who was entitled to it gave it to him, and he cashed it. H. S. (the prisoner) was indicted for larceny of the cheque. The jury were of opinion that he received the cheque knowing he was not the person entitled to it, and fraudulently intending to appropriate the proceeds to his own use, and they found him guilty of larceny. Held, that the offence amounted to larceny. Held also, that the property in the cheque was rightly laid in K.*

THIS was a case reserved by Monahan, C.J., at the Kildare Spring Assizes, 1866. The case stated was as follows:—

Hugh Stines was tried before me at the last Assizes for the county of Kildare, on an indictment in substance charging: That he on the 4th of April, 1864, feloniously did steal, take, and carry away certain valuable securities, to wit, two bank drafts for the payment of £16 11s. 9d. each, the property of Robert Kennedy.

A copy of the indictment is annexed to this case.

It was proved that at the Summer Assizes of the year 1862, the grand jury of the county of Kildare presented to Hugh Stines, off the barony of Kilkeas and Moon, a sum of £33 8s. 6d. for keeping a road in said barony in repair for half a year, that is, from Summer, 1862, till Spring, 1863; and at same Assizes presented to the same Hugh Stines, off the county at large, a sum of £16 11s. 9d. for keeping the same road in repair for the same period.

It appeared that it was by mistake that the sum of £33 8s. 6d. was presented off the barony, the proper sum which should have been presented off the barony being 16 11s. 9d., the road being a post road; the entire sum which should have been presented off county and barony for the half-year being £33 8s. 6d., namely, one-half off each.

It further appeared that the Hugh Stines to whom these presentments had been made was not the prisoner or any relative of his, but another Hugh Stines, who in fact was the contractor, and repaired the road in the said barony.

It further appeared that at the same Summer Assizes of 1862, a presentment was made for the pri-



soner for the sum of £9 10s. 8d. for keeping in repair for half a year a road in the barony of East Narragh and Reban, payable off said barony.

It further appeared that these several presentments became duly payable at the Spring Assizes of 1863, and that Hugh Stines, the contractor for the road in Kilkea and Moon, was paid the amount presented to be levied off that barony, which being in fact the amount of his contract, he made no application for the sum presented to be levied off the county at large.

It further appeared that the prisoner, Hugh Stines, at the same Assizes (Spring, 1863) was paid the amount of his presentment of the previous Assizes off the barony of East Narragh and Reban, namely—£9 10s. 9d.; and that when Mr. Kennedy, the Treasurer, was in the act of giving him the usual cheque for that sum, he, Mr. Kennedy, not knowing or recollecting that there were two contractors of the name of Hugh Stines, stated to him that there was a cheque for £16 11s. 9d. for him off the county at large, and asked him was it all right. The prisoner said it was, and received from him the cheque for the said sum of £16 11s. 9d., which was subsequently endorsed by and paid to him. This cheque, however did not form the subject of the present trial; it was referred to merely for the purpose of showing how the prisoner was able to effect the fraud, the subject of the present trial.

It further appeared that the three presentments so made in Summer, 1862, being for continuing contracts, were continued at each succeeding Assizes up to and including Spring, 1864.

It further appeared that in Summer, 1868, Hugh Stines, the prisoner, was paid the sum to which he was entitled off the barony of East Narragh and Reban, £9 10s. 9d.; and the other Hugh Stines was paid the sum of £33 3s. 6d. off the barony of Kilkea and Moon; but no application was made at that Assizes for the sum of £16 11s. 9d., payable off the county at large; and the cheque for that sum, signed by the treasurer, and countersigned by the Clerk of the Crown, remained in the treasurer's office.

It appeared that the manner in which the several presentments were paid by the treasurer, was as follows:—As soon as the several presentments for payment were regularly passed at each Assizes, the treasurer filled up cheques for the amount of each presentment in favour of the person to whom same was payable, or order, signed by himself and countersigned by the Clerk of the Crown in the manner contemplated by the 4th section of the 1st Vic. cap. 54; and the persons to whom the presentments were payable came to the treasurer's office and handed in on a small piece of paper the number of the presentment which he required payment of. This number the applicant was able to get from one of the quare books, one of which, as stated by one of the witnesses, was to be found in every public-house in the town of Naas. Accordingly, on the 30th of March, 1864, when the treasurer, Mr. Robert Kennedy, was in his office paying the presentments then payable for the barony either of Kilkea and Moon or East Narragh and Reban, the prisoner, Hugh Stines, appeared, and handed to him a small piece of paper containing on it two numbers—one that of the presentment of Summer As-

sizes, 1863, for the barony of East Narragh and Reban, £9 10s. 9d, and the other off the county at large, for the road in the barony of Kilkea and Moon, £16 11s. 9d.

The treasurer thereupon referred to the quare book in his possession, and finding the numbers accurate, and that both presentments were payable to Hugh Stines, neither presentment nor quare book containing any further description of the person, he handed to the prisoner receipts for the amount of each presentment filled up by him or his clerk, to be signed by the person so receiving the amount. And the prisoner having signed both receipts, the treasurer, Mr. Kennedy, gave him in exchange for the receipts the two cheques which had been previously signed by him and countersigned by the Clerk of the Crown. When Mr. Kennedy so gave the prisoner these two cheques he did not recollect or know that there was a second Hugh Stines, and he took for granted that the prisoner was entitled to both cheques. As soon as the treasurer had so given to the prisoner these two cheques, he recollected that he had in his desk the cheque for the presentment off the county at large, which should have been asked for and paid at the previous Assizes; and he mentioned to the prisoner that he had such cheque so remaining, and asked the prisoner was he the person entitled to it, to which the prisoner replied that he was. The treasurer then produced the cheque and showed it to the prisoner, who said that it was all right, and made some excuse for not having applied for it at the previous Assizes.

Mr. Kennedy stated that he thought he perceived some hesitation on the part of the prisoner, whereupon he, the treasurer, applied to the other contractors present, who were receiving the amount of their presentments, when several of them exclaimed there was no doubt, for that they knew the prisoner to be Hugh Stines the contractor. Thereupon Mr. Kennedy, believing him to be entitled and to be the Hugh Stines named in the cheque, gave him the cheque for £16 11s. 9d. which had been lying over since the Summer Assizes of 1863, having obtained from him a receipt for the same. The prisoner having written the name Hugh Stines on the back of each of the cheques or orders was immediately after paid the amount thereof by the Clerk of the Bank of Ireland, who was then in Naas for the purpose of paying the treasurer's cheques.

The other Hugh Stines for whom the cheques, the subject of this indictment, were intended, proved that he did not authorize the prisoner to receive them, and was no party to the fraud.

The jury were of opinion, of which there could be no doubt, that when the prisoner obtained from the treasurer, Mr. Robert Kennedy, the two cheques, the subject of the indictment, he perfectly well knew that he was not entitled to them, and that he was not the Hugh Stines named in them, and that when he so received them he fraudulently intended to appropriate the proceeds to his own use, and that by his words and conduct he represented to the treasurer, Mr. Kennedy, that he was entitled to them, and that he was the Hugh Stines named in them.

The prisoner's counsel submitted that, even if this were so, still the offence did not amount to larceny, but obtaining the orders by false pretences or



by personating the Hugh Stines to whom same were payable.

Counsel for the Crown on the other hand contended that the treasurer had no authority or power to give the cheques to any one except the Hugh Stines named in them; and therefore that no property passed by the giving them to the prisoner, and therefore that the prisoner's offence amounted to larceny.

A question also was raised as to whose the property in the cheque should have been stated to be.

The counsel for the Crown elected to take a verdict on the first count, in which the property was stated to be that of Mr. Robert Kennedy.

Under my direction the prisoner was convicted on the first count and acquitted on the others.

The jury recommended him to mercy, on the ground of the temptation held out to him by the remissness of the public officers.

I sentenced him to six calendar months' imprisonment and hard labour; and not being able to obtain bail during the continuance of the assizes he remained in custody.

I beg to submit the following questions for the consideration of the Court:—

1st. Was the property in the cheques properly described as being that of Mr. Robert Kennedy, the treasurer?

2nd. Did the offence of the prisoner amount to larceny?

If both these questions are answered in the affirmative the conviction is to be affirmed. If either is answered in the negative the conviction is to be set aside, and the prisoner discharged.

The cases referred to by the counsel are collected in Roscoe on Criminal Evidence, page 597, in the edition of 1857. Larceny; proof of the taking; distinction between larceny and obtaining goods by false pretences.

JAMES H. MONAHAN.

#### COPY OF THE INDICTMENT.

COUNTY OF KILDARE, } The jurors for our Lady the  
to wit, } Queen, upon their oath present  
that Hugh Stines, on the 4th day of April, in the year  
of our Lord, 1864, feloniously did steal, take, and  
carry away certain valuable securities of the value of  
£16 11s. 9d. each, to wit, two bank drafts for the  
payment of £16 11s. 9d. each; two other drafts for  
the payment of £16 11s. 9d. each; two bank cheques  
for the payment of £16 11s. 9d. each; two other  
cheques for the payment of £16 11s. 9d. each; two  
bills of exchange for the payment of £16 11s. 9d.  
each; two orders for the payment of money to the  
amount of £16 11s. 9d. each; and two warrants for  
the payment of money to the amount of £16 11s.  
9d. each, the property of one Robert Kennedy, and  
also certain money to the amount of £33 3s. 6d., and  
two pieces of paper of the moneys, goods, and chattels  
of the said Robert Kennedy; the said several sums of  
money secured and payable by and upon the said va-  
luable securities respectively then remaining and be-  
ing wholly and in all respects due and unsatisfied,  
against the form of the statute in such case made and  
provided, and against the peace of our said Lady the  
Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid do further present that the said Hugh Stines afterwards, to wit, on the day and year aforesaid, feloniously did steal, take, and carry away certain other valuable securities of the value of £16 11s. 9d. each; two bank drafts for the payment of £16 11s. 9d. each; two other drafts for the payment of £16 11s. 9d. each; two bank cheques for the payment of £16 11s. 9d. each; two other cheques for the payment of £16 11s. 9d. each; two bills of exchange for the payment of £16 11s. 9d. each; and two orders for the payment of money to the amount of £16 11s. 9d. each; and two warrants for the payment of money to the amount of £16 11s. 9d. each, the property of a certain other person, to wit, one other Hugh Stines; and also certain other money to the amount of £33 3s. 6d.; and two other pieces of paper of the moneys goods and chattels of the said last-mentioned Hugh Stines, the said several sums of money secured and payable by and upon the said valuable securities respectively then remaining and being due unpaid and unsatisfied to the said last-named Hugh Stines, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said first-named Hugh Stines afterwards, to wit, on the day and year aforesaid, feloniously did steal, take, and carry away certain other money to the amount of £33 3s. 6d. of the moneys of the Governor and Company of the Bank of Ireland, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said first-named Hugh Stines, afterwards, to wit, on the day and year aforesaid, feloniously did steal, take, and carry away certain other money to the amount of £33 3s. 6d. of the moneys of the persons subject to the payment of grand jury cess for the barony of Kilkea and Moon, in the County of Kildare, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

True bill for self and fellows,

RICHARD MOORE, Foreman.

COPIES of the two BANK ORDERS, the subject of the Indictment:—

No. 30th day of July, 1863.

TO THE CASHIERS OF THE BANK OF IRELAND.

Pay to Hugh Stines or order, the sum of Sixteen Pounds, Eleven Shillings, and Nine Pence for contract pursuant to Presentment, No. 284, at Spring Assizes, 1863, which charge to my account.

£16 11s. 9d.

ROBERT KENNEDY, Treasurer of Kildare.

W. LEWIS, Clerk of the Crown.

*This draft must be endorsed by the payee.*

No. 30th day of March, 1864.

TO THE CASHIERS OF THE BANK OF IRELAND.

Pay to Hugh Stines, or order, the sum of Sixteen Pounds, Eleven Shillings, and Nine Pence for contract

pursuant to Presentment, No. 194, at Summer Assizes, 1863, which charge to my account.

£16 11s. 9d.

ROBERT KENNEDY, Treasurer of Kildare.

W. LEWIS, Clerk of the Crown.

*This draft must be endorsed by the payee.*

O'Driscoll for the prisoner.—Upon the facts this does not amount to larceny. It was a case either of obtaining money under false pretences, or of personation. The prisoner did not ask for the cheque.—*Reg. v. Mucklow* (1 Mood. C. C. 160); *Reg. v. Jackson* (1 Mood. C. C. 119); *Reg. v. Parkes* (2 East. P. C. 671); *Storey's case* (Russ. & Ry. 81); *Reg. v. Davies* (25 L. J. n. s. Mag. Cas. 91; s. c. Dears. C. L. 640); *Longstreet's case* (1 Mood. C. C. 119).

*Battersby, Q.C. and Heron, Q.C. for the Crown.*—First, the property was rightly laid in the treasurer.—Stat. 1 Vict. c. 54, s. 4. On the other question, *Hardy's case* (Leach. 467); 4 Blackst. Com. 231, n; *R. v. Adams* (1 Den. C. C. 38); *R. v. Wilkins* (2 Russ. 211); *R. v. Vincent* (2 Den. C. C. 464); *R. v. Robbins* (Dears. 418); *R. v. Bramley* (Leigh & Cave, 21); *Aickles's case* (1 Leach. 219); *R. v. Brown* (Dears. 616); *R. v. Shepherd* (9 C. & P. 221); *R. v. Sparrow* (2 Cox C. C. 285); *R. v. Simpson* (2 Cox C. C. 225).

*Cur. adv. vult.*

May 3.—LEFROY, C. J.—The question here is whether the conviction for larceny can be sustained, or whether the case only afforded ground for an indictment for obtaining money under false pretences. The subject-matter was a cheque for the payment of money earned; it was drawn on behalf of a person from whom it was delivered to the applicant by a mistake, and he received it knowingly, and intending to appropriate it to his own use. Upon that a verdict was found against him, and according to the authorities cited the Court is of opinion that the conviction was good. My own impression at first certainly was that it was a case of obtaining money by false pretences, but on the finding of the jury and the authorities cited, I now am of opinion that it was larceny, and that the conviction must be upheld.

The other judges concurred.

*Conviction affirmed.*

Reported by J. Field Johnston, Esq., Barrister-at-Law.

[CORAM LEFROY, C. J., MONAHAN, C. J., KEOGH, O'BRIEN, FITZGERALD AND O'HAGAN, JJ., AND FITZGERALD, HUGHES, AND DEAST, BB.]

REGINA v. GHILLIS.—May 30, 31; June 10.

*Admissibility of prisoner's confession.*

*A police-constable having come to the prisoner's premises, and the prisoner having made to him a statement with reference to the Fenian conspiracy, in which he implicated himself, the policeman asked him if he was willing to state to his superintendent what he had stated to him. The prisoner accompanied the policeman, and made a statement to the superintendent. The superintendent, who knew*

*from the prisoner's statement that he had been implicated in the conspiracy, asked him if he was willing to make that statement to the magistrate. The prisoner agreed to do this, and went before the magistrate, by whom he was sworn, and by whom his information was taken in reply to questions put by the magistrate, the answers to which questions the prisoner, in some instances, followed up with statements of his own. The magistrate did not give him any caution. The magistrate subsequently deposed that on that occasion he did not look on the prisoner as an informer, but treated him as a Crown witness in the ordinary sense, but that a few days afterwards, when the information was re-sworn, he did consider him in the nature of an approver. The prisoner, moreover, on the second occasion, in answer to questions put to him by the counsel for other Fenian prisoners, deposed as follows—"Two of the detectives dragged me here. I swear I expect nothing—I came to save myself." The prisoner having subsequently refused to give evidence against the persons implicated in his informations, was himself indicted, and on his trial the two informations, together with the statement made by the prisoner to the policeman, were put in evidence against him. The jury convicted the prisoner. The question of the admissibility of the two informations having been reserved for the Court of Criminal Appeal—Held, that they were both inadmissible as being given under the influence of hope held out by a person in authority (Monahan, C. J., Keogh, J., and Fitzgerald, B., dissentientibus).*

*And (per Fitzgerald, B.) that the first information was admissible, but the second was inadmissible.*

CASE reserved by Keogh, J., at the Special Commission for the city of Dublin, held in November, 1865. The case stated was as follows:—

The prisoner was tried at the Special Commission for treason felony, and found guilty. He was sentenced to five years' penal servitude.

Upon the trial Mr. John Calvert Stronge was called as a witness. He is one of the Divisional Magistrates for the city of Dublin. Proved his name and handwriting to the depositions of the prisoner, first taken on the 27th September, and re-sworn on the 2nd October, 1865. Prisoner made the information on oath, and signed it in witness's presence. He was sworn, and must have been asked if the contents were true.

On cross-examination.—The information was taken from prisoner in reply to questions from witness, and in some instances he followed up the answers with statements of his own. He was first sworn. He was produced as a witness for the Crown, ready and willing to give his evidence for the Fenian prosecutions. There were about forty prisoners then in custody. No one present before witness when he made his first information on the 27th September,—no one present but the clerk who took down the evidence, himself, and witness. The information was read over in the presence of the prisoners in charge, and the prisoner was then re-sworn. The prisoner was produced by some members of the police force. He was not in custody; but a statement was made to me that

he could give evidence about the pike-making. The statement made in his presence was, "Here is the witness." He was then examined by witness, believing that he could give evidence as to pike-making. Witness did not know that he knew anything of the conspiracy. His statements came out one after another as witness pursued the subject, finding that he knew much more than witness thought. Witness did not look on him as an informer, but treated him as a Crown witness in the ordinary sense. No one had charge of him; he was not in custody. Beyond all question he was not. The first step witness took was to swear him. Administered the oath as a magistrate. His evidence affected all the prisoners, and more particularly Michael Moore. Witness gave him no caution whatsoever. Did not consider he would implicate himself. Did not caution him on the second occasion. Witness did consider him on the second occasion in the nature of an approver. Not the slightest inducement was held out to him on the first or second occasion by witness or by anyone to his knowledge.

Charles Smith, one of the G division of police, examined.—Went to look for Moore at Francis-street on the 26th September, and saw the prisoner. Told him I came to make a search. I said, "I understand you have a forge." He at once went to a door and opened it, and admitted us to the forge. He said he had let the forge to Michael Moore, who he knew was a blacksmith, and that on the following Monday he brought in three other men whom he named. He told me the way they were making pikes, and how they were sent out. I left, and returned again on the morning of the 27th. I asked him, "Are you willing to come down and state what you stated to me to my superintendent?" He said, "I am." He thereupon put on his coat and came along with me. He did that perfectly voluntarily. I did not hold out the slightest inducement or threat to make him give evidence. He told me that on one occasion he carried fifty pikes to a man at the corner of Mark's-alley. He told me he attended a Fenian meeting at a house kept by a man named Phibbs at the corner of Patrick-street. It was attended by seventy-five officers, amongst others Moore. He also said he was a sergeant in the society. The next day went back and asked him would he make the statement to my superintendent, and he said he would, and all that was voluntary and without any inducement or threat whatsoever. Went on the 5th October to him, and told him I came for him to come and hear his informations read over in the presence of the prisoners. He at once put on his coat and came along with me, and he then said, "If I had to do this again, I would rather take ten years than do it, for my family will be ruined by it." I brought him down to Lower Castle-yard, and he then said he would take five years now to get out of it.

Cross examined.—I was in plain clothes, and so was Sergeant Clarke. He knew me perfectly well, and bid me good morning. The conversation was going on while we were searching. I asked him some questions about Michael Moore, how he made the pikes. Moore was in custody at the time. To the best of my belief I told him Moore was in custody.

Said it was unpleasant to search his place, but that I must do my duty. I did not go to make an arrest. Prisoner was not in our custody. On the 27th Clarke and I accompanied prisoner to Superintendent Ryan, Lower Castle-yard.

Mr. Superintendent Ryan examined.—I brought Gillis down to the magistrate. He came voluntarily. I introduced him. I never held out any inducement or threat whatsoever. I asked him had he any objection to give information, and he said not. I saw him after in prison, and said if he would adhere to his first information I could serve him. I did not tell him that he ought not to criminate himself, or that what he would say would be used against him. I knew from his own statement that he had been implicated in the conspiracy, from his own voluntary statement. I then asked him was he willing to make that statement before the magistrate, and if it was to be as a witness. He said, "yes." I then, in the prisoner's presence, said, "Here is a man named Gillis, and would your worship hear what he has to say, and take his information?" I understood him to go before the magistrate as a witness, and I have no doubt he understood the same.

At the close of this evidence the Crown tendered in evidence the prisoner's information. Mr. Butt objected to its reception, and we allowed the information to be read, reserving the propriety of our doing so for the consideration of the Court of Criminal Appeal.

If the information was improperly received, the conviction cannot be sustained. The objection taken to the information was as being made under an expectation that prisoner would be taken as an approver or witness; and secondly, that being on oath he was bound to answer all questions put to him unless he said it would criminate himself to do so.

We refer to the information,

WILLIAM KEOGH.

May, 1866.

The informations were as follows:—

The information of George Augustine Frederick Gillis, of No. 83 Francis-street, cart and dray maker, in said district, taken before me, one of the magistrates of the Dublin Police, in said District.

I, informant, being duly sworn upon oath, depose and say, that—

About four months ago, the man now in custody, called Michael Moore, came to me at the place above mentioned, and took from me the stable at the rear of my house, at the place aforesaid, at one shilling and sixpence a week. I knew he was a blacksmith, and he told me he wanted the stable for a forge. I gave him the key, and he took possession at once, and brought there two vices, one bellows, one anvil, sledge-hammer, and smith's tools. It was some time in the middle of the week he took the stable, and on the following Monday he began to work. On that morning he brought four assistants, named Peter O'Brien, John Moore, (brother to Michael Moore), Peter Kearney, and Michael Cody. They commenced at once making pike-heads, and never ceased until the Friday before the *Irish People* newspaper was seized. They made from one hundred to one hundred and twenty pike-heads a week. We all knew perfectly

well that the pike-heads were for the use of the Fenians in Ireland. The price of each pike-head was two shillings and sixpence. The pike-heads were removed in boxes of fifty, and when only two dozen were wanting, they would be carried away under the arm of one of us. On one occasion I brought fifty pike-heads, tied up in a cloth, to the public-house of a man named Hendrick, at the corner of Mark's-alley and Francis-street; and I then delivered them, by the directions of Michael Moore, to a man whom I did not then know, but whom I could recognise again. I sat a full hour with this man. We had some drink together.

We had the place so contrived that no person could be admitted without my consent. If I did not know the person demanding admittance, I applied to Michael Moore, or, in his absence, to any of the other workmen.

I know a man called Captain Michael O'Boyle. On two occasions he came into the stable while the pikes were making. The last occasion was about three weeks ago, when I heard he went to the country. He came there to see Moore, with whom he was intimate, and he knew very well that the pikes were making for the Fenian movement.

I am acquainted with the Fenian oath. It is as follows:—"In the presence of Almighty God, I do solemnly swear allegiance to the Irish Republic, now virtually established, and to take up arms, when called upon, for its defence and integrity. I also swear implicit obedience to my superior officers. I take this oath in the spirit of a soldier of liberty. So help me God."

Several persons connected with the Fenian Society, whose names I don't know, but whom I could recognise again, visited the stable where the pikes were made. I could also identify several of the brotherhood who attended drill in the drawing-room of my house. On one occasion I was drilled myself. Michael Murphy is the name of the man who drilled me. About thirty men used to meet in my drawing-room drilling. A man named Michael Carolan, a shoemaker, took the drawing-room from me for the drilling purposes. The rent was raised by subscription from the persons drilled. I subscribed amongst the rest. I was a "C" in the Fenian Brotherhood. It signifies Sergeant. "A" signifies Colonel. "B" signifies First Lieutenant. I don't know what stands for Captain. I know nothing of the officers, except the man who is immediately over me.

I remember yesterday (Tuesday) three weeks, 5th September, 1865, I attended a Fenian meeting of Fenian officers only, held in a public-house at the corner of Patrick-street and Kevin-street, kept by a person named Phibbs. The meeting took place at half-past eight o'clock in the evening. There were present seventy-five officers of the brotherhood, amongst whom I saw said Michael Moore, John Moore, his brother, Captain O'Boyle, a man named Clohissy, said Michael Carolan, and several other persons whom I could identify. There was a man placed at the door to prevent any one but Fenians going in; any person unknown to the doorkeeper was asked whom he knew at the meeting, and when that was ascertained to be correct he was admitted. There were speeches made,

the drift of which was to stick together and stay united, and not to flinch, man to man.

The object of the Fenian Society was, and is, to unite; and if a rebellion took place to assist in it, and establish a Republic.

On Friday, before the arrests were made, and the day previous, about three hundred and seventy pike-heads were removed from the forge. The pike was similar to the heads of the lances used in Her Majesty's army by the Lancer regiments. The spear was seven inches, and the straps eighteen inches; two feet one inch altogether.

I have looked at the painted flag now produced. The stripes represent the four provinces, and the stars represent the thirty-two counties in Ireland.

I saw with Michael Cody in the forge two six-barrelled revolver pistols.

On this morning said John Moore came to my workshop at the place first named, and said to me, "You had a visit from the gentleman of the G," meaning the detective officer, and he asked me what transpired between us. I told him. He replied, "You had no right to tell them anything; they are only sifting." I told him they knew as much as myself. He remarked to me that his brother Mike would be in a great hobble from my information.

The iron of which the pike-heads were made, was bought at Parkes' on the Coombe.

No one got pikes except persons who represented themselves to, and were known by Michael Moore as Fenian centres.

Sworn before me, 27th September, 1865,

J. C. STRONGE.

Informant bound in £100 to prosecute at City Dublin Commission Oyer and Terminer.

Re-sworn before me, 2nd October, 1865.

J. C. STRONGE.

GEORGE GILLIS.

The further information of George A. F. Gillis, in said district, taken before one of the magistrates of the Dublin Police in said district.

I, informant, being duly sworn upon oath, depose and say, that—

I wish to make two corrections in my information of 27th September last, which are—first, that the Friday before they (Moore and his companions) left, before the arrests were made, the same number of pike-heads, about one hundred and twenty, instead of three hundred and seventy, were sent out. I only saw one revolver instead of two with Cody, as therein mentioned.

GEORGE GILLIS.

Sworn 2nd of October, 1865,

J. C. STRONGE.

Cross-examined by Mr. Sidney, Q.C.

Q. Are you a Fenian?

A. Yes, sir.

Q. Do you think you ought to be in the dock?

A. I don't know.

Q. How long are you a Fenian?

- A. About five months.  
 Q. You were dragged here?  
 A. I was brought here by the police for having my place set.  
 Q. Are you still a Fenian?  
 A. I always supported the cause.  
 Q. What brought you here?  
 A. Two of the detectives dragged me here.  
 Q. When were you arrested?  
 A. I don't know; the gentleman here can tell.  
 Q. What's a Republic?  
 A. Independence of the country against Crown and Constitution.  
 Q. That flag represents the provinces and thirty-two counties?  
 A. Yes.  
 Q. Are you in custody?  
 A. No.  
 Q. Where have you been since Thursday last?  
 A. I have been working at my own place.  
 Q. How much do you expect for this job?  
 A. I swear I expect nothing; I came to save myself.

Sworn 2nd of October, 1865,

J. C. STRONGE.

On the 30th and 31st May the case was argued before the Court of Criminal Appeal.

*Waters* (with him *Butt*, Q.C.) for the prisoner.—The decision in *Reg. v. Johnston* (15 Irish Com. Law Reports, 60) only goes to this, that if a policeman puts questions to a party without warning him, that does not amount to holding out an inducement or threat. In the present case the inducement of hope was held out by a person in authority. I call the attention of the Court to three of the answers given by the prisoner on cross-examination, which show that he was acting under the influence of both fear and hope—"I was brought here by the police for having my place set. Two of the detectives dragged me here. I swear I expect nothing; I came to save myself." *Reg. v. M'Hugh* (7 Cox, 483) is undistinguishable from this case. This case is stronger. The two differences are these—1. *M'Hugh* was in custody charged with an offence, and here the prisoner was not. 2. The information was given unsolicited. The passage in *Taylor on Evidence*, s. 820, is too hasty. The principle upon which a witness's answer is evidence against himself is that he is not bound to criminate himself, and that he must be taken to know the law, and therefore his statement is looked on as voluntary. There is a distinction between getting the prisoner as a witness and making him an informer. With his own words, "I came to save myself," join the knowledge that Mr. Stronge had that he was an informer. As to questions of fact, the Court are in the place of the judge who tried the case.—*Reg. v. Baldry* (2 Denison's Cr. Cases, 430); *Reg. v. Toole* (7 Cox, 244); *R. v. Lewis* (6 C. & P. 161); *R. v. Davies* (6 C. & P. 177); *Reg. v. Wheeley* (8 C. & P. 250) *Reg. v. Owen* (9 C. & P. 238); *R. v. Bentley* (6 C. & P. 148); *Lambe's case* (2 Leach's Crown Law, 552); *Berigan's case* (Ir. Circuit Rep. 177); *R. v. Tubby* (5 C. & P. 530); *Reg. v. Bos-*

*well* (Car. & Marsh, 584); *Reg. v. Dingley* (1 Car. & Kir. 637).

*Heron*, Q.C., and *J. E. Walshe*, Q.C., for the Crown, cited *R. v. Haworth* (4 C. & P. 254); *Reg. v. Baynell & Wren* (4 Cox, 402); *Reg. v. Chidley & Cummins* (8 Cox, 365) *R. v. Burley* (2 Starkie, 13); *Reg. v. Garbett* (1 Denison's Crown Cases, 236); *R. v. Court* (7 C. & P. 486); 3 Russell on Crimes, pp. 411, 598; 2 Hale's P. C. 226; 9 Geo. 4, c. 54, s. 2. 1. Being an accomplice, the Court must presume that the prisoner was properly put on his trial. 2. There was no charge against him at the time when he made the statement.

*Butt*, Q.C. replied.

*Cur. adv. vult.*

June 10.—O'HAGAN, J.—This was a case reserved for the Court of Criminal Appeal. The prisoner was tried for treason-felony, and sentenced to five years' penal servitude. Mr. Stronge, on his cross-examination, stated that the information was taken from prisoner in reply to questions from witness, and in some instances he followed up the answers with statements of his own. "He was first sworn. (His Lordship went on with the evidence.) Witness did not look on him as an informer, but treated him as a Crown witness in the ordinary sense. His evidence affected all the and prisoners, more particularly Michael Moore. Witness gave him no caution whatsoever. Witness did consider him on the second occasion in the nature of an approver." Then there is the evidence of Smith—"Told him I came to make a search. He said he had let the forge to Michael Moore, &c. I asked him, are you willing to come down and state what you stated to me to my superintendent. He said, I am. I did not hold out the slightest inducement or threat to make him give evidence. He told me he attended a Fenian meeting, &c. The next day went back and asked him would he make the statement to my superintendent, and he said he would, and all that was voluntary." I do not think the cross-examination of that witness very important. Then there is the evidence of Superintendent Ryan—"I did not tell him that he ought not to criminate himself. I knew that he had been implicated in the conspiracy from his own voluntary statement. I said, Here is a man named Gillis, and would your worship hear what he has to say, and take his information? I understood him to go before the magistrate as a witness, and I have no doubt he understood the same." There were three informations. The question arises on the second information in my judgment. If it was improperly received, the conviction cannot be sustained. The objection taken to the information was as being made under an expectation that prisoner would be taken as an approver or witness; and secondly, that being on oath, he was bound to answer all questions put to him, unless he said it would criminate himself to do so. My judgment turns mainly upon the first of the points reserved by the learned judge. I do not think its being on oath would affect the statement if made voluntarily, or without the influence of hope or fear. In my opinion it hangs all on the other question. The cases are all consistent with the honourable characteristic of our law that a self-criminating statement

cannot be received if made through the hope of reward or through fear. "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." On the one point there seems to be a good deal of difference of opinion, some holding with Lord Wensleydale, and others being of a different opinion. But it appears to me in the other view that the informations in the present case were inadmissible. I put the question thus—Was the prisoner induced to make the statement by a person in authority through the hope of obtaining immunity? I think he was, and that the informations were improperly submitted to the jury. This was the prisoner's position when he made the information. The police came to his house. He stated voluntarily that he had let the forge; that he had carried pikes; that he was a sergeant in the Society. All this was without inducement. That statement was given in evidence without objection, and might have convicted him. But the police were not satisfied with this information, and asked him to repeat the statement to the superintendent, and the superintendent asked him to repeat it before the magistrate. He went and was interrogated without any caution, and disclosed all the case against himself. He was then in custody—was in the power of the police. If he had refused to do this, it was their duty to arrest him, and they would have done so. Can there be any doubt that he became a Crown witness in the hope he would escape punishment, procuring the conviction of others by the testimony used to convict himself? If so, then the prisoner made this information under the hope held out by a person in authority, and that is not receivable, however much the Crown may have reason to complain that he did not perform his contract. But further he is asked on cross-examination, "What brought you here?" and he says, "Two of the detectives dragged me here." "How much do you expect for this job?" "I swear I expect nothing: I came to save myself." This indicates the conception he had of his position, and the motives which prompted him. We are not, as argued at the Bar, to receive all his statements as true. I have no doubt he told the truth when he said his object was to save himself; and if I had any doubt it would be removed by the evidence of Mr. Stronge the magistrate, who says on the second occasion he was dealt with as an approver. There was no caution given by the magistrate. Mr. Stronge did not consider he would implicate himself, and did not caution him manifestly on the ground that he was an approver. We have therefore also the testimony of the magistrate. Therefore, it seems to me the evidence should not have been received, given under an implied promise and expectation. I do not think the confession is necessarily inadmissible if made without inducement by a witness having a legal right to refuse to criminate himself. But we have here the additional elements which of themselves should exclude the confession. The case is stronger than *Reg. v. M'Hugh*. There the prisoner was in custody; he was not asked to become a witness, though he became one. Here he was not

actually but virtually arrested. Here he was not formally charged, but he had charged himself and supplied the evidence of his own conviction. He had no imaginable motive but making himself safe. It is *a fortiori*. This is especially so when we remember that our law provides that before the examination of an accused person, he shall be cautioned. There was no caution here. But that admission was drawn from him in detail by the searching questions addressed to him. Bodily torture is abolished, but I hope we shall never put people morally to the question—*Lambe's case* (2 Leach, 552). The case of *R. v. Burley* in 2 Starke on Evidence, 13, has been relied on. I do not think that case applies. That case merely decides that if an approver breaks his bargain with the Crown, he shall not be protected. The witness and the prosecutor are thereby relegated to their original position. But the evidence must be legal evidence, and the confession must be voluntary. This is common sense and common justice. A confession voluntary in the first instance was given in evidence without objection. That case does not warrant the doctrine that if made under the influence of hope it should be admitted. He is not to be found guilty because he was an approver upon testimony which the law would not admit against any other person. By the rejection of this evidence we shall make no invasion on the recognised principles of the Constitution. It is possible to call in question these principles—to say they have been pressed too far in favour of guilty men; but I shall not be deterred by such anticipations. But I have none such. The moment he refuses to prosecute he may be put into the dock, with all the resulting disadvantages against himself. The approver will gain nothing by his double perfidy. I am unable to entertain any dread of evil consequences from a decision in accordance with authority.

DEASY, B.—I also think that the deposition made by the prisoner was made under the expectation that in consideration of it he would be relieved from all penal consequences of what he had done. The conduct of those in authority, their acts and declarations, afforded the prisoner reasonable ground for coming to that conclusion.

FITZGERALD, J.—I also concur with O'Hagan, J. in thinking this evidence ought not to have been received, and that the conviction cannot be sustained. I have arrived at that conclusion on the grounds stated by Deasy, B. that the conduct of the parties led the prisoner to form the opinion that he would escape from the consequences of his acts. I do not mean to reflect on the conduct of Superintendent Ryan—quite the contrary. The conduct of that officer in that case and all the others which came before us, was marked by fairness and propriety. No one can fail to see that the prisoner listened to his solicitation, and went to the magistrate to be received as a Crown witness in the ordinary course, i.e. as a person who, having been an accomplice, was to be received as a witness for the Crown. Superintendent Ryan in fact was the officer who had the charge of these prosecutions. Thirty or forty persons were in custody. The police were looking for evidence, and with that object brought this party before the magistrate. This was not a mere voluntary statement, but induced by

the conduct of this person in authority. It was said he came forward as a witness, and in common with every other member of the community was compellable to give evidence, but if in place of coming he had been simply summoned as a witness, what would have been his position? The first question, he might have said, tends to criminate myself, or may be a link in the chain, and I avail myself of my right to refuse to answer it. In place of that he makes a clear statement, showing, every line of it; that he was an accomplice. The evidence was not receivable. On this, both at the Commission and here, we were referred to *Reg. v. M'Hugh* as being directly in point. I am unable to distinguish it. This is stronger. There the magistrate left the party, and in an hour he sent for him, and he requested the magistrate to take his information. The only point in which it differs is that M'Hugh was then in prison; but though that is to be taken into consideration, I am not aware of any case deciding that imprisonment is essentially an ingredient to make the information be rejected. Everything short of imprisonment has been in this case. I do not think the absence of the fact of actual imprisonment distinguishes this case from *Reg. v. M'Hugh*.

HUGHES, B.—I think the conviction cannot be sustained for the reasons which Deasy, B. has shortly stated.

FITZGERALD, B.—The grounds on which admissions in a suit are received against the parties making them are the same in civil as in criminal cases. When it is added that they are made under oath, our law does take a recognised distinction between civil and criminal cases without doubt. In every case where the question arises, it resolves itself into two: one of law and one of fact, both to be determined by the judge, the question of law being, what are those matters, the existence of which is to exclude the admission? and the question of fact being, do they exist? First, there must be the existence of a charge, or at least a suspicion of a party. Secondly, the presence of a person having some authority over the party arising from the existence of the charge. Thirdly, some reason to infer that the confession was made under some hope or fear suggested or sanctioned by the person in authority. With reference to the question of fact, it seems to be essential that whenever the confession is made in the presence of a person in authority, the prosecutor must negative the existence of any inducement. The prisoner was indicted. At least three distinct confessions were received against him, the two last being on oath, the first being made to a constable, while that constable was searching the forge. At that time no charge was made, nor, so far as appears, was any suspicion entertained of the prisoner. The confession implicated others as well as himself. It is not contended that this could have been excluded. It does seem plain to me that from the moment it was made, two of the matters existed as between the prisoner and that constable, from that moment the prisoner was, by the confession, under a charge, or at least a suspicion, and the same confession placed the constable in a position of authority. The constable denies having held out any inducement. The prisoner was not apprehended. On the next day the constable returned. The prisoner went, so far as appears, quite

voluntarily. He made a statement, the particulars of which do not appear. Here again the prisoner, knowing he was charged or suspected, was in the position of one having one in authority over him. But though I cannot help concluding he had some motive in so placing himself, I have no means of discovering that it was known to the officer. The prisoner went to the justice. When presented as a witness, the justice was not told he was implicated in any way. Treating him in the first instance as an ordinary witness, he took his information. That information was also received, and it is impossible to read it without seeing that the magistrate persisted in questioning the prisoner after he knew he was seriously implicated. The magistrate gave him no caution. He says he gave him no inducement. It is said this must be considered by the Court in connection with the known usage that an accomplice, if he gives testimony, is fairly warranted in expecting immunity, and the information must be held to be given under that expectation. I am not able to take that view. The usage which creates the hope must be more than the mere asking him to be a witness and his assenting. There must be something to show that he is actuated by the hope or expectation, though there be not a direct encouragement. There must be something to show that the existence of the expectation was intimated to the superintendent and the magistrate before he gave the confession. In the case in *1 Leach*, Lord Mansfield relies on the party not being in custody as strong evidence that he was not an approver, though there, as here, it was sworn that he was treated as an approver. I have not come to the conclusion that the information of the 27th September was inadmissible. *Davies's case* was the authority cited for the prisoner, but no reasons were given, and it is opposed to circuit decisions the other way, more than one. The case seems to be very different as to the third information. The magistrate was fully aware of the circumstances. There is sufficient evidence of the state of mind both of the magistrate and of the prisoner, and of the knowledge each had of the state of mind of the other. The magistrate took no step to remove the expectation, and though that alone would not be sufficient to operate on the prisoner's mind, it does become material as soon as the state of the prisoner's mind was known to the magistrate. The prisoner stated it was to save himself he came. After that the magistrate not cautioning him must be taken to sanction the expectation. The prisoner's statement of his expectation is a part of his whole statement. He told it with the magistrate's sanction of that expectation, and I cannot tell how he might have modified his evidence if he had been cautioned. The statement was made under the influence of hope, sanctioned by a person in authority.

O'BRYEN, J.—I think the evidence was not properly received, and that the conviction should be set aside. There were two informations, and I hold the inadmissibility of both. What passed between the prisoner and the superintendent amounted, though not in express terms, to holding out an expectation to the prisoner. He was asked to make the statement as a witness. We are not asked to speculate as to what passed in his mind, as to what expectation



he entertained when he made it. He may have made it originally with the hope he would not be prosecuted. I do not think the verbal statements to Smith would have been excluded. There is no objection to them. But their effect was this, to put the prisoner in the position of one acknowledged to be guilty of felony before the superintendent, whose duty it was to have arrested him. Ryan is to be looked at as a person in authority. The words are very clear—"Are you willing to make that statement before the magistrate?" He says, "Yes." "I understood him to go before the magistrate as a witness, and I have no doubt he understood the same." When asked to make it as a witness, was it not clearly in the light that he was to be received as an approver? We were pressed with the fact that he violated the condition afterwards; but whatever effect that might have in rendering it proper in the Crown to prosecute him, it is quite another matter whether it should have the effect of rendering the evidence given under the expectation admissible. A good deal has been said about the circumstances under which such statements have been held inadmissible. We were referred to a case in which it was said it was improbable that the confession was made from hope or fear. The ground or reason for excluding such statements is in my opinion much more correctly stated by Lord Campbell in *Reg. v. Baldry* (2 Denison's Cr. Cases, 446)—"The ground is not that the statement is false, but made under a bias;" and he says in a previous part that the exclusion does not proceed on the ground that the statement is not true. Ryan states what took place most fairly, that it was the understanding of the prisoner that he was to be received as a witness. Both the first information and the second were made under an inducement. Both, I think, were inadmissible.

KEOGH, J.—I have the misfortune to differ from those who have preceded me. As, in conjunction with Judge Fitzgerald, I had the misfortune to preside at the Commission, I shall have to go at some greater length into the facts of the case. I will take up the facts first rather than the cases. The facts are remarkable. The prisoner's counsel objected to the reception of this evidence. It was open to the Crown to have yielded to that objection and to have withdrawn it; and the case would have rested on the other evidence which, assuming that the jury did not doubt the oral evidence, was equally strong. But the Crown, acting on the course which they have adopted in the whole of the trials, under the peculiar circumstances felt they ought to give the prisoner any advantage he might have, and they did not withdraw it. That did not pass without observation. What was the evidence as regards the information? The case is as important as ever was considered in the criminal trials of this country. How came the informations to be taken? Information was given to the police that a forge had been opened on the premises of this man. The constable went to the man and asked him was there a forge. The charge against Moore was one of pike-making. "He at once went to a door and opened it, and admitted us to the forge. He said he had let the forge to Michael Moore, who he knew was a blacksmith. I returned again," &c. The constable says there was no

inducement held out to him. The constable is cross-examined. On that he says—"I said it was unpleasant to search his place, but that I must do my duty. I did not go to make an arrest. Prisoner was not in our custody." And on his direct evidence he says, "I asked him, 'Are you willing to come down and state what you stated to me to my superintendent?' He said 'I am.' He put on his coat and came along with me. He did that perfectly voluntarily." He goes down to the superintendent. What is the evidence of the superintendent? We must see if there is any inducement. He goes down. He replies that he had no objection. There is a passage here which a person might take an erroneous view of. "I saw him afterwards in prison." (I am speaking in the presence of Mr. Batt; there is nothing in that which has to do with the case.) "I asked him was he willing to make that statement before the magistrate. I said—Here is a man named Gillis, and would your Worship take his information?" That is the whole of the evidence of the superintendent; and it puzzles me to discover within any of the four corners of that anything to lead me to think there was an inducement or threat. That is the testimony exclusive of the information. Let us look at the information. He says—"I swear I expect nothing; I came to save myself." It is not "I was brought," or "I was compelled to come," but "I came." The decisions in some of the cases in this country are owing to a mistake of the rule and of the reason of the rule. Is it to be that the statement is to be refused till it be certain that no motive is operating on the mind of the party? That is an absolute physical impossibility. That cannot be the rule; and I flatter myself I shall be able to demonstrate it. Is all inducement excluded? external inducement? Is it the law that any inducement will exclude? Plainly not. The statement is not excluded on the general rule that there is any inducement at all, and I am now dealing with the case of prisoners. Everything I am putting becomes *a fortiori* when the party is not a prisoner. Is the prisoner's statement excluded because there is any inducement? because a deliberate exhortation by the magistrate to tell the truth will not exclude. Take the case of spiritual inducement—a clergyman exhorting the party as he valued his future welfare to tell the whole truth. It is impossible to imagine a stronger inducement; and it is clearly and irrevocably held that that will not avail. It must be the hope of some temporal welfare which will operate; an exemption from punishment or otherwise which will avail. The cases are abtracted in Russell on Crimes, vol. iii. pp. 403, 404; also p. 397. And even where the inducement is held out, it must refer to the very charge and not another charge.—Russell, vol. iii., pp. 394, 395, note by Greaves. It is scarcely necessary to say that Mr. Greaves' authority is now of the highest value. The object, he says, is to exclude the confessions made by the prisoner when he thinks it better for himself to admit a thing he never was guilty of. Is there anything here to show it did not come from the prisoner himself? It is not with reference to the subsequent charge, but with reference to pike-making; and it is only carrying out his own voluntary statement to go and make it. It has been held that if it comes from

the prisoner himself it is admissible. Suppose a man has made his calculations—I will derive an advantage from confession; that is no reason for not receiving it. There must be some motive. The distinction is, might he have made it or not as he thought proper? If so it is no matter what was the motive. In the case in 3 Russell on Crimes, 413, two persons were indicted. That case would seem to be *quatuor pedibus* with the case before us. There is the recent authority—the great authority—of the eminent person who presides over the Court of Queen's Bench in England. The case in Ryan & Moody's Crown Cases goes far beyond this case. [His Lordship stated the facts of that case.] That appears to go a great length. *Regina v. Winter* was the case of a bankrupt. He had liberty to refuse answering questions. His examination was put in evidence and objected to. He was told he might decline answering any questions. His examination was received in evidence. Lord Abinger alone differed from the rest of the judges. Take the case of a deposition before the Coroner, where the judge, after consulting Parke, B., admitted the evidence, and the prisoner was convicted and executed. I cannot conceive a case of greater authority brought before the profession by a person whose learning does not admit of dispute. Once for all, I say on the evidence there is not a particle to lead my mind to the conviction that this man was otherwise than a witness voluntarily tendering himself and making answers without coercion. At one time it was observed that it was matter of treaty between the Crown and the witness, and that we were to carry out the treaty. That is the business of the Crown; and the man was not in custody; he was not a prisoner. But in such a case it is not necessary that the witness should have been put upon his guard. It does strike my mind that the cases are stronger in every branch of the argument than this case before the Court. And I call attention to the fact now, that all these arose where the party was in custody. There is not a case cited in the books where the element of being in custody was not present. In *Regina v. M'Hugh* I assented, and the late Judge Moore assented; and Baron Greene, a late great authority, assented; but a great authority differed—Baron Pennefather, who had the advantage of trying the case. But, looking at the case, the prisoner was in custody. The magistrate refused to receive bail. Who will say that is the case that is here? The man is at large. He remains in his own house. The policeman comes and says, are you willing to come and make the statement? He says he will, and the policeman goes and opens the door and says, 'Here is a man, Gillis, will your worship hear him?' It is said being in custody cannot affect the question; but I find that in the case of *Phillips* attention is called to the man being in custody as to the point of whether the statement was voluntary or not voluntary. What has been the practice as to taking these informations? From the earliest times prisoners have been convicted, and capitally, on their own informations. In *R. v. Burley* there was a clear fraud practised on the man to induce him to make the declaration. On the trial he denied all knowledge of it, and he was tried and convicted on his own statement. Here is a case in which a man of his own voluntary motion, no

charge, and much less the one he was afterwards tried on—that of treason felony—being made against him, goes voluntarily before the superintendent and induces him to introduce the same witness to the magistrate, and then refuses to give evidence. We are to hold that there were threats, compulsory inducements: and that he is to relieve himself and his accomplices by putting the law in motion, and then refusing to give evidence. No doubt, a person charged is entitled to all the benefit of the law, but with all respect for the other members of the Court, I think he was rightly convicted.

MONAHAN, C.J.—I too have the misfortune of differing from the majority. The facts have been so accurately stated by Judge Keogh that it is unnecessary to go through them. The policeman, on being first examined, states that he went to the house, having received information that pike-making was carried on; that he met this man; told him what brought him there. No charge being then against him, he answers the question. A somewhat similar question was asked in *Regina v. Johnston* (15 Ir. C. L. Rep. 60); and the majority of the Court held that the questions were properly given in evidence, though the result of the answers was that the party was given into custody. And so it is admitted that the first statement was properly given in evidence. But, then, he was asked, "have you any objection to make the same statement you made to me; i.e., the same admission you made to me, to my superior—the same information you have made to me, but involving particulars in it about yourself." He answers, "I have no objection to give the same information to him as to you." I differ at this point from the majority of the Court, for I cannot find anything rendering inadmissible the subsequent statements but what would avail to exclude the previous ones. He is asked, "are you willing to make the same statements?" They are not on oath. They are not made by a person in custody or charged with an offence. It is plain that the first admissions disclosed his guilt. He is asked, "will you make this statement to the superintendent?" He says, "Yes." We are all agreed that these statements were properly received, because, forsooth, he is not asked to become a Crown witness. What next happens is this: Ryan having heard his statement, asks him, "Are you willing to make this information before Mr. Stronge," according to the evidence, because I am not at liberty to speculate as to what passes in the mind of this man. This deposition, is it properly receivable in evidence? The whole is first sworn before Mr. Stronge on the 27th September. I have stated, though not so argumentatively or forcibly as Baron Fitzgerald, the grounds on which it was properly received, though it contained an admission of guilt, and though it was given on oath. If a man is charged with an offence, and if a hope be held out of temporal advantage, or threats used in reference to the particular matter with which he is charged, these admissions in that case are not receivable. The case most strongly pressed by counsel was *Regina v. M'Hugh*, a case decided by this Court. By some accident it happened that I took no part in the decision; but, however, I might question it, I am bound by it. What were the facts of that case? M'Hugh was in custody charged with a criminal offence, and being so he sent for the magistrate, and he tells him he is anxious to make a state-

ment. He does not go further at the time. If that case is not distinguishable in any respect I would consider myself bound by it. But there is this difference: that in that case the man was charged—he was a prisoner. From the report in Cox it is not quite clear what were the grounds of the decision; but from the facts of the case and the judgment I consider the reason of the decision is this,—that the man was a prisoner in custody, and that being in custody, and being charged, the statement was not admissible. There is no well-considered case in which, under these circumstances, the statement—though it contained an admission of guilt—was rejected, unless where it appeared distinctly upon evidence, and not upon conjecture; that a hope had been held out by a person in authority. The cases referred to by Judge Keogh show that in the case of a coroner's inquest persons have been afterwards convicted and executed on their own statements. It is said the language of the superintendent implied a promise of protection. It appears to me we are going a step farther. It appears to me there is no authority to hold that where a man not charged and not in custody comes forward voluntarily (because I consider it was voluntarily after he is simply asked, "Are you willing to come forward?") the evidence is inadmissible. We are, I say, making a new precedent, because he might have refused to come forward. It appears to me that the evidence was properly received; also, that if the prisoner be looked on as an accomplice who came forward, that is a matter for the Crown. Whether he went back of his engagement or not, it is not a matter of evidence, it is a matter for the Crown.

LEFROY, C.J.—I am of opinion that the conviction was bad, because of the admission of evidence which ought to have been rejected; and that to hold otherwise would be making a new and most unwholesome precedent; and the last case cited by my brother Monahan shows that. The voluntary acknowledgment of the prisoner is departed from, and there is then brought forward the deposition taken before the magistrate under the circumstances which have been detailed so accurately and so often that it would be a mere waste of time in me to go over them. But under what circumstances did the prisoner come forward as such approver? Upon the ground upon which every approver comes forward and is accepted as a witness for the Crown, and whose testimony the Crown has the benefit of—upon the undertaking that he shall have the protection, as the Crown has the benefit of the information given by the approver. He is not left to make general statements, but what he says is confirmed and sanctioned by an oath. He is taken as an approver. When the Crown has had the benefit of that is he to be deprived of the benefit of the protection? Is this to be the law: that we, sitting here, are to say that the Crown is to be at liberty to gain evidence upon terms from an approver; upon the terms that he is to have the protection, and that that is to be violated? What is his right when a person is brought before a magistrate not as an approver? What is the duty of the magistrate? His duty is not to put questions which would criminate the man himself. There is the statement of the magistrate here upon his oath that the information arose from a suc-

cession of questions put by him. He got out the most of his answers by the repetition of his questions.

*Conviction quashed.*

THE QUEEN v. WHEELER.—May 30; June 10.

*Larceny at common law—Larceny under 24 & 25 Vict., c. 96, s. 3.*

*The prisoner was indicted for the larceny of £2 4s., the property of H. N. Upon the trial H. N. deposed that on the 30th January, 1866, he bought a load of hay at Smithfield through the clerk to a factor there; that the prisoner brought the hay to his place the same day, and delivered it; that he did not demand any money from him, but handed him the weigh-note; that H. N. put his name on it, and being ignorant of the practice of the market, handed the prisoner £2 2s. 8d., and returned the weigh-note to him; that the prisoner shortly afterwards returned and said that the amount was 1s. 4d. short, and asked for the 1s. 4d. which H. N. gave to him. J. G., to whom the hay had belonged before it was sold, deposed that he gave the prisoner the load to deliver, but did not authorise him to get any money, and that the prisoner paid him no money. The prisoner was convicted. The question of the sufficiency of the evidence to sustain the indictment having been reserved for the Court of Criminal Appeal—Held, that the prisoner was not guilty of larceny, either at common law or under 24 & 25 Vict. c. 96, s. 3 (Lefroy, C. J., dissentiente).*

CASE reserved by Fitzgerald, J., at the Commission for the city of Dublin. The case stated was as follows:—

The prisoner was tried before me and Mr. Baron Hughes at the Commission for the city of Dublin, in the month of April, 1866, on a charge of embezzlement and larceny.

The first count of the indictment charged "that the prisoner being employed in the capacity of servant to John Garry, received £2 4s., the money of the said John Garry, for and on account of the said John Garry, and feloniously embezzled," &c. The second count was for the larceny of £2 4s., the money of Henry Noble.

The prisoner was not defended by counsel or attorney.

The witnesses examined on the part of the prosecution deposed as follows, viz:—

1. Henry Noble.—On the 30th January, 1866, I bought a load of hay at Smithfield, through Michael Morgan, clerk of O'Connor, a factor there. The prisoner brought the hay to my place about two o'clock the same day and delivered it. He brought with him the weigh-note, now produced, to me, and which is in the words and figures following, viz:—

## SMITHFIELD MARKET.

Public Weigh-House and Scales, 49 Queen-street, Dublin.

No. of weekly tickets, ... 16  
 No. of cart, ... 4729  
 Description of goods weighed, ... Hay.  
 Owner's name, ... Garry.

Gross weight,	...	...	...						
Tare, as per No. registered,	...	...	...						
Re-weighed,	...	...	...						



Dated 30th day of January, 1865.

Weigher's name, JOHN MOON.

NOTE.—The buyer is requested to keep this ticket and compare it with the number in block and on the cart; and in all instances, if required, the buyer or seller can have the cart re-weighed.

He did not demand any money from me, but handed me the weigh-note. I put my name on it; and being ignorant of the practice of the market, I thought I was to pay him, and totted the amount as 16 cwt., at 2s. 8d. per cwt., and I handed him £2 2s. 8d. and returned the weigh-note to him. In calculating the amount I omitted the half cwt. The prisoner went away, but soon after returned and said he had got the amount made up at a public-house and found that it was 1s. 4d. short, and asked for the 1s. 4d. I gave him the 1s. 4d.

Cross-examined by prisoner.—It was Morgan who told me I was to put my name on the weigh-note when brought to me.

2. Sarah Slower, servant of last witness.—Was present when the money was handed to prisoner, and corroborated the evidence of last witness.

3. John Garry.—On the 30th January last I had a load of hay at Smithfield on O'Connor's stand. It was sold to Noble. I saw the prisoner there, and I gave him the load to deliver, but I did not order or authorize him to get any money. If the money was to be paid I would not have sent him. The prisoner paid me no money.

4. Michael Morgan, clerk to O'Connor.—I sold the load of hay to Noble for Garry, who said he would send prisoner to deliver it. Prisoner was a porter in the market, but he never received money for us, or had any authority to do so. The practice of the market is, that when the buyer is to pay the amount to the seller, the bill is made up at the weigh-house, and then the seller or his servant go and receive the amount, but a porter is not sent on such occasions. When the payment is to be made through the factor, the weigh-note only is sent; the buyer writes his name on it, and we collect the amount afterwards. The prisoner brought back the weigh-note to our office with Noble's name on it. He did not pay the amount to us.

On the foregoing state of facts it seemed to us that the first count of the indictment was not sustained, and we so ruled.

Walsh, Q.C., and Heron, Q.C., for the prosecution

contended, however, that the count for larceny was sustained, and after some discussion we submitted the case to the jury on the second count.

The prisoner was found guilty, and sentenced to twelve months' imprisonment with hard labour.

The question for the consideration of the Court of Criminal Appeal is, whether the evidence was sufficient to sustain the second count of the indictment.

See 24 & 25 Vic. c. 96, s. 3; *Regina v. Hamilton Thompson* (1 Leigh & Oake, 233, and note to that case); *Regina v. George Thompson* (id. 235); *Hassell's case* (id. 58).

J. D. FITZGERALD.

*Molloy*, for the prisoner.—The conviction cannot be sustained for larceny at common law, since an essential ingredient is absent: There was no taking by the prisoner; he obtained possession of the money by the delivery of the owner, without any fraud.—3 Inst. 107; 2 East. P. O. 554; Rosc. Crim. Ev. pp. 475-488. Neither can the conviction for larceny be sustained under the statute 24 & 25 Vic. c. 96, s. 3. The objects of this section are pointed out by *Greaves*; 2 Russell on Crimes, p. 247, last edition. It does not apply to the present case; the prisoner was under no obligation to return or deliver the identical money he received; he was only bound to pay the amount.—*Regina v. Hoare* (1 F. & F. 647); *Regina v. Garratt* (2 F. & F. 14); *Regina v. Marsh* (3 F. & F., 523); *Reg. v. Hassell* (L. & C. 58). *Reg. v. Thompson* (L. & C. 225) was clearly a case of larceny. The prosecutrix there had never parted with the possession of the money, Thompson had only the custody of it; and further, the jury found that he obtained the money by a trick. *Hamilton Thompson's case* (L. & C. 223) was a case of false pretences, and does not apply. Assuming for argument that the transaction was a bailment within the 3rd section, the indictment is bad: The property is wrongly laid in Noble, the evidence shows the money to be the property of Garry. This is a fatal variance.—*Regina v. Jones* (5 Cox, 156); *Regina v. Hawtin* (7 G. & P. 281). The evidence clearly proves that the offence charged in the first count was committed. This is an additional ground for quashing the conviction on the second count. Proof of embezzlement will not support a conviction for larceny.—*Regina v. Gorbatt* (1 D. & B. 166).

*Walsh*, Q. C., *Heron*, Q. C., and *Murphy*, for the Crown.—There was a false representation as to the 1s. 4d. This case cannot be distinguished from *Rea v. Metcalfe* (1 Moody, c. c. 433); *Rea v. Heath* (2 Moody, 33). *Reg. v. Brown* (Deasel. 616) cannot be distinguished from the present case. The jury must have presumed that the prisoner intended to steal the money when he took it from Noble. The money, after the delivery to the prisoner, still continued Noble's property. *Regina v. Stines* decided in this Court last term is an authority for the conviction; so is *Regina v. Walls* (1 F. & F. 109). Unless this conviction is good there never can be a larceny of money.

*Molloy* in reply.—*Metcalfe's*, *Heath's*, and *Brown's* cases do not apply. They were cases of servants who never had the possession, but merely the custody, the possession still remaining in the master. The distinc-

tion is pointed out—3 Inst., 107. It does not appear in *Regina v. Wells* whether or not the prisoner was bound to pay over the identical money. Greaves, 2 Russell, p. 249, in the note calls attention to this omission in the report of the case. In *Regina v. Stines* the treasurer had no authority to part with the cheque except to the proper owner. Not so here; Noble parted with both the property and the possession.

*Cur. adv. vult.*

June 10.—O'HAGAN, J.—The first count of the indictment states that the prisoner embezzled this money. The second count was for larceny. Witnesses were examined. [His Lordship stated the evidence of the first witness.] The evidence of the second witness is not very material. Then there is the evidence of the owner of the hay, and of the clerk to O'Connor, the factor. It seemed to the judges that the first count was not sustained. The counsel for the prosecution contended that the count for larceny was sustained. The case was submitted to the jury on that count. The question is, if the evidence was sufficient to sustain the second count. We are asked only to say if the charge of larceny is legally sustained. A good deal of argument has been addressed to us which might be important if applied to the count for embezzlement, or if the charge was for obtaining money under false pretences. The point reserved is merely whether the prisoner was guilty of larceny, either at common law or as a bailee under the section of the statute. The prisoner had no authority to receive the price. Noble thought that the practice of the market entitled the prisoner to be paid; and he paid him the price of the hay, save one shilling and four pence, which the prisoner afterwards asked for and received. I will not go through the cases. They are very numerous. Their distinctions are endless, and not very reconcilable. They were, many of them, taken when the judges were astute, and jurors anxious to avoid the consequences of the law. Now the law is humanised. Where the owner of a chattel, having full dominion over it, parts with the possession, the receiver, though he may be guilty of some other offence, is not guilty of larceny. In the case in 1 Leach, 520, the authority was limited; it was an authority to deliver to a particular person. The same observation will apply to the case in R. & R. 163. *Reg. v. Stines* was in this Court; and it was held that the prisoner was guilty of larceny, but on the ground that the party had only a qualified interest in the money, and could not part with the property to the prisoner. In this view all the cases are reconcilable. There was no larceny at common law. Can the count be sustained under the statute? I think not. [His Lordship read the 3rd section.] I am clearly of opinion that the prisoner was not a bailee within the meaning of this section. The reasons why the prisoner was not guilty of larceny at common law are applicable to this. *Regina v. Has-sell* (1 Leigh & Cave, 58) sustains the note in *Greene's case*, that two things must be proved: first, such a delivery as divests the party of the possession and vests it in the prisoner for some time; and secondly, that at the expiration of that time the same property was to be restored.

DEASY, B. concurred in the judgment of O'Hagan, J.

FITZGERALD, J.—I concur in the very clear judgment of O'Hagan, J., and would not say anything but that the case was reserved by myself. Some little doubt was thrown on the course pursued. The prisoner was undefended. The judges had to some extent to watch over his interests. We came to the conclusion that the first count was not sustained. I may say as my own opinion that I entertain no doubt as to the course adopted. We had a doubt as to the second count, but it was argued by the counsel for the Crown that the case was sustainable under the statute. My judgment was not much shaken by the argument; but in deference to the strenuous arguments addressed to us, we allowed the case to go to the jury. I agree with O'Hagan, J. that the conviction is unsustainable. Subsequent misappropriation does not amount to larceny at common law. I am equally clear that the count is not sustainable under the 3rd section of the statute. The reasons given in reference to the common law go to show it is not sustainable under the statute. [His Lordship referred to the judgment of Lord Coke in *Coggs v. Bernard*.] It seems to me at the same time possible that a proper count for embezzlement might have been framed under the statute, or that a count for money obtained under false pretences might have resulted in a conviction.

HUGHES, B.—I concur with O'Hagan, J. upon the question whether the indictment for larceny could be sustained. I am of opinion it could not. I offer no opinion as to any other indictment.

FITZGERALD, B. concurred.

O'BRIEN, J. concurred for the reasons given by both the judges.

KEOGH, J. concurred, and adopted the reasons and the reservations.

MONAHAN, C.J.—I entertain no doubt for the reasons given by O'Hagan, J. and Fitzgerald, J. As to the prisoner being a bailee, it is equally clear. The bailor must intend to retain some property in the thing.

LEFROY, C.J.—I have the misfortune, and perhaps, the hardihood to differ from those who have preceded me; but it does appear to me that this is a case within the statute. My grounds for thinking so are not so much the authority of the cases as the words of the statute. The criterion is this: did the owner of the money part with it for a special purpose, and that only? did he not entrust it to this person for a special purpose? The prisoner being the bailee and depository for that special purpose, and no other, the property will not pass from the bailor, whose money it remained till the purpose was answered for which it was given. The prisoner violated that purpose by appropriating it to his own use, and therefore is guilty of larceny of that money.

*Conviction quashed.*

## House of Lords. \*

(Reported by James Paterson, Esq., of the Middle Temple.)

CULLEN v. ATTORNEY-GENERAL.

June 8.

*Legacy duty—Exemption—Legacy for charitable purpose—Secret trust—Statute.*

*A revenue statute exempted from legacy duty legacies given for a charitable purpose in Ireland. F. gave a legacy to C. which on the face of the will was absolute, but by reason of certain letters contemporaneously delivered a trust was created which was binding in a court of equity:*

*Held (affirming the judgment of the Irish Court of Exchequer), that such legacy was not exempt from duty, inasmuch as the trust arose by reason of matters dehors the will.*

THIS was an appeal from a decree of the Court of Exchequer in Ireland.

An information was filed by the Attorney-General against the appellant Archbishop Cullen for legacy duty amounting to £743 15s. 8d., being 10 per cent. on the residue of Bridget Fitzgerald's personal estate.

Miss Bridget Fitzgerald, the testatrix, made her will in 1829, and after certain legacies gave all the residue of her property, real and personal, to the Rev. Patrick Doyle and the Most Rev. Daniel Murray, and the survivor, requesting that all the intentions expressed in her will might be fulfilled.

The testatrix made five several codicils to her said will: the first, dated the 30th April 1831, which it is not necessary further to notice; the second, dated the 7th October 1839, by which she confirmed her said will; the third, also dated the 7th October 1839, by which in order to remove any doubt of her intention as to the devise of her property, she declared that the same should go to the said Rev. Patrick Doyle (therein called the Rev. Patrick James Doyle), and the said Most Rev. Daniel Murray, named in her said will, and the survivor of them, his heirs, executors, administrators, and assigns, according to the directions therein; and that it was not intended that the same or any part thereof should be bequeathed or given to any other person. By the fourth codicil, dated the 19th November 1847, she appointed Anne Carroll executrix in place of Peter Locke, who was then dead; and by the fifth codicil, dated the 24th January 1849, she declared that the Rev. Patrick Joseph Doyle was the person whom she had by her will appointed executor, under the name of Patrick Doyle.

The testatrix died on the 16th May 1850, without having revoked the said residuary bequest; and probate of her will and the codicils thereto was granted June 18, 1850, to Patrick Joseph Doyle and Anne Carroll, but only the former acted, and the latter died intestate in the year 1853, never having interfered with the administration. Patrick Joseph Doyle took possession of the assets, as executor, and disposed of part of the residue, but paid no legacy

duty thereon. The Most Rev. Daniel Murray died in February or March 1852, and Patrick Joseph Doyle survived him, and died in December 1852, having by his will bequeathed the residue of his property to the appellant for such religious and charitable purposes as he should think fit, and made the appellant and the Rev. Philip Dowling his executors. The appellant alone took probate of his will; and letters of administration of the goods of the testatrix left unadministered were also granted on the 20th June 1854 to the appellant.

The appellant having entered into possession of the assets, and proceeded to administer the same, was called upon by the Commissioners of Inland Revenue to pay duty at the rate of 10 per cent. upon the residue—the residuary legatees, Patrick Joseph Doyle and Daniel Murray, who were strangers in blood to the testatrix. But the claim was resisted on the ground that, by certain letters written by the testatrix to P. J. Doyle and Daniel Murray, certain charitable trusts were created, and that therefore the residue was exempt from the payment of any duty by virtue of the statutable enactments in force in Ireland in that behalf.

The Commissioners of Inland Revenue were of opinion that, as the alleged letters were not admitted to probate, or alluded to in the will or any of the codicils, or in any way testamentary, they could not, according to the true construction of the law upon the subject, have the effect of creating an exemption from duty; and, accordingly, the present information was filed in the Exchequer in Ireland on the 14th of April 1862, for the recovery of the duty.

The Irish Court of Exchequer held, that a legacy given on secret trust was not exempt from legacy duty, whereupon the present appeal was brought.

The 56 Geo. 3, cap. 56, sched. part 3, includes, among other exemptions from legacy duty, "all legacies given for the education or maintenance of poor children in Ireland, or to be applied in support of any public charitable institution in Ireland, or for any purpose merely charitable."

The same exemption is continued in the statute 5 & 6 Vic. c. 82, s. 38, in the same words.

*Rolt*, Q.C. and *Bagshawe*, for the appellant, contended that if the trust which the letters of the testatrix had declared had been declared on the face of the will, there could have been no doubt that the legacy would have been exempt, and it made no difference if the trusts were in any other manner held binding by a court of equity.

The *Attorney-General for Ireland* and *C. R. Barry* for the respondent.

The following authorities were referred to:

*Lomax v. Ripley* (3 Sm. & G. 48); *Walgrave v. Tibbs* (2 K. & J. 318); *Attorney-General v. Dillon* (13 Ir. Ch. Rep. 127); *Sweeting v. Sweeting* (1 Drew. 331); *Re Wilkinson* (1 Cr. M. & R. 142); *Attorney-General v. Nash* (1 M. & W. 237).

THE LORD CHANCELLOR.—My Lords, this is a question which lies within the narrow compass. This lady, Bridget Fitzgerald, by her will and several codicils, gave the residue of her property to two gentlemen, both of whom have died, and who are now represented by the appellant, the Most Rev. Archbishop

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Cullen. By her will she gave the property to these two persons *simpliciter*, but then it must be taken as an admitted fact that she gave it to them upon their having in her lifetime validly undertaken that they would hold it upon certain charitable trusts. Now, in that part of the Stamp Act relating to Ireland which refers to testamentary instruments and the duty payable upon wills or administrations, there is an exemption which does not exist in England, namely, in favour of any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purposes merely charitable. There is no doubt that, if you are to couple that which was undertaken by these gentlemen, with the legacy, this gift comes within the exemption, for it is admitted on all hands that it was a gift which, coupling the will with the undertaking of the legatees, amounted to a gift for purposes merely charitable. The question is whether, inasmuch as the gift did not on the face of it purport to be a gift merely charitable, but was apparently a gift to the legatees themselves for their own benefit, you can, for the purposes of legacy duty, couple that legacy with the fact that the legatees had undertaken to hold it for merely charitable purposes. My Lords, I think it extremely important that a rule should be laid down on this subject; and undoubtedly the more convenient rule is that which has been adopted by the court below; because it is a rule which imposes no difficulty upon executors (administrators are not within the question in this case), when they come to pay the duty, in knowing what the amount of duty is to be. I cannot disguise from myself that the rule so laid down is one which may enable parties (unless the Succession Duty Act alters it, and I am not assured how that may be) always to evade, or rather to avoid, the payment of any legacy duty. Because, if the testator is a married man, he may leave the whole of his property to his wife taking an undertaking from her, which does not form part of his will that she at his death will dispose of the property in such and such a way. He can probably trust her, and whether he can trust her or not, if he takes measures to secure that it shall be forthcoming at his death, she will be bound to execute the trusts, and therefore no duty will be payable, because *ex facie* of the will it is all given to her. I observe that one of the learned judges, Baron Fitzgerald I think, rather alludes to a case of that sort, and says he doubts whether in such a case the court might not find the means of compelling the party beneficially interested to pay the full duty. I own I cannot follow that; and the Attorney-General for Ireland, to whom I put the question, did not contend for it. The rule, therefore, as laid down, is open to the objection that it may, according to the present state of the law, lead to parties escaping from the payment of legacy duty altogether, or very nearly so, by a testator giving the property to his wife, in which case there is no duty payable, or to a child in which case the duty is only 1 per cent., although it may really be intended to be given to strangers, the duty upon a bequest being 10 per cent. in England and 5 or 6 per cent. in Ireland. That duty of 10 per cent. or 5 per cent., as the case may be, would therefore be avoided, and a duty of 1 per cent. only or nothing at all would be paid according

as the property was given on the face of the will to a child or wife. No doubt there is considerable difficulty in that view of the question. Perhaps the only answer to it is that the statute has not contemplated such a case, and that is the real answer to the question which was put two or three times at the bar in course of the argument. What is the meaning of the words "legacy given" in the proviso? Do they mean given by will, or do they mean so given that, coupling the gift to the legatees with the obligation which the law imposes upon it, the two together are to be taken as the legacy? I own that I have had considerable doubts upon the subject, but the rule laid down by the court below is certainly the more convenient of the two, and as I know that both my noble and learned friends who have heard this case consider the decision to be perfectly right, I do not feel it necessary to state any further the doubts which have arisen in my own mind. Under these circumstances I think the decision which has been come to by the court below in the case of this will is right. I have, therefore, to move your Lordships that the judgment of the court below be affirmed.

LORD CHILMSFORD.—My Lords, the question to be decided is, whether the gift of the residue by the will of Bridget Fitzgerald to the Rev. Mr. Doyle and Archbishop Murray is exempt from legacy duty by reason of its being made applicable to trusts for charitable purposes by certain letters contemporaneous with the will, and which trusts were accepted by the legatee; confining myself entirely to the words of the Acts of Parliament, I have little difficulty in coming to a conclusion in favour of the Crown. The definition of a legacy given by the 38th section of 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, is a gift by any will or testamentary instrument of any deceased person which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate. It is clear upon the definition that the gift can be a legacy only to the person named in the will, because he alone takes by virtue of the will. Bearing this in my mind, in turning to the exemption in the 38th section of the 5 & 6 Vict. c. 82, on which the question turns, the proper construction appears to be obvious. That exemption is, "That nothing herein contained shall extend, or be construed to extend, to charge with duty in Ireland, any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable." What is the meaning of the words "any legacy?" It is a gift which, by virtue of the will is to have effect out of the personal estate. Now, the residue in this case is not by virtue of the will given for charitable purposes, but by virtue of the trust imposed by the letters contemporaneous with the will. The duty is chargeable upon a legacy given by will. The exemption applies to a legacy given or to be applied for charitable purposes. From the comparison of the definition of a legacy with the terms of the exemption which I have made, I can come to no other conclusion than that the legacy for the charitable purpose must be expressly so given by the will itself to exempt it from duty. Upon these grounds, therefore, I think the judgment



of the court below is perfectly right, and that it ought to be affirmed.

**LORD WESTBURY.**—My Lords, having regard to the argument upon this case, I think it very material to point out that where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of a party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary. The question then arises, what is the meaning of the words in the statute that has been referred to? The object of that portion of the statute is to charge testamentary gifts with certain rates of duty according to the relation, or the absence of relation, between the testator and the donee. Now, a gift by will or a legacy by will involves, of necessity, certain things, not only a description of the subject given, but also a nomination or description of the individual to take, or the purpose which is to be answered by the legacy. If there be, therefore, a gift to A., and if there be a collateral matter which renders A. bound to apply the subject of the gift to some purpose not to be found within the expression of the gift, and the obligation arises not on the face of the will, or by virtue of the will, but arises from something *aliunde*, it follows of necessity that the person to be benefited cannot, with any correctness of language, be denominated a legatee, or the purpose to be effected a testamentary purpose. When therefore we are adverting, as we have to advert here, to the effect of the exemption out of legacies charged with duties, we find the words of the exemption to be a legacy "for a purpose merely charitable." If that be so, does it not of necessity follow that the purpose merely charitable being in reality the real legacy must by every rule to be derived from the nature of the subject, and from the language of the statute, be a purpose expressed on the face of the will? The exemption is intended to be applied only to testamentary bounty, and testamentary bounty to a charity, but you cannot say that this is bounty to a charity when the charity has no place, and is not to be found either in anything that is expressed in the will, or in anything that is so referred to in the will as by that reference to be made part of the will. The words unquestionably would not include a person taking by anything other than a testamentary title, otherwise there would be no limit. A legatee taking a sum of money by virtue of a will might declare a trust a day or a month after the death of the testator, and the whole of the reasoning that we have heard to-day would be equally applicable to a charitable purpose expressed in that trust, and it might be held equally to exempt the property so first given by will and afterwards dedicated to charitable purposes from being amenable to the duty. I think the conclusion arrived at by the court below is quite a correct conclusion. In matters of this kind, relating to the interpretation of fiscal Acts we are not at all to have regard to what the effect of the decision may be with reference to the fiscal duties. Our duty is limited to this, to inquire whether the tax imposed does attach, or whether, when the tax is imposed with an exemption, the particular case comes within the fair, proper,

and legal meaning of that exemption. Whatever, may be the result upon other fiscal duties is not properly a subject of judicial reference upon the occasion of determining a question of this kind. I therefore undoubtedly concur in the opinion of my noble and learned friend on the woolsack, that the judgment of the court below ought to be affirmed.

**LORD CHELMFORD.**—The costs follow as a matter of course.

*Bagshawe.*—Perhaps your Lordships would allow me to mention that the Lord Chief Baron thought it was a proper case to take before your Lordships; in fact he said he should desire that the decision should be reviewed.

**LORD CHELMFORD.**—I do not think that ought to have any effect in this case. The costs must follow the result of the appeal.

*Decrees affirmed and appeal dismissed with costs.*

Solicitors for the appellant.—Eyre and Lawson.

Solicitor for the respondent.—Solicitor of Inland Revenue.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

**IRWIN v. ROBERTSON.**—June 15.

*Guardian—Purchase by, of minor's estate in the Incumbered Estates Court.*

*On the marriage of M. I. in 1826 with her husband C. R. a sum of £1500 charged on the several lands of C. and F. the property of said M. I.'s father, was vested in trustees for the benefit of the children of said marriage: afterwards on the 8th March, 1837, said lands of F. and C., charged as aforesaid, and also the lands of T. were upon the marriage of J. I. who was M. I.'s brother, conveyed to trustees upon trust, among others, for the children of the marriage. Said J. I. made his will and died in 1842, having expressly desired that his children were not to be made wards of Court, and having also appointed as his executor and also as the guardian of the fortune and property of his minor children his said brother-in-law C. R. who thereupon as such guardian entered into the receipt of the rents and profits of these denominations of lands which were in 1852 set up for sale in the Incumbered Estates Court. Of one denomination T., C. R. then acting as such guardian and receiver was declared the purchaser for the said sum so charged for the benefit of his children, as aforesaid, on said lands of C. and F.; and in consideration thereof said Incumbered Estates Commissioners conveyed the land of T. to the then trustees of said settlement of 1826 upon the trusts thereof. The said lands of T. were in 1865 mortgaged to certain mortgagees. Held,—that inasmuch as C. R. was guardian of the property of the minor children, the sale, though not to him absolutely but as mere trustee of his wife and children, of said lands could not be sustained, and that therefore he should be held to be a trustee for the said minors, subject however to said mortgage.*

THIS was a cause petition presented by the petitioners, John Irwin, Lynden Irwin, and William Irwin, against the respondents, Caleb Robertson, senior, Caleb Robertson the younger, and John Roche. The petition stated that in the year 1826 Caleb Robertson, senior (the principal respondent) intermarried with a Miss Mary Irwin, whose father gave her a marriage portion of £1,500. This portion was not paid in money, but was charged upon the townlands of Curnaveagh and Finesklin, which formed part of said Mary Irwin's father's estate in the County of Roscommon. The petition then stated an indenture of marriage settlement dated the 18th December, 1826, made previous to said marriage, between John Irwin (the paternal grandfather of petitioners), and said Mary Irwin, his daughter, of the first part, Caleb Robertson of the second part, Geo. O'Malley, and Geo. O'Malley Irwin, trustees, of the third part, by which it was agreed that the interest of said sum was to be paid to said Mary Irwin during her life for her separate use, and if she died leaving issue her surviving, the said trustees of the marriage settlement were empowered to raise the said £1,500 off the aforesaid lands, and pay same among the surviving issue, in such manner as said Caleb Robertson, senior, and said Mary Irwin, his then intended wife, should jointly appoint by deed, and in default of such appointment, as the survivor should appoint by deed or will, or in default of such appointment, to be divided share and share alike among the issue of said marriage. Said marriage was duly had and solemnized, and there was issue thereof.

The petition then stated that John Irwin, junior, son of said John Irwin (petitioner's said grandfather) and brother of said Mary Irwin, intermarried some time in the year 1837 with one Emily Bolton; that upon that marriage a settlement was executed bearing date the 8th day of March, 1837, whereby John Irwin, senior, conveyed to trustees said two townlands of Curnaveagh and Finesklin, subject to said charge of £1500, and also the townland of Tullaghan to the use of himself, the said John Irwin, senior, for his life, with remainder to the first and other sons of said John Irwin, junior, and Emily Bolton successively in tail male, and it was thereby provided that if there were two younger children of that marriage, the trustees of a long term in settlement mentioned should raise out of said lands by sale or mortgage a sum of £4,000 for such two younger children, the same to be payable to them in such shares and proportions as John Irwin the younger should by any deed or writing, to be attested by two credible witnesses, or by his will, to be attested by three or more credible witnesses, appoint, and in default of such appointment, to such two younger children in equal shares and proportions, on their attaining the age of 21. That the marriage between said John Irwin, junior, and said Emily Bolton, was immediately after the execution of said deed duly had and solemnized, and there was issue of said marriage, viz., petitioners, John Irwin and said two younger sons Linden and Wm. That said John Irwin the elder departed this life on the 23rd of May, 1842, and said John Irwin the younger died on the 18th of July in the same year; that previous to his death the said John Irwin the younger executed his last will and testament dated the 18th of June,

1842, and he thereby constituted and appointed his said wife Emily to be sole guardian of his said children, and he nominated his two brothers-in-law, John Duke and Caleb Robertson the younger, to be executors of his said will, and that by his said last will, which was witnessed by two witnesses only, he empowered his wife to exercise the power of appointment given to him by said settlement of the said sum of \$4,000 among petitioners, Lynden Irwin and William Irwin, but which power his said wife never acted upon. That by codicil to said last-mentioned will, dated 6th July, 1842, the said John Irwin the younger further appointed John Duke and Caleb Robertson the elder to be guardians of the fortune and property of his said children, who he desired should not be made wards of Chancery. The petition then stated that petitioner, John Irwin, junior, was resident in India since 1859, and that he reached 21 on the 21st of February, 1859, and petitioners, said Lynden Irwin and William Irwin, attained their respective ages of 21 on the 20th of November, 1860, and 21st July, 1863. That after the death of said John Irwin, junior, said Caleb Robertson, senior, as such guardian of petitioners, entered into the receipt of the rents and management of the estates down to the sale therein-after mentioned, for which he received £75 a year. That said John Duke acted during said time as executor of said will and as guardian of the fortunes of the petitioners. That when J. Irwin, junior, died in 1842, his property was deeply incumbered, and in 1851 a Colonel St. John Augustus Clarke to whom was due a debt of £1,000 with one year's interest, presented, at the suggestion of said John Duke and Caleb Robertson, a petition for the sale of the lands comprised in the said indenture of settlement, and an order for sale having been made, the said lands of Curnaveagh and Finesklin, and the said lands of Tullaghan were among others put up for sale by the Incumbered Estates Commissioners on the 30th March, 1852. That the yearly rental of said lands was £175. That the said Caleb Robertson, senior, while acting as agent and receiver over the said lands, and as the guardian of the fortunes of the petitioners, bid for and was declared the purchaser of said lands of Tullaghan for the sum of £1,850, which was about 10½ years' purchase. That by the direction of the said Caleb Robertson, senior, two of the commissioners for the sale of Incumbered Estates in Ireland, by deed poll dated 19th May, 1852, in consideration of a sum of £1,850 stated therein to have been ascertained by the said commissioners to be due to the said John Duke and Frederick Robertson, the then trustees of said marriage settlement first herein-before mentioned—namely, the settlement executed on the marriage of the said Caleb Robertson, senior, with said Mary Irwin, bearing the aforesaid date of 18th December, 1826, on foot of an incumbrance affecting the estate of petitioner John Irwin, an infant under the age of 21, owner, and by the commissioners authorized to be retained by the said John Duke and Frederick Robertson in discharge of the purchase-money of £1,850, they, the said commissioners did grant unto the said John Duke and Frederick Robertson (trustees) the said town and lands of Tullaghan, with the appurtenances to hold unto them, their heirs and

assigns, for ever, subject to the tenancies referred to in the schedule to said deed poll annexed. That said Caleb Robertson has ever since continued in possession of the rents and profits thereof, and has applied them to his own use. The petition then alleged that said John Duke died on the 26th March, 1854, leaving said Frederick Robertson him surviving, who also died in the year 1860, leaving Caleb Robertson, junior, his next brother and heir-at-law, him surviving, who now, as petitioners contend, is a trustee for them of said lands of Tullaghan, charged with said sum of £1,500 according to their rights as declared by the trusts of said deed of marriage settlement of the 8th March, 1837.

The petition then alleged that said Mary Robertson, otherwise Irwin, is long since dead, and there were issue of her said marriage with Caleb Robertson the elder living at the time of the execution of a deed of appointment herein-after mentioned, namely, said Caleb Robertson, Elizabeth Barry, otherwise Robertson, Mary Robertson, Frederick Robertson, Rebecca Robertson, Maria Grierson, otherwise Robertson, and William Robertson. That by deed of appointment bearing date the 7th of December, 1864, after reciting that he was desirous of executing the power of appointment vested in him by his marriage settlement of the 18th of December, 1826, it was witnessed that the said Caleb Robertson, did effectuate said intention, and in pursuance of said power, did direct, limit and appoint that the sum of £1,500 therein mentioned, and all interest due thereon, and all accumulations thereof, should be shared and divided amongst the children of said marriage in manner following, that is to say, five shillings to Elizabeth Barry; five shillings to Mary Robertson; five shillings to Frederick Robertson; five shillings to Rebecca Robertson, five shillings to Maria Grierson, and five shillings to William Robertson, and all the rest, residue and remainder of said £1,500, and accumulations thereof, to Caleb Robertson the younger, who was the eldest son of said marriage.

That by a certain indenture of mortgage of the 1st June, 1865, made between Caleb Robertson the younger of the first part, and one John Roche, of Fermoy, in the County of Cork, of the other part, he the said Caleb Robertson the younger did thereby grant to the said John Roche and his heirs all that and those the lands of Tullaghan aforesaid, *habendum* to the only proper use of said John Roche, his heirs, &c., but subject to redemption on the payment of the sum of £900 with interest; that petitioners are willing that said lands should stand charged with said sum of £1,500 in favour of the parties entitled to same under the trusts of said settlement of 18th December, 1826, and that said sum of £900, with interest secured by said mortgage of 1st June, 1865, should be declared a charge on said lands part of said £1,500. The petition then prayed that the lands of Tullaghan may be declared to be vested in Caleb Robertson to secure the said sum of £1,500, and subject thereto to the use and upon the trusts of the indenture of 8th March, 1837, and that it may be referred to the Master to take an account of the rents, issues and profits of the said lands of Tullaghan by the said Caleb Robertson received since

the 19th May, 1852, after all proper deductions and due credits, including the interest due and payable on said sum of £1,500, and striking a balance, and that said Caleb Robertson be directed to lodge the amount of said balance to the credit of this matter, and that the said Caleb Robertson do pay to the said petitioners their costs of suit.

The respondent, Caleb Robertson the elder, denied the allegation in the above petition that he had ever suggested the said sale in the Incumbered Estates Court, and said that he received the rents merely in performance of a promise he had made to petitioners' father; and as to the bidding, he merely went into the market, and bid up at the sale with several strangers, and further, that he did not deter them from bidding up the lands.

*M<sup>r</sup>. Causland* Q.C., *Brewster*, Q.C., and *Boyd*, were for the petitioners.—Caleb Robertson the elder and Mr. Duke being the executors of the will of petitioners' father, and guardian of their fortunes, were placed under a great responsibility to devote themselves to protecting the interests of the petitioners, especially as their father had desired in his will that they should not be made wards in Chancery. The purchase of Tullaghan was actually made in trust for Mrs. Robertson to secure at least £1,500, which was put in settlement on Mary Irwin's marriage with Caleb Robertson, senior. [*The Lord Chancellor*.—Mr. Duke bought this, not in his character of guardian, but as a trustee of Mrs. Robertson. Is not that so?] Yes; but the interests of both were conflicting—as guardian of the children he was bound to raise the sale to the highest penny, so as to get the maximum of money for the minimum amount of land; while as trustee for Mrs. Robertson his duty was to obtain for her the maximum of land for the minimum of money. Duke filled then this double capacity with his co-trustee, Frederick Robertson, which Frederick had survived, and whose heir Caleb Robertson is, and Caleb himself was the agent and guardian of the children. It is well settled law that in all cases where a purchaser occupies a fiduciary relation towards the seller, the Court will, whether the buyer benefited himself or not, act upon the wise principle of setting aside the sale if even there was a chance that the buyer would have advantages himself at the seller's expense, and in every such case the buyer will be decreed to hold the property in trust for the seller. In this case the purchase was made, not for the benefit of the minors whose interests Caleb Robertson was bound to protect, but for his own wife and children—that purchase, then, cannot stand. *Fox v. Mackreth* (1 White & Tudor L. C. 92) is the leading case on this doctrine. In *Ex parte James* (8 Ves. 343) Lord Eldon said that "the principle is, that as the trustee is bound by his duty to acquire all the knowledge possible to enable him to sell to the utmost advantage for the *cestui que trust*.....The doctrine as to purchases by trustees' assignees and persons having a confidential character, stands much more upon general principles than upon the circumstances of any individual case." A trustee cannot buy even as agent for a third party.—*Ex parte Bennett* (10 Ves.) per Lord Eldon—"The general interests of justice require that a solicitor cannot be permitted to buy for himself, or

for another, as in several cases the powers of the Court would not be equal to protect against a deception, from the impossibility of knowing the truth in every case: that in truth is the principle upon which the Courts of Equity have held that trustees shall not buy. If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise."<sup>1</sup> *Popham v. Exham* (10 Ir. Chr. 440) decides that a solicitor bidding at a sale without the leave of the Court, vitiates the sale to him.—*Malcomson v. Eager* (10 I. E. 1); *Carey v. Carey* (2 Sch. & Lefroy, 173).

*Ormsby, Q.C., and Gamble*, appeared for Caleb Robertson, junior.—The lands here were sold at the highest penny. This case is not within the authorities cited on the other side; he did not buy a perch of these lands for himself. [*The Lord Chancellor.*—But he did for his wife and children.] The respondent here came of age in 1859, and yet the party never, until now, after so many years, comes forward to have his alleged rights declared, and if a trustee purchase his *cestui que trust's* property, and the latter sleeps on his rights, his remedy is gone.—*Campbell v. Walker* (5 Ves. 577). The Incumbered Estates Court, which was a Court of Equity, sanctioned this sale and purchase. If, then, the consideration was adequate here, the Court will not hold that we are trustees for the petitioner.—*Luff v. Lord* (10 Jur. N. S. 1248). The Master of the Rolls there dismissed with costs a bill filed by a *cestui que trust* to set aside a purchase made by a trustee, the Court being of opinion that the trustee had discharged the duty cast upon him of procuring adequate consideration. *Baker v. Reads* (18 Beav. 398) was where a bill was dismissed on the ground that the *cestui que trust* had lapsed his time, as in the case before the Court.

*Warren, Q.C., Chatterton, Q.C., and Finch Whyte* were for the respondent, Caleb Robertson, senior.

*William O'Brien* appeared for the respondents, Roche and Hunt, the mortgagees.

**THE LORD CHANCELLOR.**—This is a very plain case indeed, and I thought so from the moment when I heard it opened. As to the essential matter—and that is to declare that the purchase is one which under the circumstances cannot be sustained in this court—there never was in any other case a purchaser placed in so many positions which disqualified him from being a purchaser. Mr. Robertson was guardian of these minors; he was the executor of their father's will; he had taken upon himself the management of the estate he was the receiver over, receiving pecuniary compensation for acting as receiver; and he was in substance a creditor on their estate, through his wife and family. In every point of view he was disqualified from being a purchaser. It is true that he was not the purchaser of the estate in point of form, but substantially he was in the same position. In the case of *Ex parte Bennett*, (9 Ves. 381) it was held that the purchase could not be sustained, though the bidder in that case merely acted as such, and was merely a nominal purchaser for a third party. But the case before me is not such a case. It is not the case of a purchase by the seller's solicitor, who had no interest in the case; nor is it the case of a com-

mon purchaser for another party, though nominally for himself. The present case is one of a buyer who had a substantial interest in the estate; not, indeed, in the legal or equitable sense, but who was substantially and beneficially interested, since he bought for his wife and children. It was a very fair object for him to desire to do the best he could for his wife and children. It was an eligible purpose he bought the property for. But what was that purpose? To secure the interests of his wife and children. He was substantially interested himself in the purchase; so that in every point of view his position disqualified him from becoming a purchaser of the property. That being the case, the doctrines of this Court are clear and imperative that the purchase cannot be sustained. I do not think it necessary to enter into any detail of what was done in the Incumbered Estates Court upon the petition to sell the estate, or into the records of this case. I don't say that things were not rightly and regularly done in that Court, nor enter into any inquiries upon the subject. It must be presumed that things were then regularly done, having regard to the Court which did them. But there is not enough before me to satisfy me that the petitioners were in that Court represented in such a formal manner as would suffice to protect their interests; therefore the case comes back again to the same question—Can this purchase be sustained? It cannot; and I thought it could not from the moment when I heard the case opened. But what must be the result to the other two respondents, the persons who have advanced their money upon mortgages of this property? The mortgages must be sustained. They will stand as charges upon the estate prior to the balance of the purchase money, and the balance of the purchase money will be a charge upon the estate, third in point of order. Then the next question is upon the account. Mr. Robertson will be liable to account for the rents and profits of the estate independently of his position as receiver for his wife, if that were material. What was the transaction? He was receiver for the minors before the purchase was made, and he cannot displace himself from that position of receiver for these parties by acting as receiver for his wife after the purchase. He therefore still remains receiver of the rents of the estate for the minors. Whether he accounted with his wife or not is nothing to them. I cannot limit the account against him merely as administrator of his wife, but it will be an account taken in the ordinary and usual way of the rents and profits received by him since the purchase, and of how they have been applied. If any have been received by Caleb Robertson, junior, the account will be directed against him also while he received them.

*Ormsby, Q.C.*, for Caleb Robertson, junior.—There is no prayer in the petition for any account against my client.

*M'Causland, Q.C.*, for the petitioners.—We have charged that Mr. Robertson, senior has received the rents and profits down to the present day.

**THE LORD CHANCELLOR.**—Then the account will be directed merely against Caleb Robertson the elder. An account must also be taken of what is due up to the sum of £1850, with interest upon the charge of £1500.

*Warren, Q.C.*, for Mr. Robertson, senior.—The whole £1850 became purchase money, and my client is entitled to be allowed interest upon the entire sum.

*Brewster, Q.C.*, for the petitioners.—The sum of £850 would be assets of Mr. Robertson's wife.

THE LORD CHANCELLOR.—Considering Mr. Robertson's position, and that he was interested to do the best he could for his wife and family, and that this property has been improving, I think that the allegation of the petitioners—that the proceedings in the Incumbered Estates Court were instituted with the concurrence and at the suggestion of Mr. Robertson was well founded, and that the petitioners were therefore warranted in making it; but there is no charge made against Mr. Robertson of connivance or fraud in the transaction, so that I shall leave the parties to abide their own costs of this hearing.

*Brewster, Q.C.*—That ruling is very hard as against minors.

THE LORD CHANCELLOR.—Well, I will give the minors their costs down to this hearing, excluding any charges against Mr. Robertson of fraud or misconduct.

*Warren, Q.C.*—The petitioners have charged against Mr. Robertson that they "have been deprived of the entire of their fortunes by reason of said property having been pressed to a sale by said Caleb Robertson at so unfavourable a time, and said sale having been conducted in the improper manner in which it was conducted."

THE LORD CHANCELLOR.—That is a great deal too strong.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

M'CABE v. FOOT.—April 21.

*Slander*—What words actionable *per se*—*Imputation of offence against the Fishery Acts, 5 & 6 Vict. c. 106*—26 & 27 *Vict. c. 114*.

To say of a person that he drew a river at night, thereby imputing an offence against the *Fishery Acts, 5 & 6 Vict., c. 106*, and 26 & 27 *Vict. c. 114*, is not an imputation of such an offence as is sufficient to make the words actionable *per se*.

DEMURRER: The first paragraph of the summons and plaint complained that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say—"I (meaning the defendant) heard that Daniel M'Cabe (meaning the plaintiff) and Timothy Callaghan drew the River Blackwater with a net at night" (meaning thereby, and giving and causing it to be understood that the plaintiff, after the making and passing of the *Salmon Fishery (Ireland) Act, 1863*, had used a net, not being a landing net; for the capture of salmon and trout in the fresh

water; portion of the River Blackwater in the County of Cork as defined by the Commissioners under the said Act, between the hours of eight o'clock in the evening, and six o'clock in the morning, and not within the limits of a several fishery next above the tidal flow, and held under grant or charter, or by immemorial usage). The second, third and fourth paragraphs all complained of the same words, alleging that they imputed the same offence of night-fishing with a net other than a landing net, but varying the reasons for the non-existence of the right of fishing according to different sections of the *Salmon Fishery Acts of 1863 and 1842*. To these several paragraphs of the summons and plaint the defendant demurred, saying that the paragraphs respectively did not disclose any cause of action good in substance, for that the words therein alleged to be spoken by the defendant were not, nor were any of them, slanderous, inasmuch as they did not impute to the plaintiff such a criminal offence as was punishable in the manner required by law.

*James Murphy* (with him *Jellett, Q.C.*) in support of the demurrer.—To make the imputation of an offence slanderous *per se*, the offence imputed must be one which would subject the party to some corporal punishment. The penalty consequent upon the acts here imputed is merely pecuniary. No case will be found in which slander has been held to lie for imputing an offence for which a fine would be the penalty.—*Lewknor v. Crutchley* (Cr. Ch. 140); *Turner v. Ogden* (2 Salk. 626); *Onslow v. Horne* (3 Wils. 177); *Whitacre v. Hillidell* (Alleyne, p. 11); *Holt v. Scofield* (6 T. R. 691); *Feise v. Linder* (3 Bos. & Pul. 372); *Poland v. Mason* (Hob. 305); 1 *Starke on Slander*, 43.

*W. M. Johnson and Clarke, Q.C.*, contra.—The imputation here is of night poaching, and is one which would tend to degrade a person in the eyes of society. The offence is punishable by fine and forfeiture of the instruments used in committing it.—*Stat. 5 & 6 Vict. c. 106, s. 94*.—*Cookaine v. Wismam* (Cr. Eliz. 49); *Tibbott v. Haynes* (Cr. Eliz. 191). Penalties are every day being substituted for punishments. Could it be said that the imputation of such crimes as arson, or perjury, or forgery would not support an action of slander?

*Jellett* in reply.—If these words are held slanderous *per se*, then the imputation of the breach of various municipal regulations for which fines have been imposed by statutes must also be held actionable *per se*. Yet can it be said that the imputations in those cases are imputations of infamous offences?

O'BRIEN, J.—It certainly is not desirable to extend the class of cases in which actions of slander may be brought, and the last argument of Mr. Jellett is strong to show that the Court should not do so in this instance. It might as well be said that an imputation on a man that he did not scour a ditch lying along a public road, was slanderous *per se*. The offence charged here is not a criminal offence in the sense which is required for an action of slander.

FITZGERALD, J.—An action does not, in the absence of special damage, lie for slander, unless the words carry the imputation of an offence punishable by corporal punishment in a temporal Court, and I should

say that I consider that that embraces a degrading punishment.

LEFROY, C. J. concurred.

*Judgment for defendant.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE LORD CHIEF BARON.\*]

HALL v. CLAY.—May 31st.

*Action against an attorney—Motion to set aside counts of a summons and plaint.*

*A count in a summons and plaint against an attorney by a client for negligence in conducting a case for him where he was defendant, averred (inter alia) "Though he knew that, except as to £15 lodged in court by the said H. Hall, the said H. Hall, the now plaintiff, had a good defence, he neglected," &c. Another count averred that defendant "for a long time" neglected to pay and apply certain monies which he had received from plaintiff. Held, on motion to set aside or amend the count, that the first paragraph must be struck out, and for the second that the word "long" be changed to "unreasonable," but that defendant should not have his costs.*

THIS was an action against an attorney by a former client. The summons and plaint was as follows:—Victoria, &c. to the said William Keating Clay greeting. William Keating Clay, the defendant, is summoned to answer the complaint of Henry Hall, the plaintiff, who complains that defendant is indebted to plaintiff in the sum of £190 16s. 6d. for money lent by plaintiff to defendant, and for money received by defendant for the use of plaintiff, and for money paid by plaintiff for defendant at his request, and for money found to be due by defendant to plaintiff on accounts stated between them, and for interest on monies forborne by plaintiff to defendant at his request, the particulars of which are endorsed hereon. And also for that an action was depending in the Court of Exchequer between one Nicholas Starke as plaintiff and the said Henry Hall, the now plaintiff, as defendant therein; and that the now defendant, in consideration of a retainer as attorney by the now plaintiff, undertook to attend to and manage the said action for the now plaintiff; and plaintiff says that notice of trial was given on the 20th day of January, 1866, for the next after sittings of the said Court of Exchequer, in the city of Dublin, and that it was the now defendant's duty, and he undertook within a reasonable time before the trial of the said action came on to prepare evidence and subpoena witnesses, and to deliver briefs to counsel and to instruct them to appear at the trial and defend the said action; and though he knew that

except as to £15 lodged in court by the said Henry Hall, the said Henry Hall, the now plaintiff, had a good defence, and although the now plaintiff had given to the said William Keating Clay, the now defendant, all necessary information within due time for conducting his defence, and as to the evidence to sustain the same, and as to the witnesses to give evidence therein, yet the said now defendant neglected to subpoena witnesses, and to deliver briefs and to instruct counsel, whereby the cause was taken as undefended and a verdict passed for the then plaintiff, who had judgment against the now plaintiff for £51 6s. 6d., together with the costs of said action, the sum so recovered, being exclusive of the amounts so lodged in court. And the said Nicholas Starke took in execution the goods of the now plaintiff, who was compelled to pay, and did pay, the said sum of £51 6s. 6d., with £32 5s. for the costs thereof, and was put to other expenses therein. And also for that in consideration that plaintiff retained defendant, as and being an attorney of the Court of Exchequer, to conduct the defence of the now plaintiff in an action depending in that Court at the suit of Nicholas Starke against the said now plaintiff for reward to defendant, defendant accepted such retainer and promised the now plaintiff to conduct the said defence with due and proper care, skill, and diligence, yet defendant did not conduct the said defence with due and proper care, skill, and diligence, whereby the said Nicholas Starke recovered in the said action a judgment against the now plaintiff for a large sum of money as for the damages and costs of the said Nicholas Starke therein; and the now plaintiff became liable to pay, and did pay, the same and other costs and expenses. And also for that heretofore plaintiff retained and employed defendant in carrying on business as an attorney and solicitor, and especially in the completing a purchase in the Landed Estates Court and in paying off certain debts of the said plaintiff for which his person and property were liable; and defendant accepted such retainer, and undertook and agreed with plaintiff, and it became his duty, to apply the sums of money which in the course of such employment came into his hands for that purpose in completing such purchase, and in paying off the said debts for the payment whereof the said monies were from time to time received by him. And plaintiff says that a sum of £1,200 was paid by and on behalf of plaintiff to defendant, and received by him in pursuance of such retainer, and which was to be applied by him as to portion thereof in paying into the Landed Estates Court the sum of money payable by plaintiff on account of the purchase of his lands which had been sold in the Landed Estates Court for the debts of the plaintiff, and had been purchased in for him, and as to the residue in discharging certain remaining debts of plaintiff, and which monies were more than sufficient therefor, yet defendant did not fulfil his undertaking and promise or perform his duty in that behalf, but, on the contrary, for a long time neglected to pay the said monies payable on account of purchase-money into the said Court, and did not procure the conveyance from the said Court, and did not pay the said debts to which the said residue was to be applied, but retained the same in his hands, in consequence whereof plain-

\* The other members of the Court were engaged in the Court for Crown cases reserved.

tiff was put to and incurred heavy costs and expenses in proceedings in the Landed Estates Court, and in the Court of Bankruptcy and Insolvency, and in payment of interest on such purchase-money, and in procuring money for and paying said debts, and in costs incurred and proceedings occasioned by such non-payment thereof by defendant with the monies which were so received by him for the purpose, by which said several matters in the three last counts mentioned plaintiff says he has sustained damage to the amount of £600. And plaintiff prays judgment against the said defendant to recover the said sum of £790 16s. 6d., with interest on £190 16s. 6d. thereof and his costs of suit.

*Doussé*, Q.C. (with him *Carton*) for defendant applied to the Court to set aside or amend the sixth count by striking out the words "and although he knew that except as to £15 lodged in Court by the said Henry Hall, the now plaintiff, had a good defence," inasmuch as said averment is for the purposes of said count immaterial and is untraversable, and is calculated to prejudice and embarrass defendant in the fair trial of this action; and further, that the 8th count may be set aside or amended as embarrassing, and calculated to prejudice defendant in the fair trial of this action; because it is uncertain whether the causes of action complained of in said count are founded upon a violation by defendant of the terms of his retainer, as stated in the introduction to said count, and in breaches of the express contract alleged therein, and because if the causes of action complained of are founded on breaches of that express contract, the breaches complained of do not follow the terms of the contract as alleged; and because, while the contract stated in said count alleges, amongst other things, a promise by defendant to pay certain monies into the Landed Estates Court, the breach alleged appears to be delay only and not default in making such payments; and because said count complains in a substantive cause of action that defendant did not procure a conveyance from the Landed Estates Court although no duty or promise to obtain such conveyance is expressed or charged in any part of the count.

*Leslie*, contra for plaintiff, in support of the plaint.—The plaint is taken from *Hoby v. Built* (3 B. & A. 350). There is an obligation on an attorney to bring a case to trial when he has undertaken it. I admit that it is not necessary to aver that plaintiff had a good defence, but still that averment would go to increase the damages. As to a retainer by an attorney, *Fray v. Vowles* (28 Law Jour. Q.B. 232); *Marzetti v. Williams* (1 B. & A. 415). There is an implied promise by an attorney that he will apply the money to its proper purpose when he has received it, and not keep it in his hands.

*Carton* not called on to reply.

*Pigot*, C.B.—The passage in the 6th count averring defendant's knowledge that plaintiff had a good defence, must be struck out, but on the condition that defendant undertakes not to object afterwards to the absence of that allegation. As to the 8th count, there being no allegation that defendant did not pay or apply the monies received, but only that he did not do so for a long time it is ambiguous and embarrassing. The allegation is plainly not of a neglect to pay,

but only a neglect to pay for a long time. This must be amended by inserting the word "unreasonable" for "long;" but the objection is so small that I won't give defendant his costs. His costs must be costs in the cause.

*Motion granted, but without costs.*

[BEFORE THE LORD CHIEF BARON.]\*

DOWLING v. ADAMS.—May 31st.

*Practice*—Application to discharge a conditional order obtained by an uncertificated attorney

*On an application to discharge a conditional order obtained by an uncertificated attorney*—Held that the motion must be refused, but without costs as there was a case reported where a similar motion was granted. But semble, the Court will refuse such a motion with costs for the future.

THIS was an action for a wrongful dismissal. Defendant obtained a verdict, and plaintiff a conditional order to set aside the verdict on the ground of misdirection and the reception of illegal evidence.

*Walker* (with him *Exham*, Q.C., for defendant, applied to the Court that the conditional order be set aside, with costs, on the grounds of the said order having been improvidently issued, and also because plaintiff's attorney, Samuel Bell Carpenter was not duly licensed to practice, which prevented the officer from listing the motion to show cause against the conditional order. There was a letter from Mr. Carpenter dated May 28th, saying that another attorney would be employed in his place. Counsel moved on the affidavit of A. D. Kennedy, defendant's attorney, which set forth the facts as above. [*Pigot*, C.B.—Can you treat the order as a nullity?] Yes; it has been done. *Quinton v. Butt* (5 Ir. Jur. n.s. 106); *Patterson v. Powell* (9 Bing. 620).

*Keogh* contra.—My client is not to be prejudiced by the default of his attorney, of which he was not cognisant. Defendant ought to have served a notice on our attorney that this motion would come on if he did not take out his licence.—1 Archbold, 69. If my client was aware that his attorney had no licence, an order might then be made to stay the proceedings till a certificated attorney was employed. The attorney may be punished, but the client ought not to be injured.—*Welch v. Pribble* (1 D. & Ryl. 215); *Reeder v. Bloom* (3 Bing. 9). *Patterson v. Powell* relied on by the other side was only a motion to set aside a notice of trial which could not do much harm to the client.

*Exham*, Q.C., in reply.—We are in this dilemma, we are ready to show cause but cannot, for the case cannot be put into the list. How can we get it into the list? We have taken the course pointed out by a former decision of this Court in *Quinton v. Butt* (5 Ir. Jur. n.s. 106). The proceedings are most effect-

\* The other members of the Court were engaged in the Court for Crown cases reserved.



tually stayed, but I want to remove the stay. The Court would not have issued the order had they known that the attorney was uncertificated.

PIGOT, C.B.—This case involves two questions,—one of law, on which I must decide *ex debito justitiæ*, the other a discretionary one. The first is whether the order should be set aside, the second as to the costs of the motion. With respect to the first I have not a shadow of doubt. The only thing to make me at all hesitate is the case in the JURIST, but the argument there is very short, no authorities are cited, and the circumstances of the case indicate that it ought not to govern the present case. It was there decided that where a case is brought before the Court as that was, and when the Court can do so without substantial injury to the client, it will set aside the proceedings. There was a subsequent decision in this Court in the case of *Colclough v. Colclough*, where by inadvertence a licence had not been taken out by an attorney, this being without his knowledge or that of his client; and on that ground we ordered that the proceedings adopted by the uncertificated attorney should not be a nullity, and that the client ought not to suffer. That case established a principle wholly at variance with that which is contended for here by Mr. Exham. A party ought to see if there is not a conflicting authority later than some former decision which was in his favour. I must decide this case according to *Colclough v. Colclough* and the authorities cited by Mr. Keogh, and also from my recollection of the other authorities in England; and I must refuse this motion so far as it seeks to set aside the conditional order; and if in doing so it were necessary for me to overrule the case in the JURIST, I would overrule it; but I think it is not necessary so to do, for the Court there acted of its own motion and did no prejudice to the client. But it is not so here, for irreparable damage would be done to the client if I granted this motion. As to the costs, if it were not for the case in the JURIST I would order that the costs be paid by the party who fails in the motion; but we are in the habit of taking into consideration the fact, that there are decided cases which may have misled a party into making a motion which he otherwise would not have done. I do not feel at liberty, on account of that case, to give the costs of this motion; but if another motion such as this should hereafter arise, I would refuse it with costs. I now give an opportunity to either party to apply for his costs against the uncertificated attorney.

*Motion refused, but without costs.*

[BEFORE THE LORD CHIEF BARON AND FITZGERALD AND HUGHES, BB.]

M'LEES v. M'CURDY.—June 1.

*New trial motion—An award finding for plaintiff, without damages, is good.*

*A. brought an action for trespass qu. cl. fr. against B. who traversed plaintiff's possession of the close.*

*The case was submitted to arbitration, and it was agreed that "it shall not be necessary for the arbitrators to find specifically on each of the several issues, but that they shall be at liberty to make an award generally either for plaintiff or defendant." It was agreed also that the costs should follow the event of the award. The arbitrators found that the close was plaintiff's, and therefore found for him, but made no mention of damages. Defendant refused to pay the costs, £45 11s. 5d., alleging that the award was not final as it did not give damages, whereupon plaintiff brought an action against defendant for the costs. The jury, by direction of his Lordship, found for plaintiff. Held, (Fitzgerald, B., dissentiente) on motion to set aside the verdict, or for a new trial, or to reduce it to £35 13s. 1d., the sum found to be due on taxation, that the award was good, but that the verdict should be reduced as above.*

THE summons and plaint was as follows:—"Victoria, &c. Nathaniel M'Curdy, defendant, is summoned to answer the complaint of Hugh M'Lees, who complains that before and at the time of making the agreement herein-after mentioned, matters in difference were depending between plaintiff and defendant, and thereupon by an agreement dated 6th day of March, 1862, it was agreed by and between plaintiff and defendant that the said matters in difference should be, and the same were thereby referred to the arbitration of David Wilson and James Sinclair, and such other person as the said David Wilson and James Sinclair should appoint, the decision of the said arbitrators, or any two of them, to be final and binding upon the parties, provided their award should be made and signed by the said arbitrators, or any two of them, in writing, on or before 1st day of November then next; and that all costs incurred in the case up to the date of said agreement, as also the costs of said award, should follow the award made by the said David Wilson, James Sinclair, and such other person to be appointed as aforesaid, or any two of them. And the said David Wilson and James Sinclair, before proceeding to the said reference, to wit, on the 14th day of August, 1862, duly appointed one John Woods to be the third arbitrator together with them, the said David Wilson and James Sinclair, in and concerning the matters in difference so referred as aforesaid. And the said David Wilson, James Sinclair, and John Woods, afterwards and before the time so appointed for making the said award, to wit, on the day and year last aforesaid, took upon themselves the burthen of said arbitration, and afterwards, before the time for making the said award, to wit, on the said day and year last before-mentioned, the said David Wilson, James Sinclair, and John Woods having taken upon themselves the burthen of the said arbitration, the said David Wilson and John Woods, being two of the said arbitrators, made and published their award in writing, under their hands, of and concerning the matters in difference so referred to them as aforesaid, and thereby determined the said matters in favour of plaintiff. And plaintiff's costs incurred in said case up to the date of said agreement, together with his costs of the said award, amounted to the

sum of £45 11s. 5d.; and plaintiff avers that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle plaintiff to be paid the said sum of £45 11s. 5d., yet the said sum of £45 11s. 5d., the particulars of which are annexed hereto, is still due and unpaid by defendant to plaintiff. And plaintiff prays judgment against the said defendant to recover the said sum of £45 11s. 5d., and interest thereon, and his costs of suit."

Defence—"Nathaniel M'Curdy, defendant, appears and takes defence to the action of the said Hugh M'Lees, plaintiff, and says that the said arbitrators did not make any such award as in the summons and plaint is averred, and therefore he defends the action."

The last paragraph of the submission to arbitration referred to in the summons and plaint, upon which the sole question in the motion turned, was as follows—"And it is hereby further agreed by and between the parties aforesaid, that it shall not be necessary for the said arbitrators to find specifically on each of the several issues in this cause, but that they shall be at liberty and have full power to make an award generally either for plaintiff or defendant."

The pleadings in the former action were as follows:—

Summons and plaint:—"Victoria, &c. Nathaniel M'Curdy, defendant, is summoned to answer the complaint of Hugh M'Lees, who complains that defendant, to wit, on 15th day of July, 1861, broke and entered certain land and premises of plaintiff situate at Ballyclough in the County of Antrim, and cut down and carried away certain grass and herbage of the plaintiff then growing thereon, to wit, of the value of £5, and took and carried away the same, and converted and disposed thereof to his own use. And also for that defendant converted to his own use plaintiff's goods, that is to say, certain grass and herbage, to wit, of the value of £5, to plaintiff's damage of £20. And plaintiff prays judgment against said defendant to recover the said sum of £20 and his costs of suit."

Defence—"The said defendant, Nathaniel M'Curdy, appears and takes defence to the action of the said Hugh M'Lees, plaintiff, and as to the first count in the summons and plaint says, that the land and premises in the said count mentioned were not the land and premises of plaintiff, as therein alleged. And for a further defence to the said count defendant says that he did the acts in the said count complained of, and every of them, by the leave and licence of plaintiff. And as to the second count of the said summons and plaint, defendant says that the goods therein mentioned were not the goods of plaintiff, as therein averred. And for a further defence to the said second count, defendant says that he did the acts in the said second count complained of by the leave and licence of plaintiff, and therefore he defends the action."

The award was as follows—"We find that the ground claimed by plaintiff belongs to the mill holding, and we find for plaintiff accordingly. We recommend that the banks of the stream be repaired and clearly defined on the east side. Dated, Bushmills, 14th August, 1862. David Wilson, John Woods, arbitrators."

The case was tried before Fitzgerald, B., at the

last Belfast Spring Assizes, and the jury, by direction of his Lordship, found for plaintiff for the sum claimed, the learned Baron reserving leave to defendant to move to have the verdict entered for him.

*Falkiner*, for defendant, having obtained a rule nisi accordingly,

*Harrison*, Q.C., (with him *Seeds*) for plaintiff, showed cause against the conditional order obtained that the verdict had for plaintiff be set aside, and instead thereof that a non-suit or a verdict for defendant be entered, or that a new trial be had on the ground of misdirection of the learned judge, or that the verdict for plaintiff be reduced from £45 11s. 5d. to £35 13s. 1d. pursuant to leave reserved. The only question is, was the alleged award an award, as it does not give damages to plaintiff though finding for him. It is a good award, for by the terms of the submission, the arbitrators are not bound to find specifically, but may make a general award unbound by technicalities.—*Jebb v. M'Keirnan* (Moo. & M. 340); *Strangford v. Green* (2 Mod. 228). I give up the other point as to the reduction of the verdict.

*Falkiner*, contra, for defendant.—This award cannot stand. It is the duty of arbitrators to award damages, and the clause in the submission relied on by plaintiff does not discharge them from what is a legal obligation.—*Morgan v. Thomas* (9 Jur. 92) cited in Russell on Awards, ed. 1856, p. 340, where other authorities are referred to. *Martin v. Burge* (4 A. & E. 973); *Wakefield v. Slanelly Railway and Dock Co.* (11 Jur. N. S. 456).

*Seeds*, in reply, relied on *Wood v. Duncan* (7 Dowl. 91); *Taylor v. Shuttleworth* (6 Bingham, N. C. 277).

*Cur. adv. vult.*

June 12.—The judgment of Pigot, C.B., and Hughes, B., was now delivered by

Pigot, C.B.—Courts of justice ought to consider what is the substantial matter, and reject what is formal, and thus give a reasonable construction to an instrument. In the present case the controversy is whether plaintiff or defendant is entitled to a small piece of ground. The action was for trespass *qu. cl. jr.* with a count *de bonis asportatis*. Defendant traversed the trespass and asportation, and pleaded also leave and licence. The controversy was referred for settlement to two arbitrators, who had power to appoint a third if they thought fit. The submission to arbitration provided that all costs should follow the event of the award, and there was a further provision in the following terms—"And it is hereby further agreed by and between the parties aforesaid that it shall not be necessary for the said arbitrators to find specifically on each of the several issues in this cause, but that they shall be at liberty and have full power to make an award generally either for plaintiff or defendant. The arbitrators entered on the reference, and made their award as follows—"We find that the ground claimed by plaintiff belongs to the mill-holding, and we find for plaintiff accordingly." To this was added a memorandum—"We recommend that the banks of the stream be repaired and clearly defined on the east side." The costs were taxed on the prin-

ple that this was a finding for plaintiff, and defendant refused to pay the costs, whereupon plaintiff brought an action to recover them. The action was tried before Baron Fitzgerald, who saved the point as to whether plaintiff was entitled to the costs, defendant contending that the award was not final, as the arbitrators did not award any damages. It is much to be lamented that the course was not adopted of making the submission a rule of Court—the Court might then have made an amendment in the award. We must now construe the submission. What, then, were the matters in controversy? Whether the mill-holding was the property of plaintiff. On that depended the decision of the issues. If the case had been before a jury, and they found for plaintiff, they must have given some damages, nominal at least, else the plaintiff would not have judgment: and costs under the statute of Gloucester, would only follow the damages. But here the submission gave power to the arbitrators to determine the question unbound by technicalities. We ought to construe the submission by considering the subject-matter. Plaintiff and defendant were farmers, whose land adjoined, and the law allowed them to refer the matter in dispute to unprofessional men, and I do not think it otherwise than natural to hold that the parties gave the arbitrators power to find generally, and thus the arbitrators would have done all that was required of them. I think the finding of damages was not required if the arbitrators thought it unnecessary. Suppose the arbitrators thought the land and herbage belonged to plaintiff, but that there was no appreciable injury done to him, and therefore awarded him no damages, would that be a bad award? It would be clearly within the terms of the submission, and this appears to me to be what the arbitrators have done. They derive their authority by consent of the parties, and are not bound to find damages if none have been sustained. *The Duke of Beaufort v. The Swansea Harbour Trustees* (8 C. B. n. s. 146) shows the disposition of Courts to hold an award sufficient when the arbitrators decide the question submitted to them, though in an irregular way. The following cases are in point also—*Gray v. Guennap* (1 B. & Al. 106); *Dunn v. Warblers* (9 M. & W. 293); *In the matter of arbitration between Brown and the Croydon Canal Co.* (9 A. & E. 523). I have entered into this question at some length, because I have considerable difficulty in the case, especially when I find that my brother Fitzgerald differs from me. On the whole, this award in substance determined the question in the case, and we must therefore hold it to be a good award. The verdict, therefore, will stand, but will be reduced to £35 13s. 1d., and we will give no costs of this motion, as both plaintiff and defendant have succeeded in part and have failed in part.

FITZGERALD, B.—I regret that I cannot concur in the judgment of the majority of the Court. I need only refer to the ground of my dissent, which is, that I am unable to find any provision in the submission enabling the arbitrators to dispense with the assessing of damages.

*Rule absolute for reducing the verdict, but without costs.*

## [BEFORE THE FULL COURT.]

FITZPATRICK v. MOYLAN.—June 8th.

*Practice—Motion to send back a case to the Master.*

*A case was referred to a Master for arbitration. He made his award in favour of A. but gave him no costs, though thinking him entitled to costs, because he did not know if he had jurisdiction to give costs. Upon motion to send back the case to the Master to certify in respect of the costs, Held that the matter should be sent back to him for that purpose.*

THIS was a complicated matter of account; there was also a cross-action of *Moylan v. Fitzpatrick*; both cases were by consent referred to Mr. Cathrew to arbitrate, and he made his report in favour of Mr. Moylan in both cases, but conceived that he had no jurisdiction to deal with the question of costs; and though he thought Mr. Moylan entitled to costs, yet was of opinion that the matter should be brought before the Court, that it might make the proper order.

Martin accordingly (with him Heron, Q.C.), for Mr. Moylan moved that Mr. Moylan might be declared entitled to have final judgment entered up in his favour in both causes, and that he might be declared entitled to his costs of the reference to the Master and his report; and, if necessary, that the report might be remitted to the Master to certify in respect of the said costs. Counsel moved on an affidavit of one Michael Reddin (who deposed to the facts as above stated), and relied on *Cross v. Cross* (13 C.B. n. s. 253); *Bell v. Postlethwaite* (5 E. & B. 695); *Caswell v. Grovcutt* (31 Law Jour. Exch. 361).

Palles, Q.C., contra for Mr. Fitzpatrick.—A case will not be sent back to an arbitrator unless his award has been clearly bad.—*Oldfield v. Price* (6 C.B. n. s. 539); *Phillips v. Evans* (12 M. & W., 309; C. L. P. Act, sec. 11); *Duke of Beaufort v. Swansea Harbour Trustees* (8 C.B. n. s. 146); *Leggo v. Young* (16 C.B. 626); *Hutchinson v. Shefferton* (13 Q.B. 955); *Cleary v. Cleary* (10 Ir. C. L. R. 329). The arbitrator did not make any affidavit.

Heron, Q.C. in reply.

PIGOR, C.B.—We must make the order. We are within the power given to us by the statute. We so hold upon the ground that the arbitrator has made a mistake, which is sufficient ground for sending the case back to him.

*Motion granted.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

**MAGNAMARA v. CAREY.**—May 8; June 22.

*Trustees—Marriage settlement—Recital in, of agreement to convey certain premises—Omission of conveyance thereof in operative part of deed—Omission to register deed.*

*A marriage settlement recited the title of M. the intended husband, to various properties, and then recited an agreement to settle all the said several properties upon the trusts of said settlement. The operative part, however, omitted two of said properties from the grant to the trustees. The intended husband was a solicitor, and he it was who had prepared the said settlement. C. one of the said trustees and the brother of the lady was a practising barrister, and it was in the petition alleged, but not proved, that he had acted professionally for his sister in the approval of the draft of the settlement. After the marriage, M. the husband mortgaged the very lands omitted from the operative part of the settlement, and they were lost. It was not proved that the trustee C. was aware of the omission of the lands from the settlement before the loss occurred after M's death. In a suit against C. as surviving trustee by the eldest son of M. to make him liable for the loss resulting from the omission of the lands from the settlement. Held—That C. was not liable for the loss.*

*A trustee is not liable for the non-registration in the Registry office of a deed conveying lands to him, when his attention has not been called to the fact of the non-registration thereof.*

THIS was a cause petition presented by the petitioner, Richard Francis Macnamara, against the respondents, Henry Carey, Esther Jane Macnamara, George Mathews, and Elizabeth Agnes Mathews, his wife, Sheffield Beetham and John G. Tatlow. The petition prayed that the trusts of a certain indenture of 9th of May, 1839, might be performed and carried into execution under the direction of the Court, and that it might be declared that Henry Carey had been guilty of breaches of trust, and that he might be removed from being a trustee of the same indenture, and for a reference to the Master to appoint two fit and proper persons to be trustees in the place of the said Carey, and of another trustee, named Smith, deceased, and that Carey might be ordered to procure proper conveyances to such new trustees, when appointed, of the several lands and premises agreed by the said indenture of settlement to be settled, including certain lands called the lands of Quilty, and the house No. 24 Gardiner's-place, free from any incumbrances charged thereon, by one Connell Wilkins Macnamara since the execution of the said indenture. The petition also prayed for a reference to the Master to inquire and report what loss had been occasioned to the trust estate, and which loss respondent, Henry Carey, might be ordered to recoup to the estate. The petition opened by stating that a certain indenture of

9th May, 1839, purporting to be a settlement made previous to the marriage of Esther Jane Carey with her husband, Connell Wilkins Macnamara, was executed by the parties to said indenture, being Connell Wilkins Macnamara, of the first part, Charlotte Macnamara, widow, of the second part, Esther Jane Carey, spinster, of the third part, and Francis Pratt Smith and Henry Carey, barrister-at-law, one of the respondents, of the fourth part. This indenture amongst other things recited that said Connell Wilkins Macnamara was under the last will of one Dillon Macnamara entitled to all and singular the interest which the said Dillon Macnamara had in the lands of Quilty in the County of Clare, producing a profit rent of £40 a year, and that he the said Connell Wilkins Macnamara was also entitled to the profit rent arising out of the house No. 24 Gardiner's-place, Dublin, and the estate, property, and interest of Dillon Macnamara in said house, and further recited that said Connell W. Macnamara was entitled to the reversion expectant on the death of Charlotte Macnamara in the dwelling-house and tenements known as "the twenty-six chimney House," with the lands thereto attached amounting to 40 acres, or thereabouts, situate at Rathmines, in the barony of Upper Cross and County of Dublin, and further recited that said Esther Jane Carey was entitled to certain premises in petition fully stated, and was also entitled to two sums of £1,000 and £700 each, and said indenture contained a further recital in the words following, that is to say, "And whereas a marriage is intended to be shortly had and solemnized between the said Connell Wilkins Macnamara and Esther Jane Carey, and whereas upon the treaty for said intended marriage, the said Connell Wilkins Macnamara and Esther Jane Carey respectively agreed to convey, settle and assure the said several lands, tenements, and premises whereof they are so respectively seised, possessed of and entitled to, as also the rents herein-before mentioned, to the several uses and upon and for the several trusts, intents, and declarations hereinafter limited and declared concerning the same," and it was agreed that the said sum of £1,700 should be paid over to the said Connell Wilkins Macnamara immediately upon the execution of said indenture. The petition then stated that said indenture of settlement was duly executed by Connell Wilkins Macnamara, Esther Jane Carey, Henry Carey, and by all the above named parties to said indenture—that the said sum of £1,700 was paid to Connell Wilkins Macnamara, and the said marriage was on the 11th May, 1839, duly solemnized between the said Connell Wilkins Macnamara and Ester Jane Carey. Of this marriage there was issue, two children, viz., petitioner, Richard Francis Macnamara, who attained the age of 21 on the 9th October, 1864, and the respondent, Elizabeth Agnes Macnamara, now the wife of the respondent, George Mathews, of Coolock House, in the County of Dublin, esquire, who attained her age of 21 on the 26th March, 1861. The petition then stated that Connell Wilkins Macnamara was, at the time of the execution of said indenture, and of the solemnization of said marriage, seised and possessed of all the said lands and premises of which he is in the same indenture mentioned to have been seised or possessed, and among others, that he was entitled to all and singular

the lands of Quilty, situate in the County of Clare, as held under and by virtue of an indenture of lease dated the 6th of November, 1782, for the residue of a term of 900 years, and producing a profit rent of £40 a year, and was also entitled to the house No. 24 Gardiner's-place, in the city of Dublin. That upon the treaty of the said intended marriage it was agreed between said Esther Jane Carey and Connell Wilkins Macnamara that the said lands of Quilty and the said house and premises in Gardiner's place should be granted and assigned to said trustees upon the trusts of said indenture, yet that the said indenture did not contain any clause directly granting or assigning the said lands of Quilty or the said house and premises in Gardiner's-place to the trustees thereof; but petitioner submitted that the aforesaid agreement to settle the same was binding in equity on the parties to the said settlement, and that according to the true construction thereof it should be held that the said lands of Quilty and the said house and premises in Gardiner's-place became, on the execution thereof, subject to the uses and trusts therein declared concerning the said lands and premises, and that under the covenants and agreements therein contained the said Connell Wilkins Macnamara could have been compelled immediately thereafter to grant and assign the said lands of Quilty, and the said house and premises in Gardiner's-place, to the trustees of the said settlement, upon the trusts aforesaid.

The petition then stated that the said Henry Carey, one of the trustees named in the said settlement, was the brother of the said Esther Jane Macnamara, and acted as her professional adviser and agent in and about the preparation of the said deeds, and did not employ any solicitor on her behalf, but allowed the said Connell Wilkins Macnamara, who was himself a solicitor, to prepare the draft of said indenture of settlement, and that he, the said Henry Carey, who was a barrister, approved of the draft on behalf of Esther Jane Carey, and acted with such negligence with regard to the settling, comparing, engrossing, and executing of the said indenture of settlement that he allowed the said lands of Quilty, and the said house and premises of No. 24 Gardiner's-place, to be left out of the granting part of said deed contrary to the agreement recited therein as aforesaid. That immediately after the execution of said marriage settlement the same was handed to said Henry Carey, and that the same remained in his possession for about two months, and during that period the said Henry Carey neglected to have same registered in the Registry of Deeds Office in Ireland, as petitioner submitted he was bound to do, and afterwards, contrary to his duty as such trustee, handed the original indenture of settlement after its execution, and unregistered, to the said Connell Wilkins Macnamara, to deal therewith, and with the lands and premises thereby granted and assigned, as he should think fit. Petitioner further charged that from the time of the execution of said indenture of settlement on the 9th of May, 1839, to the year 1843, said Henry Carey allowed the original indenture of settlement to remain in the hands of Connell Wilkins Macnamara, and beyond the control of him the said Henry Carey, without taking any steps to have the said indenture of settlement registered so as to pre-

vent the said Connell Wilkins Macnamara dealing with the said lands, and never took any steps to compel the said Connell Wilkins Macnamara in pursuance of his covenants and agreements in said indenture of settlement contained, to grant and convey the said lands of Quilty and the house and premises of 24 Gardiner's-place by a proper conveyance to the uses and upon the trusts of the said indenture of settlement as petitioner submitted he was bound to do, and said indenture was not registered until 10th of April, 1843. That said Connell Wilkins Macnamara taking advantage of the non-registration of the said indenture of settlement, by an indenture of mortgage bearing date the 27th February, 1841, and made between Wilkins Macnamara of the one part, and William Hopkins, of Fitzwilliam-square, Dublin, esquire, of the other part, he, the said Connell Wilkins Macnamara, in consideration of the sum of £500 therein mentioned to have been paid to him by the said William Hopkins, granted unto the said William Hopkins, his executors, administrators, and assigns, among other premises, the said house and premises known as No. 24 Gardiner's-place, and also the said lands of Quilty, containing by estimation 33 acres, situate in the barony of Irlanst and County of Clare, being the lands in the said indenture of settlement mentioned, to hold the same for a term of 800 years, to be computed from the date of the indenture now in statement, with a proviso for redemption on the payment of £500, and interest thereon at 5 per cent. as by same indenture of mortgage which was registered on 3rd of March, 1841, appears. That by a further indenture bearing date 18th October, 1841, the said Connell Wilkins Macnamara for the considerations therein mentioned, granted and assigned unto William Gibson, his executors, administrators and assigns, the said lands of Quilty, to hold to the said William Gibson, his executors, administrators and assigns, for the residue of the term of 900 years for which the said lands were held under an indenture of the 6th of November, 1782. That by another indenture of the 12th May, 1842, and made between Charlotte Macnamara, widow, of the first part, Connell Wilkins Macnamara, of the second part, George F. Woodroffe of the third part, the said Charlotte Macnamara and Connell Wilkins Macnamara, for the considerations therein mentioned, and according to their several estates and interests, granted unto the said George F. Woodroffe all the capital, messuage, dwelling-house, or tenement known as the six-chimney house, and the appurtenances thereto belonging, to hold to the said George Woodroffe, his heirs and assigns, being a lease of lives renewable for ever. The petition then stated that Francis Pratt Smith did not, to petitioner's knowledge, interfere with the preparation of said indenture; that he was long since dead, and died in insolvent circumstances, without having ever interfered with the said trusts in any way; that said Connell Wilkins Macnamara, having emigrated to Australia, was returning in the month of August, 1853, on board the ship Madagascar, bound from Melbourne to London, and that said ship was lost on her homeward passage, with all persons on board, including said Connell Wilkins Macnamara. The petition, which was of great length, stated a multitude of facts connected

with the case. The foregoing statement, however, is considered sufficient, the simple question being, was Carey guilty of a breach of trust or not.

Mr. Carey, the respondent, denied in his answering affidavit that the said deed of 9th May, 1839, contained any agreement to settle the lands of Quilty, or 24 Gardiner's-place, or at least that it contained any that could be enforced against the said Connell Wilkins Macnamara, or if it did that no obligation was cast on him (Henry Carey) to enforce same; and it was submitted that his duty as trustee was confined solely to the lands and premises purported to be conveyed to him by the said settlement; that he (Henry Carey) never acted as professional adviser or agent of his sister, Ellen Jane Macnamara; that she was then at the time of the making of said deed of full age; and that she and also respondent (Henry Carey) had implicit confidence in him, the intended husband, Connell Wilkins Macnamara, who was a practising solicitor. And he denied that he acted as her professional adviser; and alleged that though he might have seen the draft, he did not directly or indirectly interfere with the engrossing thereof, and that he was not bound so to do; and that he never caused the lands of Quilty or Gardiner's-place to be left out of the granting part of said deed; and when said deed was executed he was wholly ignorant of the omission complained of, and that as trustee he could not be held responsible for any act prior to the execution of said deed; and the omission must have been owing either to the default, breach of duty, or fraud of Connell Wilkins Macnamara, who was the solicitor selected by said Esther Jane Carey. And as to the non-possession of said deed by deponent, and the permitting of Connell Wilkins Macnamara to take possession of same, he submitted that said Connell Wilkins Macnamara being under said indenture tenant for life of all the properties included therein, he was entitled to the custody of said deed; and further, he submitted that it was not part of the duty of a trustee to see to the registration in the registry office of the settlement creating the trusts, which is an act which ought not properly to be done by a trustee personally, and that such act was and should have been performed by the solicitor of said Esther Jane Carey, viz. Connell Wilkins Macnamara.

*Ormsby, Q.C. Warren, Q.C. and Gamble*, were for the petitioners.—Mr. Carey, the respondent, who was a practising barrister, and who undertook the office of trustee, is brother of petitioner. He was bound to see to the registration of this deed in his capacity of trustee, and he was further bound to see to the reformation of the deed; and if those lands of Quilty and 24 Gardiner's-place were omitted from the operative part of the deed by the fraudulent act of Connell Wilkins Macnamara, yet even so the trustee Carey is responsible for such omission; and it was his duty to enforce the reformation of the deed; he did not do so, and is now liable for his neglect. In *Bostock v. Floyer* (1 Law Rep. Eq. Ser. 26) a trustee was held liable for the loss of a trust fund by the fraudulent act of his solicitor, although in employing such solicitor he might have exercised ordinary care and discretion—*Chaigneau v. Bryan* (10 Ir. Ch. 172). In *Les-*

*ter v. Lester* (6 Ir. Ch. 513) a trustee was held liable to make good any loss that accrued to the estate of the *cestui que* trust by reason of an omission to register a judgment as a mortgage. That case goes a great length when it will be remembered how perilous it is to deal with those judgment mortgages; but nevertheless the trustee was there held liable. In *Fenwick v. Greenwell* (10 Beav. 412) trustees were made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement. *Hobday v. Peters* (28 Beav. 603) that will be relied upon by the other side, is a case unworthy of consideration. The trustees there had covenanted to keep up a policy on the life of a man who had not a farthing, and of course they were not liable for the non-payment of the policy; but here they are clearly liable—*Ex parte Geaves in re Strahan* (8 De Gex, M'N. & Gord. 291). Beyond a doubt the court would have reformed this deed had the trustee but done his duty—*Halles v. Carr* (3 Sw. 638). On the operation of recitals in a deed see *Moore v. Magrath* (1 Cowp. 9).

*Brewster, Q.C., Palles, Q.C., and S. Walker*, were for the respondent, Henry Carey.—We admit that the trustee would be liable for a breach of trust the moment he became aware of the non-registration of the deed if he omitted to register it; but every trustee has a right to expect that everything has been properly done; the trustee had a right to expect that the very deed by which he was created a trustee was correct. There must be strong and conclusive evidence of mistake to persuade a court of equity to alter a settlement—*Alexander v. Crobie* (Lloyd & Gould. temp. Sugd. 145); *Bunbury v. Lloyd* (Jones & Lat. 638). In this last case Sir Edward Sugden, at page 675, says that a subsequent settlement will prevail over prior articles, which articles he took to be proved by the recitals in the settlement. The trustees are answerable only for whatever passed to them by the conveyance, and of anything beyond that they are ignorant; and as Quilty and 24 Gardiner's-place did not pass to the trustees, of course the trustee is saved harmless. Mr. Carey did not act as professional adviser. He was not bound to compare the draft with the engrossment; and as to the charge that he permitted the deed to remain with Connell Wilkins Macnamara, why he was, as tenant for life, entitled to the custody of the title deed—*Garner v. Hannyngton* (22 Beav. 627). There is not a single case in the books to show that a duty was cast upon the trustee to reform a deed and to register same. In *Young v. Smith* (Law Rep. Eq. Cases, 180), a marriage settlement contained a recital of an agreement that after acquired property of a wife should be settled, the corresponding operative part was merely a covenant by the husband alone without the usual words "it is hereby agreed;" and it was held that the covenant was not controlled by the recital, and was binding on the wife.

**June 16. THE LORD CHANCELLOR.**—In this case the petitioner seeks to make the respondent responsible for a breach of trust with regard to certain premises which were agreed to be put in settlement by a certain deed of the 9th of May, 1839. That settlement was made previous to, and in contemplation

of, the marriage of Miss Esther Jane Carey. This indenture was executed by the several parties thereto; by Connell Wilkins Macnamara of the first part; Charlotte Macnamara, widow, of the second part; Esther Jane Macnamara of the third part; and a Mr. Francis Pratt Smith and Mr. Henry Carey of the fourth part. This indenture deals with a number of properties which are recited therein, but the important ones are two in number—namely, Quilty, in the county of Clare, and a house at number 24 Gardiner's place in this city. By this indenture of marriage settlement it was agreed that those premises should be put into settlement. That agreement was not carried into effect, inasmuch as those premises were left out of the granting part of the deed. The petitioner also charged that the respondent, Mr. Carey, had neglected to have the deed registered as he was bound to do; and now, by reason of the deed being left unregistered, it appears that Mr. Connor Wilkins Macnamara took advantage of its non-registration, and nothing appearing on the registry, he mortgaged those premises as in the petition mentioned. Now, there is no necessity in going *verbatim* through all the facts which have been fully stated. I shall pass by the charges that Mr. Carey, who is a barrister, was his sister's legal adviser, inasmuch as Mr. Carey point blank denies that he acted as his sister's professional legal adviser in any way; and indeed this accusation, though made, is not supported. This charge of being professional adviser then is of no weight and is out of the case. The first question that I shall consider is, was Henry Carey as trustee bound to see and have this deed, which actually constituted him trustee, reformed? He says he knew nothing about the omission at all. These premises had been subsequently mortgaged for value; and if this settlement had contained the lands of Quilty and 24 Gardiner's place premises in the granting part thereof these premises could not have been mortgaged; that is, if the settlement had been then registered; so that the first material question has reference to the reformation of the deed. The question whether the recital in the deed of itself amounted to a contract on behalf of the settlers to settle those premises, and whether it was the duty of the trustees to have filed a bill to have enforced that settlement, I have considered. I think, under the peculiar construction of this suit, he could not enforce it. Could Connell Wilkins Macnamara himself have enforced it? He could not. He who had fraudulently kept out of the granting part of the deed what it was agreed to grant in the recital part, he, I say, could not call upon the trustees to enforce a reformation of this deed. The heir-at-law is the petitioner here and stands in the shoes of Connell Wilkins Macnamara. Well, those premises have been mortgaged by the very man who prepared the deed. The mortgagees were innocent parties; and, to use the words of Sir Edward Sugden in *Alexander v. Crook* (Lloyd & Gould, 149), a court of equity is always tender in varying a settlement when the effect will be to defeat vested rights. In like manner the case of *Migram v. Parry* (31 Beav. 215). Now in this case the heir-at-law and owner of those premises mortgaged them. That mortgage was made years ago, and for five and twenty years no complaint has

been made; neither has any complaint been made by Mrs. Macnamara from the time her husband was lost—for thirteen years. Apart, then, from the difficulties attending the reformation of the settlement, I am strongly inclined to think that if such attempt were made by Mr. Carey it could not be sustained. The next question I shall consider is the substantial one as to the non-registration of the deed. Now is the respondent to be made liable on account of the non-registration of the deed? "A trustee is only answerable for fraud or gross neglect; and therefore where trust-money is suffered by a trustee to remain in the hands of A. with the privity and approbation of the parties beneficially interested, instead of laying it out in a purchase pursuant to marriage articles, and A. becomes insolvent, the trustee is not in this case answerable—*Allen v. Hancock* (7 Brown, Par. Cas. 375)." Mr. Carey was ignorant for many years of the non-registration of this deed. I have heard the case now argued fully, and have considered the cases that have been cited attentively, and I must hold that the respondent is absolved from the charge of absolute negligence. Now, as to constructive negligence, this is the first attempt that has been made to fasten on a trustee to whom the conveyance of the premises, for the purposes of the trusts, has been made, the duty of employing a solicitor of his own to see that the conveyance to him was registered. I have not heard in the course of the argument any such case put, and that although the Registry Act is in operation for one hundred and fifty years—*Lester v. Lester* (6 Ir. Chan. 513) has been relied upon for the petitioner. There the trustee was made liable for an omission to register a judgment as a mortgage. That case is quite different from this. It was there the duty of the trustee to see that the affidavit was properly registered as a mortgage. It was not registered, and that owing to the trustee's neglect; but here it was the very deed constituting him trustee that was unregistered. *Luther v. Bianconi* (10 Ir. Ch. 194) was where "L. on his marriage gave a bond and warrant to the trustees of his settlement upon trust, when the trustees should think fit and expedient so to do, to levy the amount and hold it for the uses of his settlement. No judgment on the bond was ever entered, and the amount of the bond was lost; and it was there held that the discretion conferred on the trustees was not absolute, but to be controlled by the Court; and that the circumstance that the enforcing the bond might have been injurious to L.'s credit as a trader, and have lost him various situations did not justify him in omitting to enforce the bond." Now, that case is not a parallel case with the one we are now considering. The distinction is plain there. The trustees not alone had discretion to act but knew they had the discretion; in fact the trustees were perfectly aware of the facts, but here the case is that they were ignorant of the omission, and even ignorant of the non-registration. In *M'Gachan v. Drew* (15 Beav. 84) "trustees were made liable for not taking the proper steps to get trust funds transferred with their names." There also the trustees had acted negligently. If a trustee has done all that he could do he shall be held harmless. So in *Clark v. Hollins* (19 Beav. 362). A



number of cases have been cited against trustees, but I have not heard a single one that goes the length sought for here, that a trustee is liable to see to the registration of the deed appointing him trustee. I shall then dismiss this petition, but I shall not give costs.

## Rolls Court.

Reported by H. W. B. Mackay, Esq., Barrister-at-Law

IN RE M'CAY, SOLICITOR.—May; July 3.

*Costs—Taxation—Solicitors' Act—Special circumstances.*

*A petition for taxation (presented more than twelve months after the bill of costs was furnished) by one of two trustees behind the back of his co-trustee—Refused, although the solicitor had commenced an action at law against the petitioner alone.*

THIS was a petition under the Solicitors' Act, 12 & 13 Vic. c. 53, that it might be referred to one of the taxing masters to tax the bill of costs furnished by William M'Cay, solicitor to William Hayes, the petitioner, and to take an account of credits to which William Hayes or one Obadiah Willans, his co-trustee, might be entitled, and strike a balance; and that William Hayes and Obadiah Willans might be ordered to pay the amount, if any, which should be found due on such ascertainment, after all credits, within one fortnight after taxation; And to tax the costs of the reference, &c.: And that on payment by William Hayes and Obadiah Willans of any balance due by them William M'Cay might be ordered to hand over to them all deeds and documents in his custody or power belonging to them: And that he might be restrained from proceeding, pending such reference, with an action at law hereafter mentioned brought by him in relation to the said bill of costs. The affidavit of Mr. Hayes stated that he had on behalf of himself and Captain Willans, as his co-trustee, placed certain deeds, constituting an equitable mortgage, in the hands of Mr. M'Cay, with instructions to look after their interests; and that Mr. M'Cay subsequently instituted proceedings in the Landed Estates Court, and on the 25th September, 1864, furnished deponent with a bill of costs on foot of the proceedings, debiting him and his co-trustee with £140 3s. 3d.; and on the 21st of January, 1865, furnished him with two other bills of costs, the one on foot of proceedings in the Landed Estates Court debiting them with £4 2s. 3d., and the other on foot of proceedings in a bankrupt matter debiting them with £8 3s. 6d. That deponent applied to Mr. M'Cay not to press for payment until certain funds in the Landed Estates Court should be distributed; and the latter induced him to believe that this would have been acceded to, but that he was afterwards (25th January, 1866) furnished with a writ of summons and plaint for recovery of the first bill of

costs, without, however, any claim being made on foot of the others. That Captain Willans resided at Aldershot, and was the brother-in-law of Mr. M'Cay; and that he had been made no party to the proceedings for recovery of the costs, nor even, as deponent believed, furnished with the bill. Mr. M'Cay also filed an affidavit stating that the sum part of which was invested on the security of the equitable mortgage, had been raised under the powers of a marriage settlement and received by Mr. Hayes alone, Captain Willans having merely joined in receipt for the sake of conformity. That after receipt of this sum Captain Willans never in any manner interfered with or controlled the disposal of it, which was altogether managed by Mr. Hayes without the privy or sanction in any way of Captain Willans; and that the account rendered to the *celleux que trustent* was in the handwriting of Mr. Hayes. That Captain Willans never gave deponent authority to act professionally for him in the matter, but, on the contrary, stated to deponent that Mr. Hayes having lent the money of the equitable mortgage on his own responsibility and without his (Captain Willans') knowledge or sanction he would not interfere in the matter, but leave it altogether to Mr. Hayes to recover that portion of the trust fund as he might think proper. That deponent had only been the brother-in-law of Captain Willans from March, 1864; that nearly three and a-half years elapsed after the termination of the proceedings in the Landed Estates Court before the bill was furnished; that application had been made for payment to Mr. Hayes but without effect; and that proceedings in the action at law had been stayed from time to time at his request on the understanding that he was about to come to a settlement. Mr. Hayes filed a further affidavit stating that Captain Willans co-operated in the disposal of the sum lent on mortgage; and that Mr. M'Cay was the solicitor of Captain Willans, and was aware of the nature of the investments, and had examined the accounts and received the interest on one of the loans. A letter from Mr. M'Cay to Mr. Hayes was put in, in which he admitted having received an account admitted by the *celleux que trustent*.

*F. W. Walsh, Q.C.*, for Mr. Hayes, cited Morgan on Costs, 320; *Re Strother* (3 K. & J., 518); *Re Nicholson* (3 De G. F. & J., 93, 102); *Lockart v. Hardy* (4 Beav. 224).

*Berkeley, Q.C.*, and *Vereker*, for Mr. M'Cay objected that the proceedings were being taken behind the back of Captain Willans, whom, nevertheless, it was proposed to charge with costs, and cited Morgan's Chancery Orders, 11 med. On the question of special circumstances required (section 2) by the Act, he cited Morgan's Chancery Orders, 19.

THE MASTER OF THE ROLLS commented strongly upon the injustice of refusing the prayer of the petition; but reserved the question in order to consider the authorities; and on July 3 made the following order:

It is ordered that no rule be made on the said petition, the bill of costs having been delivered more than twelve months; and having regard to the provision in the statute that no reference to tax shall be made after the expiration of twelve months after the bill of costs shall be delivered, sent, or left with the client, except under special

circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made; and no such special circumstance having, in the opinion of the court, been shown according to the cases decided in England, and, amongst others, to the case of *Re Strother* (3 K. & J. 518). And it is further ordered that the petitioner do pay to the respondent, William Macartney M'Cay, the costs of this motion and order.

## Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

THE QUEEN AT THE PROSECUTION OF JOHN M'CARTHY  
v. THE JUSTICES OF THE PEACE IN AND FOR THE  
COUNTY OF CORK.—May 26.

*Game Laws—Summary jurisdiction of magistrates—  
"Setting dog"—Statutes 10 W. 3, c. 8; 27 G. 3,  
c. 35 (Ir.)*

*Magistrates have no jurisdiction under statutes 10 W.  
3, c. 8; 27 G. 3, c. 35 (Ir.), to convict summarily  
for keeping a "setting dog."*

THIS was a motion to make absolute a conditional order that a writ of certiorari should issue directed to the Justices of the Peace in and for the County of Cork, to remove into this Court, for the purpose of being quashed, all and singular records of conviction of whatsoever trespasses and contempts whereof John M'Carthy was at Petty Sessions held for the Mallow Petty Sessions district of said county on the 28th November and 12th December, 1865, convicted on the complaint of one James Hartnett, for having and keeping a certain dog, on the ground that the grounds that the said conviction was made without and in excess of jurisdiction, and that the said conviction was insufficient, and disclosed no offence the subject of summary jurisdiction, or for which justices of the peace at Petty Sessions had jurisdiction to impose a pecuniary penalty, or the penalty mentioned in the said conviction, and that there was no evidence to warrant the said conviction.

From the affidavit of the prosecutor it appeared that he was, on the 17th November, 1865, summoned to appear before the justices at Petty Sessions on the complaint of one James Hartnett, which complaint stated the prosecutor, "on the 10th day of November, 1865, at Raham in said county, did have and keep a certain dog called and being a setting dog, the same not being a whelp under the age of twelve months kept at nurse for persons qualified within the statute in such case made for the having the same, he, the prosecutor, not then having an estate of freehold in his own or his wife's right of the yearly value of £100, the former currency of Ireland, equal to £92 6s. 1½d. sterling, present currency, or a personal estate of the value of £1,000 of said for-

mer currency of Ireland, equal to £923 1s. 6½d. sterling, present currency, nor being a person allowed or licensed thereunto by the justices of the peace of the County of Cork at any general quarter sessions of the peace held for the county where he then lived, nor being in any other manner whatsoever qualified, empowered, licensed, or authorised by law, to have or keep the same for himself or any other person, contrary to the statutes in that case made and provided, whereby he had forfeited the sum of £4 12s. 3½d. sterling, present currency." The affidavit then further stated that the complaint came on after a postponement to be heard at Mallow on the 28th Nov.; that the complainant, James Hartnett, swore that on the day named in the summons he saw the prosecutor, M'Carthy, with a dog and gun on the lands of Fiddane, and not of Raham, as stated in the summons, and that he had seen the dog set. On cross-examination, however, he admitted that he was thirty years of age, that he never was the owner of a pointer, hound, beagle, greyhound, land spaniel, or setting dog, and could not tell the difference between any or either of them. The only other witness examined for the complainant was Captain William Harris, who proved that he had on a former occasion shot over the dog in question, and that he saw said dog set partridge, but on cross-examination the said William Harris admitted that he knew a terrier dog to set partridge, and the said William Harris would not swear what breed the said dog was, but admitted that he would not call a terrier a setting dog. The affidavit of the prosecutor then stated that the said dog was not a pointer, hound, beagle, greyhound, or land spaniel, but was a dog which set game, and was of a species and breed totally different from either a pointer, hound, beagle, greyhound, or land spaniel, and he said that it was not and could not be proved that the said dog was either a pointer, hound, beagle, greyhound or land spaniel. He went on in his affidavit to say that no evidence was offered by the complainant that the prosecutor (defendant below) was not a properly qualified person to have said dog. The solicitor for the prosecutor submitted that the justices had no jurisdiction to convict summarily. The magistrates submitted a case to the law adviser upon the variance as to place between the summons and the evidence, but refused, though asked, to submit the whole case to his opinion; and the law adviser having given his opinion that the variance was not material, the magistrates, on the 12th December, convicted the prosecutor of the offence mentioned in the summons, and ordered him to pay a fine of £4 12s. 3½d. sterling, to be applied and distributed according to law, that was to say, 10s. thereof to be paid to said James Hartnett the informer, and the remainder thereof to the Crown, the said fine to be paid within one month from the date of conviction, and in default of payment of said sum, to be levied by distress and sale of the defendant's (below) goods if need were. The prosecutor then went on to say that before and at the time of the alleged offence he was duly licensed by the excise to kill game, and that at the time of the said alleged offence he was merely walking over his own lands with said dog and gun at Fiddane aforesaid.

*William Johnson* for the prosecutor.—The conviction for keeping a setting dog is not good, as the magistrates have no summary jurisdiction in that case. The question turns on the statutes 10 Wm. 3, c. 8, and the 27 G. 3, c. 35. The second section of the first-mentioned Act provides that "no person or persons whatsoever, not having an estate of freehold in his own or his wife's right of the yearly value of £40 at the least, or a personal estate of the value of £1,000 at least, over and above all debts by him owing either for himself or as a servant to any other, unless he be such servant as hath no other way of livelihood for his wages from such person, have or keep any hound, beagle, greyhound, or land spaniel within this kingdom, other than and except whelps under the age of twelve months, which shall be kept as nurse for persons qualified within this Act for the having the same, on pain that such hound, beagle, greyhound, or spaniel so kept contrary hereunto, shall or may be seized or taken away by any justice of the peace of the respective counties where the same shall be so kept, or by any person or persons authorised thereunto by warrant under the hand and seal of such justice of the peace, or by any person having a freehold of the yearly value of £30 or upwards within such county, which justice of the peace and freeholder respectively seizing such hound, beagle, greyhound or spaniel, may detain the same to his and their own uses, or otherwise dispose of the same as they shall think fit; and all and every person or persons so keeping such hound, beagle, greyhound or spaniel contrary hereunto, and being thereof convicted before some justice of the peace of the county where such offence shall be committed, on the oath of one or more credible witness or witnesses, which oath such justice of the peace is hereby authorised to administer, shall for every such offence forfeit and lose the sum of £5, to be levied by warrant of such justice of the peace before whom such offender shall be convicted; by distress and sale of the goods of such offender, returning the overplus (if any be) to the party distrained on—the one moiety thereof to the informer who shall prosecute for the same, the other moiety to be issued for the use of the poor of the parish where such offence shall be committed." That section specifies certain dogs, among which "setting dogs" are not included. Then section 10 of the same Act enacts "that no person or persons not having an estate of freehold of the yearly value of £100 or upwards, or a personal estate of the value of £1,000, shall have or keep any setting dog or bitch, other than such person or persons as shall be allowed and licensed thereunto by the justices of the peace of the county where he shall live, at the general quarter sessions of the peace to be held for such county next after Christmas in every year, in order to the making and training up setting dogs or bitches; and that under such regulations only, and not otherwise, as shall be allowed and specified in such license." The twentieth section keeps up the distinction between different classes of dogs. It provides "that nothing herein contained shall restrain any person within any manor from keeping hounds, beagles, greyhounds, spaniels, or setting dogs within the same to hunt, course, bet with, or otherwise use in such manor," &c. Under this statute the justices have no

power to convict summarily. If the matter violated be of private right, the party injured may bring his action; if of public right, the party is guilty of a misdemeanor, and may be indicted.—2 Inst. pp. 131, 165. "Whosoever anything is prohibited by a statute, the party grieved shall have his action upon the statute, and the offender shall be for his contempt fined and imprisoned." Then stat. 27 G. 3, c. 35, s. 8, recites that by the 10th section of the 10 Wm. 3, c. 8, "it is enacted that no person or persons shall have or keep any setting dog or bitch under the qualifications and regulations therein particularly mentioned," and it enacts "that no person or persons shall have or keep any pointer, hound, beagle, greyhound or land spaniel, other than and except such person or persons as by the said Act may have or keep any setting dog or bitch, and under and subject to the same qualifications, regulations and penalties." But there is no penalty named in the Act of Wm. 3 for keeping a "setting dog or bitch." The conviction here merely states that the party did keep a setting dog, and that being so, the only jurisdiction which the magistrates had was to take informations and send them forward.

*Heron, Q.C.* for the prosecutor below, contra, to support the conviction.—Some effect must be given to the concluding words of s. 8 of st. 27 G. 3, c. 35, and the best way to do it is by extending the penalty given in s. 2 of st. 10 Wm. 3, c. 8, to the case of a setting dog mentioned in s. 10. [*Fitzgerald, J.*—Surely the section of the Act of G. 3 does not alter the law as to setting dogs, whatever it may do as to others.] *Mr. Longfield*, in his book on the Game Laws, p. 31, puts the construction which I contend for on these Acts. [*O'Brien, J.*—*Mr. Levinge*, in his book on the Game Laws, expresses an opinion the other way.] The effect of the 8th section of 27 G. 3, is to put the animals mentioned in the 10th section of the 10th Wm. 3 under the same sanction as those mentioned in s. 8 of 27 G. 3. All are put together under the same qualifications and penalties. [*O'Brien, J.*—All are put under the same qualifications and penalties, but those are the qualifications and penalties given in the case of setting dogs.] Then, the effect will be that the penalties given in s. 2 of 10 Wm. 3, vanish altogether. [*Fitzgerald, J.*—I do not see the difficulty of holding that the Act of 27 G. 3 intended to place the dogs mentioned in it under the same qualifications as those mentioned in s. 10 of the 10th Wm. 3. The stat. 27 G. 3, s. 10, does not alter the law as to setting dogs, but it says as to the other dogs mentioned in it that no one shall keep them except those qualified to keep setting dogs.] I say that as the qualifications are the same for both classes of dogs, so the penalties should be the same.

THE COURT held that the certiorari should go; the order was made by consent to bring up the conviction and quash it without further argument, and the prosecutor was declared entitled to his costs.

**THE GRAND JURY OF THE COUNTY OF DUBLIN v. THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.—June 2.**

*Grand jury—Presentment—Liability of township to county charges.*

*A township in the county of Dublin held not exempt from contributing to the cost of repairing a pier situate in the county and outside the township.*

THE single question in this case was as to the validity of a presentment made by the grand jury of the county of Dublin, by which the district of Rathmines was made liable to contribute to the expenses of repairing a pier at Rush, in the said county. The Commissioners of the Rathmines and Rathgar Township were of opinion that their district was not liable to contribute to such a part of the county expenditure as this: the case had stood over from time to time, and now by consent came on to be argued before the Court upon the single question above stated.

*Jellett, Q.C.*, for the commissioners.—The grand jury had no right to place this charge upon this district. Previous to the passing of the local Act by which Rathmines and Rathgar were constituted a township—namely, the Statute 10 & 11 Vic. c. 253 (local and personal)—this district in common with other portions of the county was subject to the General Grand Jury Act. The Dublin Grand Jury Act, statute 7 & 8 Vic. c. 106, made special provisions for the county of Dublin. Section 13 of that Act enables the grand jury to present sums of money to be raised off the county at large for the building and repairing of court-houses and sessions-houses. The following sections contain the other public works for which presentments may be made on the county at large, being milestones, fever-hospitals, and dispensaries, and lunatic asylums. Section 53 empowered the grand jury to present either on the county at large or on particular baronies for building or repairing bridges, gulleys, &c. Section 55 and the following provide for presentments for roads, which are to be made on the baronies. Then came the Rathmines Local Act of 1847, 10 & 11 Vic. c. 253 (local and personal), which incorporated the Towns Improvement Clauses Act of 1847, 10 & 11 Vic. c. 34. By section 28 of the Local Act it is enacted that after its passing the county grand jury is “not to make presentment for the making or maintaining of any road or bridge, or any other work within the said district which the said commissioners are hereby authorized and empowered to make or maintain; and that in consideration of the said district being hereby made chargeable with the cost of making and maintaining the roads, bridges, and other works which the said commissioners are hereby authorized to make and maintain within such district, it shall not be chargeable with the cost of making or maintaining any other like works within the county or barony, save and except those, the cost of which, under the 7 & 8 Vic. c. 106, are chargeable upon the county at large.” Section 48 of the Towns Improvement Clauses Act enacts that the commissioners are to be surveyors of

highways within the limits of the special Act, “and the inhabitants of the district within the said limits shall not, in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate.” Then comes the Act under which this presentment was made. Under previous statutes piers and harbours had been vested in the Commissioners of Public Works. This was altered by statute 16 & 17 Vic. c. 136, sections 7 & 8 of which gave the commissioners power to transfer these works to the grand juries of counties, and empowered the grand juries to present for the repairs of those works sums of money to be raised “off the county at large, or any barony or baronies therein.” The warrant transferring the pier in this case to the grand jury was dated the 25th of February, 1854. But this Act being subsequent to the Rathmines Local Act and to the Towns Improvement Clauses Act, cannot avail to place any part of this charge on the township, although the presentment is one to be levied off the county at large. As to the effect of general words in a general Act of Parliament to control the words of a special Act, see *Fitzgerald v. Champneys* (2 Johns. & Hem. 31). All Acts of Parliament, the effect of which is to impose a new burden on any place, must be expressed in such clear and unambiguous words as to leave no doubt of the intention of the Legislature.—*Shaw v. Ruddin* (9 Ir. C. L. R. 214), *Mahony v. Wright* (10 Ir. C. L. R. 420). The meaning of the 10th section of the 10 & 11 Vic. followed up by the 30th section of the first local Act is to show that it was intended that this district should be exempted from all expenses generally chargeable except such as would be thrown on the county at large. Section 23 of 25 Vic. c. 25 (local and personal) enacts that “the grand jury shall not have any jurisdiction, &c. with respect to making or maintaining roads and bridges within the district which are to be maintained by the commissioners at the cost of the district;” and the grand jury shall not have any jurisdiction, power, or authority with respect to any other work within the district. Section 25 enacts that “after the commencement of this Act the grand jury shall not make any presentment for the making or maintaining of any bridge or other work within the district, and the district shall not be chargeable with the cost of making or maintaining any road, bridge, or other work within the district.”

*Brewster, Q.C.*, and *Robert O'Hara*, for the grand jury.—Sections 47 & 48 of the Towns Improvement Clauses Act show that that Act is confined to roads and streets, and extends to nothing else. The Rathmines local Acts are confined in a similar way. Except so far as those Acts extend, the township is part of the county. For the purpose of crime and police it is part of the county. The recital in the Act 10 & 11 Vic. c. 253 (local and personal) shows that intention of the Legislature. The district is made a township for purposes of paving, lighting, &c. By section 30 the grand jury is to make out a separate warrant for the district, leaving out the matters from which it

is exempt. The Piers and Harbours Act was passed on the 20th August, 1853; on the 25th February, 1854, the warrant was issued placing the repair of this pier upon the county rates. Then in 1862 the second Rathmines Act was passed. Section 23 of that Act must be read with reference to the works which by the other Acts the grand jury is disabled from executing within this district. If the section was to be construed literally, the grand jury could not erect a lunatic asylum, or a bridewell, or a court-house within the district; and those are works for which the commissioners have no power to tax the district. The charge for the county surveyor would be payable out of this district as well as out of any other district of the county but for section 26 of the 25 Vic. c. 25 (local and personal), which is a legislative declaration to that effect. Section 25 of the first Rathmines Act contained a similar exemption. An opposite doctrine to that of the cases cited on the other side will be found in *The Central Gas Consumers' Company v. Clarke* (13 C.B. n. s. 838). Upon the meaning of the words "other works," which occur in some of these sections, *The King v. Mosely* (2 B. & Cr. 226); *Laudiman v. Breach* (7 B. & Cr. 96); and *Kitchen v. Shaw* (6 Ad. & Ell. 729), are important.

JELLET, Q.C. replied.—The most that can be argued is that the district is chargeable with such works as are chargeable on the county at large. This is a work which the grand jury has a right to present either on the county at large or on any barony.

LEFFROY, C.J.—We are of opinion that Rathmines is not exempt.

O'BRIEN, J.—The question in this case is certainly one of importance, not only as to this, but as to similar taxes which might be imposed from time to time. It is the manifest object of the first Rathmines Act of 1847 to give the commissioners certain powers, and then the 25th section recites the fact that under the 7 & 8 Vic. c. 106 the grand jury of the county of Dublin "at each presenting term are authorized and empowered to make presentment for the making and maintaining of roads and bridges within the said county, comprising the district included in this Act. And whereas the making and maintaining of such works within the said district are by this Act transferred to the said commissioners, and the expenses thereof made chargeable upon the rates hereby authorized to be levied by the said commissioners upon said district, be it enacted that from and after the passing of this Act it shall not be lawful for the grand jury of the said county to make presentment for the making or maintaining of any road or bridge, or any other work within the said district, which the said commissioners are hereby authorized and empowered to make or maintain; and that in consideration of the said district being hereby made chargeable with the cost of making and maintaining the roads, bridges, and other works which the said commissioners are hereby authorized to make and maintain within such district, it shall not be chargeable with the cost of making or maintaining any other like works within the county or barony, save and except those the cost of which under the said Act of the seventh and eighth years of her Majesty's reign are chargeable upon the

county at large." That is, that the powers given to the commissioners are taken from the grand jury, and in consideration of what is referred to, what is done? The district shall not be chargeable with the cost of making or maintaining "any other like works." There is the exemption. Now, the words "like works" refer not only to the class of roads and bridges, but also the class of works which the commissioners are entitled to make. The power of making roads and bridges is taken away from the grand jury and given to the commissioners. The commissioners are authorized to make them, to raise the funds, and therefore the Rathmines district is exempted from any charge for works such as they are thereby empowered to make. If this section stood alone the case would be almost too clear for argument. We should construe the words "other like works" as words *ejusdem generis*, because the Act of Parliament shows that it extends to works that the commissioners are obliged to make. Then, going to the exception, what does it do? Assuming that Mr. Jellett is well founded in his argument that the exemption of works chargeable on the county at large refers not to works that it was discretionary to the grand jury to throw on the county or barony, but to presentments and works exclusively chargeable on the county at large, assuming that, can that have the effect of extending the exemption? Then, is there anything in the subsequent provisions? We now come to the subsequent Act of 1862. In the interval had passed the Act 16 & 17 Victoria, which gave the grand jury a discretionary power to charge the costs of these piers on the county at large or on the barony. Well, then comes the Act of 1862, and I was struck at first with the 25th section. It is almost impossible to construe that section in its strict terms; for, if so, it would exempt the Rathmines district from all kinds of works of all descriptions. It is impossible to say it can be pushed to that extent. Are we violating the terms of the Act of Parliament by not doing so? The 2nd section provides in express terms that the two Acts are to be read together. That shows that we are to look to the whole of the two Acts to construe the 25th section, and are not to construe it in a manner totally inconsistent with the first Act.

FITZGERALD, J.—I too am of opinion that Rathmines is not exempt. For all general purposes this district remains a part of the county at large, subject to the liabilities of the county at large, save where it is exempted. I am clearly of opinion that it is not exempt from its proportion of the charge in question, and I adopt and follow the reasons given by my brother O'Brien. In fact, I very much adopt the argument of Mr. Brewster.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ARMSTRONG v. FORTESCUE.—June 2.

### Libel—Interrogatories.

*In an action for libel, the plaintiff having applied for leave to furnish interrogatories to the defendant, the Court refused to allow the following interrogatories to be exhibited. 1. Whether the defendant ever saw or read the writing complained of, or ever corresponded, communicated or conversed with any person in relation to it? 2. Whether any person to the knowledge or belief of the defendant ever read said writing? 3. Whether the defendant composed or caused to be composed and transmitted or delivered said writing to any person? 4. Whether the defendant caused lithographed copies of said writing to be made, and if yea, what became of said copies?*

In this case, the pleadings in which will be found in the present volume of the IRISH JURIST, p. 129, the defence having been since amended pursuant to the order of the Court there reported, the plaintiff applied to the Court for leave to exhibit to the defendant the following interrogatories:—

1. Whether the defendant ever saw or read the writing complained of set forth in the writ of summons and plaint, or did he ever correspond or communicate or converse with William Jones Armstrong, Edward Burke White Venables, or any other person or persons, and whom, in relation to said writing. If yea, set forth such correspondence, communications, and conversations, and state when same respectively took place.

2. Did any person or persons, and whom, (*sic*) and at or about what time or times, to the knowledge or belief of the defendant, ever read or peruse said writing or any copy thereof, or of any part thereof?

3. Did the defendant compose or cause to be composed said writing, and did he send, or transmit, or deliver, or cause to be sent, transmitted, or delivered, said writing, or any copy thereof, by post or by hand, or otherwise, to any person or persons, and if yea, let the defendant set forth the names of the several persons to whom, and the times when said writing was sent, transmitted or delivered, or caused by him to be sent, or transmitted, or delivered?

4. Did the defendant cause any and what number of lithographed copies of said writing to be made, and if yea, whom did he employ to make said copies, what became of said copies, and where are they respectively to the defendant's knowledge or belief? did the defendant at any time and when, send or cause to be sent by post or otherwise, to any person or persons, and whom, any and what number of lithographed copies of the said writing?

The following affidavit to ground the motion had been made by the plaintiff and his attorney.

John Tew Armstrong, of No. 15 Lower Dominick-street, in the county of the city of Dublin, one of the attorneys, and the plaintiff in this action, and John Thomas Hinds, of No. 28 Westmoreland-street, in

the county of the city of Dublin, attorney for the plaintiff in this action, severally maketh oath and saith, and the said plaintiff for himself saith that he has been for the last thirty years and upwards an attorney and solicitor, having an extensive practice, and still is an attorney and solicitor, practising in the city of Dublin, and said plaintiff saith that the libel, the subject of the present action, was on or about the 13th day of June, 1865, received by him through the Post Office from the defendant in the form of a letter bearing date the 12th day of June aforesaid, signed by the defendant, in the defendant's own handwriting, and addressed by him to plaintiff, and this deponent has been informed and believes that the defendant caused lithographed copies of said letter to be struck off, and that he sent several of said copies to the mutual friends of the plaintiff and the defendant, some of whom are the plaintiff's clients, although this deponent does not know to whom said copies were sent, except so far as same is admitted and disclosed by the defences filed by the defendant; and the plaintiff saith that immediately upon his discovering that such circular letter had been prepared by the defendant, plaintiff, on the 28th day of June, 1865, wrote and sent to the defendant a letter containing in reference to the said libel the following passage—"I had at first intended not to reply to it, but as I have reason to believe that you have had lithographed copies of it sent amongst our mutual friends and my clients, it is absolutely necessary that I should reply to it. I must also request you to furnish me with names of the several persons to whom you sent copies of your letter, that I may also furnish them with my reply to you." That by letter bearing date the 3rd day of October, 1865, received in due course by plaintiff from defendant, defendant states as follows:—"I have but to add in conclusion that I have not sent copy of my letter of the 12th ult. to any of your clients," and plaintiff further saith that by a letter written and sent by him to the plaintiff on the 5th day of July, 1866, the plaintiff stated in reference to said libel as follows:—"Your answer to that is, that you did not send copy of your letter of the 12th ultimo to any of my clients, I have now to request you to inform me to whom you sent copies of your letter." And plaintiff saith that defendant gave no reply whatever to said last letter, and saith that the said defendant and plaintiff are near relations, and the relations, friends and acquaintances of both parties are mutual and intimate friends and acquaintances, and deponent verily believes that the defendant had the said lithographed or circular letter composed and prepared with a view to circulating same among the friends, acquaintances, clients, and others of the said plaintiff; and plaintiff says he believes that such circular letter was in fact circulated by the defendant amongst the persons aforesaid; and plaintiff saith that it is material and necessary for enabling him to have a fair trial in this action that he should obtain the discovery sought by the interrogatories herein, and that it is not and will not be in the power of the plaintiff to procure such information unless through the aid of interrogatories as proposed by plaintiff; and the said John Thomas Hinds for himself saith that he has been advised, and he believes it to be true, that it is material that the plaintiff, for a fair trial of this action,

should be furnished with the information aforesaid, and the said plaintiff and the said John Thomas Hinds jointly make oath and say that the said plaintiff will derive material benefit in this cause from the discovery which he seeks by the interrogatories which he requires to be delivered in this cause, and that we believe the plaintiff has a good cause of action upon the merits in the present cause.

*Heron, Q.C.* (with him *Macmahon*) in support of the application, cited *Donohoe v. Thompson* (10 Ir. Jur. N. S.)

*Dowse, Q.C.*, and *Tandy, contra*.—This is a different case from *Donohoe v. Thompson*. The interrogatories sought to be exhibited here are fishing interrogatories. They are too vague. They would tend to criminate the defendant. The plaintiff cannot now assign, because he has taken issue on these publications. There is no demurrer here. Notice of trial has been served.—*Tupling v. Ward* (6 H. & N.); *Sterne v. Sevastopolo* (14 C. B. N. s. 737); *Keaney v. Tottenham* (unreported); *Baker v. Lane* (3 H. & C. 544); *Hawkins v. Carr* (14 W. R. 148) *High v. Butterfield* (5 B. & Smith); *Robson v. Crawley* (2 H. & N. 766); *McMahon v. Ellis*.

*Macmahon* in reply.—[*Monahan, C. J.*—How do you distinguish this case from those English cases?] *Bartlett v. Lewis* (12 C. B. N. s. 249) decides that whatever question may be put to a witness, though he may refuse to answer it, may be exhibited as an interrogatory, though the party may refuse to answer it. No case goes so far as *Donohoe v. Thompson*. [*Monahan, C. J.*—The action there was not brought for any personal act of the party; it was for false imprisonment. *Keogh, J.*—Does not this appear to be a very different sort of action, an action of libel? You, knowing of no other publication, are to search the defendant's conscience as to his private transactions.] The plaintiff swears he believes the defendant did publish the libel. [*Keogh, J.*—No more was done in *Donohoe v. Thompson* than was done in *Sterne v. Sevastopolo*. The jurisdiction of the Court was admitted.] The marginal note in *Macmahon v. Ellis* is not correct.

*Cur. adv. vult.*

June 5.—The Court refused to allow the interrogatories to be exhibited.

[CORAM MONAHAN, C. J., KEOGH, J., AND O'HAGAN, J.]

LEWCH v. COEINGER.—June 5, 6.

*Fraudulent conveyances*.—10 Chas. I. (Ir.) sess. 2, c. 3.

*C. who held a farm of lands under D. his landlord being in arrear for a half year's rent, D. with the knowledge that a judgment had been obtained against C. by a creditor accepted from C. a surrender of the farm* Held—That D. was not liable to penalties under 10 Chas. I. (Ir.) sess. 2, cap. 3.

The first count of the summons and plaint complained

that up to and for a long time previous to the 7th of April, 1865, one Matthew Daly, then of Kippagh, in the county of Cork, was possessed of or entitled to and interested in as lessee under a lease thereof in certain lands, tenements, and hereditaments, to wit, the lands of Kippagh, in the county of Cork, of great value, to wit, of the yearly value of five hundred pounds; and the plaintiffs averred that the said Matthew Daly being so possessed of, entitled to, and interested as aforesaid in the said lands, tenements, and hereditaments, became and was indebted to the plaintiffs in a large sum of money, to wit, the sum of sixty-nine pounds eight shillings and sixpence, being the amount of a judgment theretofore recovered by the plaintiff against the said Matthew Daly. Nevertheless the plaintiff averred, that the said debt being still unpaid, and the defendant, well knowing the premises, collusively and in contravention and in violation of the statute in such case made and provided, and to the end, intent, and purpose to delay, hinder or defraud the plaintiffs, then being such creditors of the said judgment debts, was party to a fraudulent conveyance of the said estate and interest in the said lands, tenements, and hereditaments from the said Matthew Daly to the said defendant by a deed in the nature of a surrender of said lease or assignment of said lands, tenements, and hereditaments, duly executed under the hand and seal of said Matthew Daly, and which deed bears date on or about the 7th day of April, 1865. And the plaintiffs averred that afterwards and without the plaintiffs having been paid their said full debt, the defendant did wittingly and willingly put in ure, maintain, and justify said deed and conveyance to the intent before stated, as true, simple, and made *bona fide*, and upon good consideration, contrary to said statute; and the plaintiffs averred that they were the parties aggrieved thereby, whereby an action had accrued to the plaintiffs to demand and have for her Majesty the Queen, and for themselves of and from the defendant, being a party to said deed and conveyance, one year's value of the said lessee's estate and interest in the said lands, amounting to the sum of £500, one moiety thereof to be for her said Majesty, and the other moiety for the plaintiffs.

The second count, to save prolixity, prayed that the entire of the first count might be read as if incorporated in and forming part of it, save and except the words "did wittingly and willingly put in ure, maintain, defend, and justify the said deed and conveyance to the intent before stated, as true, simple, and made *bona fide* and upon good consideration;" and that in lieu of said words might be read the words "did alien or assign the said lands, tenements, and hereditaments, or a part thereof."

The defendant pleaded to each count of the summons and plaint—1. That the defendant was not collusively, or in contravention or violation of the statute in that behalf, or to the end, interest, or purpose in the said counts respectively mentioned, party to the conveyance therein also respectively mentioned; nor was the said conveyance fraudulent, nor had the defendant such knowledge as in the said counts respectively is alleged. 2. That the plaintiffs were not at the time of the commencement of this action the par-



ties aggrieved within the meaning of this statute 10 Chas. 1. sess. 2, cap. 3.

The following were the issues:—1. Whether the first defence is true in substance and fact? 2. Whether the plaintiffs were at the time of the commencement of this action the parties aggrieved within the meaning of the statute as alleged? The case was tried before O'Hagan, J. at the Spring Assizes for the city of Cork. The action was brought to recover penalties under the provisions of 10 Charles 1. sess. 2, cap. 3; and the main question to be tried was—whether or not a deed of assignment on surrender of a lease of a farm of lands in the county of Cork called Kippagh, executed by one Matthew Daly in favour of the defendant, and dated 7th April, 1865, was or was not accepted by defendant in contravention of that statute. At the trial the defendant produced on subpoena a lease of the lands dated 4th May, 1859, made by one James Moore to the said Matthew Daly, which was an ordinary farm lease of seventy-five acres, at £65 per annum, for a term of lives still in being. It was admitted that Daly held this farm under that lease till the date of the assignment. The defendant then produced the assignment of 7th April, 1865, which appeared to have been prepared by the defendant himself, who was an attorney and solicitor. The plaintiff, John Lynch, proved that he was the husband of the co-plaintiff, and that in March, 1864, the co-plaintiff had recovered a verdict against the said Matthew Daly at the Cork Spring Assizes. An attested copy of the judgment, which bore date 24th March, 1865, was produced, the amount being £69 8s. 6d. The plaintiff proved that Daly was then in possession of the farm of Kippagh, and that it was then well stocked; that immediately afterwards Daly sold off all his stock and left the farm, and that the plaintiffs were never afterwards able to realize the amount of their verdict. The defendant's agent proved the following correspondence between himself and the defendant in relation to Daly's farm:—

Millstreet, March 26th, 1865.

Wm. R. Copinger, Esq., Cork.

Dear Sir,—I have been speaking to your tenant, Mat. Daly; he is in great trouble of mind. He has removed all the cattle off the lands, and feels you have a right to distrain all property left behind in order to save you in the rent. He is determined, with your assistance, to manage so that they shall not benefit by his farm by trying to dispose of his interest in it. He is of opinion that the only way he can do so is to surrender the lease and give you possession; then to procure you a tenant of undoubted solvency who will pay the amount due on the farm at present, you giving a fresh term. Can this land be really sold, it being held for lives and not for years. For your own sake it behoves you to be active in this matter, as poor Daly does not—as I can clearly see—want to keep your land, or have you at a loss. It would be a great calamity if this Lynch could by any chance get into the farm. Yours truly,

JEREMIAH HEGARTY.

Offices, 54 South Mall, Cork,  
27th March, 1865.

Dear Sir,—I am in receipt of yours of yesterday.

My anxious wish would be to assist Daly in every way in my power, but he must not expect me to do any act that would compromise me as a gentleman, or place me in the power of those Lynches; and if I were now to take a surrender of his farm and re-let it to his nominee, it would be a moral fraud; for much as I deplore Daly's present position, he must not expect me to do what is wrong. I will not distrain his goods now on the farm for rent only due upon Saturday; what would the world say to me if I did such an act? If Daly finds that he cannot hold on his farm, and is willing to surrender it to me absolutely and without any contingent promise or arrangement, I'll take up the farm and forgive him the rent now due; and I think that if he means to act fairly and justly towards me, he ought to do this. I would most willingly assist him if I could, but you must upon a moment's reflection see how improvident it would be for me to place myself in the power of these Lynches. If Daly is prepared to give an absolute surrender of the farm with a virtual possession, I'll send down to you a surrender for him to execute.

Yours,

W. R. COPINGER.

The witness also proved the contents of a memorandum from himself to the defendant, left at the defendant's office in Cork on April 1st, 1865, to the effect that Daly was about to abandon the farm, and urging the defendant to accept a surrender from him. In reply to this the defendant on receipt of it wrote the following:—

Offices, 54 South Mall, Cork,  
1st April, 1865.

My dear Sir,—I am in receipt of yours of yesterday. I regret I did not see you, but was so much engaged in Court that I could not leave for a moment. With respect to Daly's farm, I am resolved to do no act for which anyone can attach blame to me. I would feel myself fully justified in taking a surrender of Daly's farm and forgive him the present rent, but if I was to pay him a penny it would be said I acted improperly, and no matter what the loss will be I'll not have that said of me. If Daly gives me an absolute unequivocal surrender of the farm I will accept of it; and should I hereafter receive any fine for it, I will of my own accord make him a present of any sum I receive over the half year's rent, or over what will recoup me. Beyond that I cannot and will not go. I am sorry indeed that he is obliged to leave the land, for I always heard, and particularly from yourself, that he was a very honest man; but I am sure he won't think worse of me by not compromising myself in the transaction.

Offices, 54 South Mall, Cork,  
3rd April, 1865.

My dear Sir,—I am afraid this Kippagh is turning out an unfortunate business with me. If this unfortunate Daly cannot get anything for his farm I think he is acting prudently to surrender it. I'll make him no promise directly or indirectly, but if he surrenders the farm to me absolutely, I'll forgive him the rent he owes me; but privately I tell you that if I manage to let the farm, and receive a fine for it, I'll give him of my own accord any sum over the March rent now

due; but this you are not to tell him, for I hold out no inducement to him to obtain a surrender the lands. What I am now doing is legal and proper, and out of that course I'll not travel. I send herewith a deed of surrender and memorial for execution by Daly if he is still of the same mind to surrender his farm, but I'll not accept a partial surrender. It must be an unequivocal surrender with an absolute possession. In requiring this it is not with any feeling of distrust for the man I require it; but if I was to take from him a deed of surrender and allow him to remain in possession, I might by-and-by be wrongfully charged with accepting a mere fictitious surrender of the farm; and as I conveyed to you before, I'll not put myself in the power of anyone whatever; I must be above board and straight. If the man is prepared to give up the farm, then let him execute the deed and memorial in the presence of two witnesses; and I shall ask you kindly to be one of them, and get Daly to read the documents first; and when he gives up the possession you will please put a man in care of the farm. If there are any labourers' houses on the farm, get the possession of them also, and put them back as caretakers. Yours ever,

W. R. COPINGER.

The defendant's counsel called upon the judge to nonsuit the plaintiffs, but after some discussion withdrew his application and went into evidence. The defendant was examined and deposed that he had no fraudulent intention in taking the assignment, or any other intention, but to get his land when he could not get his rent, which was in arrear for six months. Upon cross-examination he deposed that he knew of the verdict against Daly; that he refused to set the lands after the surrender to Daly's father for fear he might be supposed to be acting in collusion with Daly; that he afterwards set them to one O'Reardan at a rent of £70, and received a fine of £40, and gave £10 to Daly. At the close of the defendant's case the plaintiffs' counsel called on the learned judge to direct a verdict for the plaintiffs as the defendant's intention was of no consequence in the matter, which he refused to do, and charged the jury, calling their attention to the terms of the statute, and telling them that the defendant would be liable to the penalties, civil and criminal, imposed by the 11th section if the impeached instrument had been executed with any of the intents and purposes specified in the 10th section; and that if it had not been executed and accepted with any of those intents or purposes they should find against the plaintiff. That it was material to them to consider whether the defendant's object was to defeat the execution, or to serve himself by taking a surrender *bona fide* upon a release of the rent in arrear from a defaulting tenant; and that if he had the latter object and took the surrender from the tenant *bona fide*, making it for such a consideration, he was not liable to penalties under the statute. The plaintiff's counsel called on the learned judge to tell the jury that if the defendant had notice of the intended fraud of the tenant, and, having such notice, drew and accepted the surrender—even for his own benefit—they should find for the plaintiff, which he refused to do. The jury found for the defendant. In the

Easter term following the plaintiff's counsel obtained an order for a new trial on the ground that the verdict was against evidence and the weight of evidence, and on the ground of misdirection by the learned judge, against which

Clarke, Q.C. (with him Jellott, Q.C., and W.M. Johnson) showed cause.—If a man who is in debt and has a judgment entered against him, and expects an execution to come down upon him, sells his property *bona fide* to me, and I buy it *bona fide*, and I am quite aware that this is done for the purpose of avoiding payment of a debt, that act is protected. *Wood v. Dixie* (7 Q.B. 892) is now considered a leading case.—*Riches v. Evans* (9 C. & P. 640); *Clarke v. Wright* (6 H. & N. 849); *Hall v. Omnibus Saloon Co.* (4 Drury, 492); *Darvill v. Terry* (6 H. & N. 807). The whole question is—was the sale intended to be *bona fide*?

Heron, Q.C., and Keogh in support of the order.—There were two English Acts passed in the reign of Elizabeth, both of which are included in the one Irish Act of Charles I. Deeds purely voluntary are void as against subsequent purchasers, and notice in that case is immaterial.—*Doe v. Manning* (9 East. 59) followed in *Gardiner v. Gardiner* (12 Ir. C. L. R. 565). A deed is fraudulent if intended to defeat creditors, and if the assignee is cognisant of that intention. In the one statute there are the words—"not having notice of such fraud," &c., but in the statute which refers to purchasers these words are omitted. The other parts are the same. So the 3rd section in the Irish Act which has the saving clause as regards purchasers has no words about notice; and that is the distinction between that section and the fourteenth, the one respecting creditors. So 3 & 4 Wm. 4, c. 27, s. 26. All these statutes are only declaratory of the common law. Section 11 of the statute of Charles I. is the section which gives this action; section 10 avoids the conveyance. The same state of facts gives the action against both grantor and grantee. *Bona fides* means the intention really to pass the estate. There are the three elements necessary to validate the assignment, good consideration, *bona fides*, and the absence of notice; that runs down through all the legislation. In the cases cited on the other side the party had no notice of the fraud. *Wood v. Dixie* is law. [*Monahan, C.J.*—The language of that 14th section is very general.] The two English Acts are put into one. The second Act, 13 Eliz. c. 5, begins at s. 10 of the Irish Act. A creditor has a greater protection than a purchaser.—*Holt v. Kelly* (13 Ir. L. R. 33; 1 Ir. Jur. 118); *Butcher v. Harrison* (4 B. & Ad. 129); *Cresswell v. Coates* (3 Dyer, 351 b); *Allen v. Stear* (Cro. Eliz. 645). [*Keogh, J.*—Your argument would apply equally to *Wood v. Dixie*.] *Wood v. Dixie* decides that a mere intention to defeat creditors will not invalidate the deed. If this surrender had been sent by post it would have been good. The cases before *Wood v. Dixie* decided that a mere intention to defeat creditors was sufficient to invalidate the deed. [*Keogh, J.*—The fallacy that seems to pervade your argument is this,—that an intention to defeat creditors is fraud]—*Stevenson v. Newnham* (13 C.B. 285). If the intention were to put the property of a party in a course of distribution amongst his creditors it would not be fraudulent: but it would if, as

here, it was not with a view of distribution (for there were no other creditors), but to deprive the plaintiff of the result of the verdict the law gave him. [*Keogh, J.*—That has been held not to be fraud.]

*Jellett, Q.C.* was not called on.

*MONAHAN, C.J.*—That an assignment for the purpose of defeating the creditor, though *bona fide*, might be within the mischief of the statute, was thought for a considerable time, but *Wood v. Dixie* established a contrary doctrine. *Wood v. Dixie* decided that if made with the intent to defeat creditors, still, if *bona fide* and not a mere pretence, such an assignment is not void within the statute. The jury have found here that Mr. Copinger's object was to get payment of his debt and to get up his land. I do not see that even that question need have been left to them.

*O'HAGAN, J.*—Upon the authorities I think I put the case too strongly for the plaintiff, for I asked the jury what were the defendant's motives. My charge, if erroneous, was so rather against Mr. Copinger than otherwise.

*KEOGH, J.* concurred.

*Rule discharged.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

*DROUGHT v. DROUGHT.*—June 1.

*Demurrer—Estoppel—Recitals in a deed.*

*A recital in a deed of the absence of incumbrances on an estate, is of the vendor only, and does not bind the vendee.*

THE summons and plaint was as follows:—*Victoria, &c.*—*Frederick Drought*, the defendant, is summoned to answer the complaint of *Robert Seymour Drought*, the plaintiff, who complains that by indenture bearing date the 30th day of August, 1854, made between the said defendant of the first part, *Isabella Drought* of the second part; and *Jane Drought* of the third part, defendant, for the consideration therein mentioned, granted, bargained, sold, aliened, assigned, released, and confirmed to the said *Jane Drought*, her heirs and assigns, the lands, hereditaments, and premises described in the said indenture, to hold the same unto the said *Jane Drought*, her heirs and assigns; for the term in the said indenture mentioned; which term is still subsisting, subject nevertheless to the payment of two-sixth parts of the yearly rent and fines for renewal by the original lease of 24th October, 1894, in said indenture mentioned, reserved and made payable in respect of the premises conveyed by said indenture, and also subject to a certain sub-grant or sub-release of the 3rd day of September, 1785, in said indenture also mentioned. And the said *Frederick Drought* did by the said indenture covenant for himself and his heirs with the said *Jane*

*Drought*, her heirs and assigns, in manner following, that is to say, that save and except the payment of the said yearly rent and fines for renewal and the said sub-grant or sub-release, the said lands, hereditaments, and premises thereinbefore granted, sold, and released were not, nor was any of them, subject or liable to any former or other gift, grant, release, or assignment, or any judgment, recognizance, or incumbrance of any nature or kind whatsoever; and the said *Jane Drought*, by indenture bearing date the 28th day of March, 1859, granted, bargained, sold, assigned, released, and confirmed to the said plaintiff, his heirs and assigns, the said lands, hereditaments, and premises in the said first-mentioned indenture mentioned, and all the estate and interest of the said *Jane Drought* therein subject as aforesaid, and plaintiff entered into said lands and premises, and became and was, and continually hath been, and now is, possessed thereof, and seised of and entitled to all such estate and interest in the same as the said *Jane Drought* had; and although, after the making of the said first-mentioned indenture, and previous to the making of the said last-mentioned indenture, the said *Jane Drought*, and since the making of the last-mentioned indenture plaintiff respectively, did all things necessary to be done on their behalf respectively, or to be done or performed by them respectively according to the tenor and effect, true intent and meaning, of the said first-mentioned indenture; yet the said lands, hereditaments, and premises were, at the time of the making of the said first-mentioned indenture, and from thence continually hitherto, and during the continuance of the said term have been, and still are, subject and liable to another and former incumbrance, other than and different from the said yearly rent and fines for renewal; and the said sub-grant or sub-release, namely—to a certain annual rent charge of £10 of the late Irish currency, which is equivalent to £9 4s. 7½d. of the present currency, charged upon the said lands and payable thereout to one *Anne Clancy*, otherwise *Drought*, by reason of all which matters aforesaid the said lands and premises are of much less value, to wit, less by the sum of £300 to plaintiff, than they otherwise would be, and he hath not been able to sell, and hath been prevented from selling the same for so large a price, or so advantageously as he otherwise might have done; and plaintiff has not only been compelled to pay, and has paid divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £119 10s. 5d. on foot of the said yearly rent charge, but hath also been obliged to pay, and has paid, the costs and charges sustained by the said *Anne Clancy*, otherwise *Drought*, in prosecuting a certain suit in Equity, for the recovery thereof, which amounted to a large sum of money, to wit, the sum of £10. And so defendant, although often requested so to do, hath not kept the said covenants, so by him made as aforesaid, but hath broken the same; and to keep the same with plaintiff, hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of plaintiff of £300.

*Defence.*—The said *Frederick Drought* appears and takes defence to the action of the said *Robert Seymour Drought*, plaintiff, and says that he, the said

defendant, never executed the alleged deed, alleged to bear date the 30th day of August, 1854, in the summons and plaint mentioned. And for a further defence to the said alleged cause of action, in plaint mentioned, defendant says, admitting for the purposes of this defence the making of the said indenture of 30th August, 1854, that the said lands, hereditaments, and premises in said indenture mentioned, were not nor was any part of them, at the time of the making of the said indenture, nor at any time since, nor are they now subject or liable to the other and former incumbrance, or to any part of same, in said indenture stated, namely—to the annual rent-charge of £10 of the late Irish currency, in the said summons and plaint mentioned, and alleged therein to be payable to one Anne Clancy, otherwise Drought. And for a further defence to the said alleged cause of action in plaint mentioned: defendant says, admitting for the purposes of this defence the making of the said indenture of the 30th day of August, 1854, that plaintiff ought not to be permitted to say that the lands, hereditaments, and premises, in said indenture mentioned, were, at the time of the making of the said indenture, and from thence continually hitherto, have been and still are subject and liable to the annual rent-charge of £10 of the late Irish currency, agreed to be charged on said lands, and payable thereout to one Anne Clancy, otherwise Drought; because defendant says that heretofore and before the execution of the deeds or either of them, in the plaint mentioned, and which said deeds are deeds by indenture, one Frederick Drought being seised in fee of the lands in said indenture described, did, by his will bearing date 22nd September, 1802, devise all his interest in said lands to two trustees upon trust, to the use of his, the said Frederick Drought's, wife, for the term of her natural life, and from and after her death, in trust, to the intent and purpose to permit and suffer his, the said testator's, grand nieces, Eliza Drought, Isabella Drought, Morris Drought, and Anne Drought (being the person in the plaint called Anne Clancy, otherwise Drought), during their respective lives, to have, receive, and take the several sums or rent-charges of £10 each, of the then currency during their respective natural lives, over which said annuities their respective husbands should have no manner of power or division, and subject to said annuities; the testator devised said lands to the use of his grand nephew, the defendant, and to his heirs and assigns for ever; and defendant says that save under the said will the said annuitants or any of them had no title to said respective annuities, or any part of same; and defendant says that the said Frederick Drought and his wife died before the execution of the indenture of the 30th day of August, 1854, in the plaint mentioned; and that afterwards, and before the execution of said indenture, the said defendant entered into possession of the said lands, and remained in possession thereof until the execution of the said indenture; and defendant says in the said indenture, are contained the words following, that is to say—"And whereas of the said four annuitants (meaning the said Eliza Drought, Isabella Drought, Morris Drought, and Anne Clancy, otherwise Drought) Isabella Drought, party hereto, is now the only survivor, and all the gales and arrears

of the three of the said annuitants, which, by reason of the death of said three other annuitants, have ceased to be payable, have been fully paid and satisfied." And in the said indenture are also contained the words following, that is to say—"And whereas the said Isabella Drought, for the purpose of enabling him (meaning defendant) so to do at his (meaning defendant's) request, hath agreed to release the same (meaning the said lands) from the said annuity to which she is entitled, which is now the only one of the said four annuities, chargeable and payable out of the said part of the said lands." And defendant says that the said Isabella Drought, by said indenture, released said lands from said charge to which she was entitled; and that the said indenture is signed with the respective proper names, and in the handwriting of defendant; and of the said Isabella Drought, and of the said Jane Drought, and sealed with their respective seals, and was delivered as the act and deed of the respective parties thereto; and defendant says that the said Jane Drought afterwards, to wit, on 28th day of March, 1859, conveyed by indenture (being the indenture in plaint secondly mentioned), under her hand and seal, all her estate and interest in the said lands, under said indenture of the 30th day of August, 1854, to plaintiff, and which indenture of 28th March, 1859, was executed by plaintiff, under his hand and seal; and defendant avers that the said Jane Drought and the said Isabella Drought and defendant, did by the said deed of 30th day of August, 1854, severally admit and acknowledge the truth of the statements in said indenture, and hereinbefore set forth, and in the said last-mentioned indenture contained; and for the reasons aforesaid that the said plaintiff, as the assignee of the said Jane Drought, by the said indenture of 28th March, 1859, is estopped from saying, and ought not be permitted to say, that there are any such causes of action as in said plaint alleged, and ought not to be permitted to aver that the said annual rent-charge or any part of same, alleged to be payable to said Anne Clancy, was, at the time of the execution of said indenture of 30th day of August, 1854, or of the said indenture last-mentioned, or at any time since an existing charge on said lands or any part of same, and therefore defendant defends the action.

Replication and demurrer:—As to the 1st and 2nd pleas of said defendant, by him above pleaded, the said Robert Seymour Drought, plaintiff, traversing the same and the several matters therein respectively stated and alleged, takes issue thereon respectively. And as to the plea of defendant, by him above thirdly pleaded, the said R. S. Drought says, that the same does not disclose any defence to the said summons and plaint, or to the cause of action, or claim of plaintiff, therein set forth good in substance, because according to the true construction of the said indenture of 30th August, 1854, in the said summons and plaint, and 3rd plea mentioned and referred to, the said recitals in said indenture contained; and in said plea set forth do not nor does either or any of them contain, nor are they, nor is any of them, the statements of all the parties to the said indenture, but on the contrary thereof, contain and are the statements of the said defendant, Frederick Drought, the vendor only, and by

which he alone is bound. And also because the said recitals, or either or any of them, not containing statements of plaintiff, or of any person or persons through whom he derives or with whom he is in privity; plaintiff is not in any wise bound or estopped by the said recitals, or either or any of them, or by the matters contained in them or in any of them.

*E. Kelly* (with him *J. E. Walsh*, Q.C.) for plaintiff, opened the demurrer.—The recital is of one party only—the vendor—and cannot bind plaintiff. The authorities are collected in *The Duchess of Kingston's case* (2 S. L. C. 706); *Stronghill v. Buck* (14 Q. B. 781); *Edwards v. Brown* (3 Y & J., 423); *Hayne v. Maltby* (3 Term R., 438); *Young v. Raincock* (7 C.B., 310).

*Buchanan* (with him *Dowse*, Q.C.), contra, in support of the plea.—The recital is the recital of both parties and binds plaintiff.—*Baker v. Dewey* (1 B & C., 704); *Bowman v. Taylor* (2 A & E., 278); *Bringloe v. Goodson* (5 Bing. N.C., 738); *Rowntree v. Jacob* (2 Taunt., 141); *Hill v. Manchester Water Works* (2 B. & A., 544); *Beckett v. Bradley* (7 M. & G., 994); *Re Foreyth* (11 Jur. N.S., 213).

*Dowse*, Q.C., on same side.

The cases cited on the other side are distinguishable from this.

*J. E. Walsh*, Q.C., was not called on to reply.

*Pigott*, C.B.—The rule in cases such as this is stated by *Patteson*, J., in *Stronghill v. Buck*. Defendant's argument carries its own refutation with it; he has expressly excepted some incumbrances and covenanted against others. This is the first instance I have known, in all my experience, of an attempt to shake the covenants in a purchase deed by estoppel. Such covenants are expressly made to guard against the possible failure of the recitals. The case is too plain to make it necessary for us to review the authorities.

*Demurrer allowed.*

[BEFORE THE LORD CHIEF BARON, FITZGERALD, B., AND HUGHES, B.]

REYNOLDS v. KINSELLA.—June 11th.

*New trial motion—Way of necessity.*

*A: brought an action against B. for disturbance of a right of way. B. traversed plaintiff's right to the way. Plaintiff swore at the trial that he had no other way by which to bring his cars, and that it was a way of necessity. The jury found for plaintiff.*

*Held*—(Fitzgerald, B., dissentiente)—*On motion for a new trial or to enter a verdict for defendant, that it was more satisfactory to direct a new trial though plaintiff had proved a prima facie case.*

*This was an action for disturbance of a right of way. It was tried before the Lord Chief Justice at the last*

*Assizes for the Queen's County. The summons and plaint contained one count which stated that plaintiff was possessed of certain lands, premises, and a messuage therein, together with the right of turbary upon the bog of Garrymore, and was entitled to a right of way from the said lands, premises, and messuage over a certain close to the said bog and back again from the bog over the close to the said lands, premises, and messuage for himself and his servants on foot, and with horses, cattle, and carts, at all times of the year. And the count then stated the disturbance. Defendant filed 4 defences. 1. That plaintiff had not the right of turbary as alleged. 2. That plaintiff was not entitled to the right of way as alleged. 3. A traverse of the obstruction. 4. That plaintiff trespassed on defendant's close outside the way which defendant prevented, which are the grievances. Plaintiff at the trial put in the following deeds. A lease dated May 4th, 1789, whereby George Sandes demised to Andrew Delaney (plaintiff's grandfather on the mother's side), part of Kilcavan in the Queen's County then in his possession, containing 54 acres, be the same more or less, giving and granting sufficient turbary in the most convenient part of the said bog of Garrymore for Andrew Delaney, his executors, administrators, and assigns, and their under tenants, with liberty to and from the high road to draw same. To hold from May 1st, 1789, for 61 years. A lease of May 31st, 1794, whereby George Sandes demised to Lawrence Reynolds (plaintiff's father, son-in-law of Andrew Delaney) part of the lands of Garrymore and Kilcavan, called "The Old Street," and a large field east of the Old street for the lives of three persons (all since deceased); and the lease provided that if a house were built on the demised premises there is sufficient turbary to be allowed on Garrymore bog. The premises demised by this lease were different from those in the lease of May 4th, 1789. A lease of January 30th, 1860, whereby William Stephen Sandes demised to Andrew Reynolds, the plaintiff, the lands in both the former leases of May 4th, 1789; and May 31st, 1794, together with other lands (all which lands were described in a map on the lease), together with a right of turbary and hog mould for the use of the said Andrew Reynolds, his executors, administrators or assigns only, and to be consumed and made use of on the said demised premises, and not elsewhere, the same to be procured at and taken from such part of Garrymore bog, and in such quantity as the said lessor, his heirs or assigns, or his or their agent for the time being shall from time to time point out and approve of, with liberty for the said Andrew Reynolds, his executors, administrators, and assigns, to draw the said turbary only from the high road through a field in Kilcavan, now occupied by William Pigott.*

*Plaintiff examined.*—Andrew Delaney was my mother's father; he and my mother are dead; my grandfather was the lessee of Kilcavan; my father (Lawrence) married Andrew Delaney's daughter, and built a house when he got possession; my father and myself are in possession of Kilcavan 50 years; through all that time turf was cut by us on the bog of Garrymore; we drew it home by the way now in dispute, we had another road out of the bog; it is marked yellow on the map from B. to F., it went to the low

part of the same bank, and was cut away by defendant; I have no way of drawing from the low part of the bank: in drawing turf from B. to F. I always had a wide space that I made myself with gravel and scutch grass; I used to have a great many carts; I made a road wide enough for five or six carts. I loaded my cars there with the turf. At letter B. I made a bridge; the cars would pass over that bridge on their way to my house; from that they would go over Pigott's field to my house. All the time I can remember, the horses went that way. Since the yellow road was destroyed, I have no other way to go; the best part of the road was gravelled within a few perches of the bog. All that period I never was dispossessed of or interrupted in it.

Plaintiff also gave evidence as to the disturbance.

Cross-examined.—Under the lease of May 4, 1789, I cut till the lease expired. The lease of 1794 relates to totally different lands. The lease of 1860 comprises the lands in the lease of 1789, and the lands in the lease of 1794, and other lands in addition. The lives in the lease of 1794 are all dead. The last died 13 or 14 years ago; they died before 1855. Before the lease of 1860 I claimed myself the bottoms, where the road in question now is. I claimed the soil of it myself. I was served with a notice to quit (notice produced); can't recollect the service of any other notice. Turpin's letter was written shortly after I caught young Kinsella. I told Turpin my road was cut away. Mr. Sandes' free bog adjoins the bank where I cut; it is all Mr. Sandes' bog; it extends up to the bridge.

Re-examined.—My father and I cut away down to our bank, and as we cut we kept possession, and used the cut away bog till defendant got the lands. The notice to quit only mentioned the lands of Garrymore. I gave up the bottoms, reserving to myself the privilege of the roads and bottoms. I had no other way for bringing my turf.

To a juror.—From the yellow mark I gave up possession of the cutaway bog when served with the notice to quit. I said to the driver, "I'll keep possession of the road and turf bank." I gave up the cutaway bog and grove, reserving the road and liberty to get to my bank. I had no other way of getting to my bank; they took in the cutaway bog in the lease of 1855. The landlord never questioned my right.

George Parkinson examined.—I live at Garrymore. As long as I have known the road the Reynolds used it. I went with my father to demand possession of cutaway bog; he demanded possession of the cutaway bog, and the grove, and the road and high banks from Mr. Reynolds. The road is the road in dispute; Reynolds said he'd give up the grove and cutaway bottoms, but not the road nor the banks. Mr. Pigott wrote to take possession; it is now narrower, he can't use it compared to the way he did use it. Possession was given to Kinsella of all but the road and the bank.

On cross-examination, witness stated that if Mr. Sandes made a road over his bog plaintiff could go by it and the bog without passing the road in question, and that Mr. Sandes' bog extends so that such a road could be made.

Edward Keelan.—I know the road now in dispute;

Mr. Reynolds used it for drawing his turf. I know the place where he used to carry his turf; I saw Kinsella's men, one of them digging them convenient to the road. I saw the place where the road was gravelled. Reynolds cannot draw as well now as he used before the road was made narrow. It is narrower than it was for 27 years. The bog road should be wide enough for two carts; Kinsella's bog road is nine yards wide.

Edward Delany.—I have known the road in dispute; I know part of it 40 years, as the bog was cut in the road advanced. I knew Reynolds and his father to put down furze and scutch grass. Part of it is dangerous for two carts.

This closed plaintiff's case. For defendant there was given in evidence a lease dated May 30, 1855, from William Stephen Sandes to defendant of the land over which the right of way was claimed, to hold from November 1 then last past for 61 years.

J. Meighan examined.—I remember the giving possession of the bog to defendant; the boundaries were laid out with marks outside the road in dispute; sod and turf were given to Kinsella of all within the mark. The rest of the evidence on the part of defendant related to the alleged disturbance.

At the close of the evidence for defendant his counsel called upon his Lordship to direct a verdict for defendant upon the second issue—on the existence of the alleged right of way—upon the following grounds—That no sufficient evidence was given of the right claimed. That the user prior to 1860 being in exercise of the rights granted by the leases of 1789 and 1794, or one of them, is not available for the purpose of relying upon a prescriptive right, and that any rights granted by those old leases expired when those leases expired, or at all events in 1860, when any tenancy created by overholding was determined by surrender by the acceptance of the lease of Jan. 30, 1860. That the right of turbary granted by the lease of 1860 is essentially different from any rights which had existed under the previously expired leases, and that the terms of the right granted in said lease being a right to cut and take from such place, and in such quantity as the lessor should point out and approve of, does not sustain or prove the right alleged. That such a state of circumstances as would have had the effect of reserving to Mr. Sandes a right of way by necessity by the grant of the lease of 1855 had not been proved, and even if it were proved, such a right of way did not pass to plaintiff by the deed of 1860, and if it did pass would not prove the right alleged. That the only right of way plaintiff can claim is that expressly granted by the lease of 1860 through Pigott's holding, and that Mr. Sandes had not any power to either expressly or impliedly grant in 1860 a right of way over the lands previously granted to defendant by the lease of 3rd May, 1855.

The Lord Chief Justice directed a verdict for plaintiff upon said issue, but reserved liberty to defendant to move to have a verdict upon said issue entered for him if the Court should be of opinion that his Lordship should have so directed. The Court to be at liberty to draw inferences of fact.

Pallas, Q.C., for defendant, having obtained a rule nisi accordingly,

*Battersby*, Q.C. (with him *Martin*) for plaintiff, now showed cause against the conditional order obtained by defendant that the verdict had for plaintiff be set aside, and instead thereof that a verdict be entered for defendant pursuant to the leave reserved by the learned judge, or that a new trial be had on the grounds of misdirection of the said learned judge, and that said verdict was against evidence. The sole question is, did the right of way exist or not. The cases on this subject are—*Doe d. Egremont v. Courtenay* (11 Q. B. 702); *Doe d. Biddulph v. Poole* (id. 716); *Howton v. Frearson* (8 Term. R. 50); *Buckby v. Coles* (5 Taunt. 311); *Morris v. Edgington* (3 Taunt. 24); *Barlow v. Rhodes* (3 Tyrw. 285); *Pinnington v. Galland* (9 Exch. 1); *Pearson v. Spencer* (1 B. & S. 571).

*J. E. Walshe*, Q.C. (with him *Palles*, Q.C., and *Byrne*) contra, for defendant in support of the order.—The cases cited are not material here. As to a way of necessity—*Holmes v. Goring* (9 Moo. 166; s.c. 2 Bing. 76); *Plant v. James* (5 B. & A. 791).

*Palles*, Q.C. on same side.—*Suffield v. Brown* (10 Jur. N. S. 111); *Polden v. Bastard* (4 B. & S. 258); *Hargrove v. Lord Congleton* (12 Ir. C. L. R. 362).

*Martin* in reply.—*Jordan v. Atwood* (Owen, 121); *Oldfield's case* (Noy. 123); *Packer v. Wellstead* (2 Sid. 111); *Clark v. Cogg* (Cro. James, 170.)

*Cur. adv. vult.*

June 12.—The judgment of himself and Hughes, B., was now delivered by

*PRIGOR*, C.B.—We think there was *prima facie* evidence of the existence of a way of necessity. Plaintiff says he had no other way but the one in dispute. We are all of us aware of the great difficulty there is in the access to, and still more so in the exit from, a bog; and the expense of making a road through the bog would be very great. I consider the circumstances to have been as follows, from what we know to have occurred with regard to several estates. Mr. Sandes had a considerable tract of land, and houses on it, and therefore he required a right of turbary for his tenants in those houses. In letting the land where the bog intervened, it was necessary to give a right of way through the bog, which was more extensive formerly, as appears from the evidence of plaintiff and others. In 1855 the land was let to defendant, and from that time to the period of the interruption of the right of way, that road was constantly used for going to the bog, and this was some evidence to go to the jury that defendant was aware of the fact that that road was a way to which plaintiff was entitled, and that it was a way of necessity, and plaintiff swears that it was a way of necessity. The jury therefore might reasonably find that it was a way of necessity. But if we allowed the verdict to stand for plaintiff, defendant would be concluded without having had his case sufficiently investigated, so that, on the whole, we think it more satisfactory to direct a new trial. It must be, however, on the terms that if plaintiff obtains a verdict in the new trial, he shall have the costs of both trials, and in no case shall defendant have the costs of the former trial.

*FITZGERALD*, B.—I am unable to concur in this judgment. It appears to me that there was no evi-

dence of a way of necessity. It is settled that a party who relies on a way of necessity must aver in his plaint there is no other way, and must then prove that there is no other way.—*Holmes v. Goring* (9 Moo. 166; s.c. 2 Bing. 76). I therefore think that the verdict ought to be entered for defendant.

*Rule absolute for a new trial, but without costs.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

*EASTWOOD v. EASTWOOD.*—June 27.

*Interest—Pleading.*

*When the interest of an alleged next of kin is disputed on the ground of the illegitimacy of his ancestor, the objecting party may require the party whose kindred is objected to to file a pleading setting out his kindred, and the Court will direct him to do so.*

*Fetherstone*, for the plaintiff, the executor and residuary legatee in a will, moved that before he should be called on to propound or prove the validity of the will of James Eastwood, deceased, the deceased in the cause, the defendant should file a declaration propounding and setting forth her interest, and proceed to prove the same. A caveat and appearance to the plaintiff's warning had been entered by the defendant. An affidavit in support of the motion was filed by the plaintiff's solicitor alleging the illegitimacy of the defendant's father, whose father was the uncle of the alleged testator.—*Crispin v. Doglioni* (2 S. & Tr. 17); *Hingston v. Tucker* (ib. 596).

*Dr. Miller* for the defendant.—The practice in Ireland has been in cases of this kind for the plaintiff to file a petition in the nature of a peremptory exception, and for the defendant to answer it, setting out fully her interest. An issue then would be knit, and the question could be tried either on affidavits or *viva voce* before a jury.—*Davidson v Woods* (7 Ir. Jur. n.s. 202).

*KEATINGE*, J.—That case was a very peculiar one. A decree had been made establishing a will of a Dr. Colvin, of Armagh; but it was not a decree in the ordinary way, but was grounded on the consent of the parties. The party who alleged herself injured by that decree came in and made this case: "I was one of the next of kin of the deceased, and interested in setting his will aside; but the case was compromised behind my back, and I am not bound by the decree." The general rule [is]—that next of kin who are privy to a suit touching a will are, though not parties, bound by it. But the case made there was a double one. First she said I am a next of kin; and second, I was no party to the compromise, and am not bound by the decree. In that case the inquiry was a preliminary one; and a petition had been properly filed by



the executor to restrain the threatened litigation. In that proceeding I decided that the party was not bound by the decree. Then another inquiry arose as to the legitimacy of the party so seeking to re-agitate the question. I allowed that inquiry to be carried on in the course of the same proceeding by petition. That inquiry went to a jury, and they found against the party, finding that she was illegitimate. But here the inquiry is as to legitimacy and nothing else; and it is very desirable to have a uniformity of practice in the Courts in England and in Ireland. The case cited of *Crispin v. Doglioni* is an authority in support of the motion, and the notice given here is evidently taken from it; and it establishes that where a preliminary objection is made to the kindred of a party, the Court has a clear right to direct that the matter shall be inquired into, and that for such purpose the party objected to shall file some kind of pleading, whether called a declaration, petition, or pleading showing the *locus standi* of the party. The 70th rule (contentious) also supports this view, directing that "any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition." Unquestionably, in cases merely of interest—as in a contention whether parties are first or second cousins and similar cases—the case is brought forward by a declaration alleging intestacy, and setting out the kindred of the party to the deceased, and negating the existence of any kindred in a nearer degree, to which declaration the other party files a plea objecting the interest of the party so declaring; but in such cases that is the sole question in controversy. In this case the inquiry as to kindred is only preliminary; if the kindred is made out the inquiry remains as to the validity of the will. On the whole, I think that this preliminary inquiry should be raised by a pleading, by whatever name it may be termed, whether declaration, plea, petition, or statement; and accordingly, I now direct that such pleading or statement be filed in the Registry by the defendant within four days, and that it do set forth the interest of the defendant; and though I am not called on to make an order to that effect, yet I recommend the party to set forth fully the interest she relies on—in fact to give a detailed pedigree; and let the plaintiff within four days after having received notice of the filing of the defendant's pleading, file her pleading or statement in answer to the plaintiff's pleading, the costs of the motion to be costs in the cause.

*Order accordingly.*

WATSON v. WATSON.—July 2.

*Executor—Probate.*

*It is no ground for the Court passing over the surviving executor that he is old, and in embarrassed circumstances, and without interest, but the grant was ordered to be impounded for fourteen days.*

*T. P. Lynch*, for the defendant, moved that letters

of administration of the goods of Andrew Watson, deceased, with his will and codicil annexed, should be granted to the defendant, notwithstanding that the plaintiff, the surviving executor of said testator is alive. Andrew Watson, by his will dated 13th Jan. 1832, appointed three executors, one of whom is the plaintiff, and gave him a legacy of £300, and to his eldest son considerable sums of money, and by his codicil he made him his residuary legatee. On the 2nd Oct. 1832, probate was granted to Henry Watson, one of the said executors saving the rights of the others. He died on the 9th March, 1860, but did not name any executor. Letters of administration with Henry Watson's will were granted on the 3rd April, 1860, to the defendant, one of his sons, and a legatee in his will. The second executor named in Andrew Watson's will died on the 22nd February, 1840, without having proved that will, and not having intermeddled. The unadministered assets of said Andrew Watson now consisted of £590 2s. 1d., part of a fund in the Bank of Ireland, and which the Landed Estates Court in a matter there pending, had set apart by an order of Judge Dobbs, dated the 14th May, 1866, to the separate credit of the personal representative of the said Andrew Watson. It was sworn by the defendant that the plaintiff had never acted as executor to said Andrew Watson, and was over 80 years of age, and nearly blind, and in very embarrassed circumstances, and had no beneficial interest on the personal estate of said Andrew Watson, but that he had a claim against said estate which was unfounded, and that if he got possession of said sum of money, that he would apply it to pay off said alleged claim, and that the defendant and other persons named were the only persons beneficially interested in the unadministered assets of said deceased, and they all desired the grant to be given to the defendant. Counsel contended that this was a case coming under the 78th section of the Probate Act.

*Dr. Ball*, Q.C. for the plaintiff.—The plaintiff is named by the testator executor. He is able and willing to act, and therefore the Court cannot pass over him.

*KEATINGE, J.*—This case is not within the section referred to. I must therefore set aside the caveat filed by the defendant, and the plaintiff desiring to accept the grant, I order that the grant, when sealed, be impounded in the registry for fourteen days, so as to enable the defendant to take such proceedings as he may be advised.

IN THE GOODS OF ROBERT MCCREDY, SUPPOSED DECEASED.

*Person missing since 4th February, 1866—Administration on presumption of death—Security.*

*A. B. a captain in the Bombay Staff Corps, who was in England on leave of absence, left his lodging in London on the 4th February, 1866, in a cab, with his luggage, consisting of several articles, stating to his landlady that he was going by the Irish mail train to Ireland (where his relations re-*

sided). *He had never since been heard of, nor could anything be heard of his luggage, though advertisements and inquiries had been made in every quarter. Held, under the circumstances, that a grant of administration with his will annexed might be granted to his brother on giving security, and on the renunciation of the executor named in the will, as the Court could not dispense with justifying security.*

*Dr. Townsend, Q.C.*, for Noel Kennan, the sole executor named in the will of the said Robert Mecredy, applied for a grant of probate to his will, dated the 25th February, 1857, on the presumption of his death. It appeared from the affidavit of Henry Sandys Mecredy, an elder brother of Robert Mecredy, that the latter had left Ireland for India in 1851, having obtained an appointment in the East India Company's Service, and was at the time of his disappearance a captain in the Bombay Staff Corps in India. That Robert Mecredy, in the year 1855, returned from India on medical certificate, and after two years he returned to India, whence he finally returned to England on sick leave in the spring of 1862. In March, 1862, he went to reside with his said brother in Summer-hill, in Dublin, and remained there until the 4th May, 1862, whence he went to England, and was seen by his said brother in August of that year in Harrogate. On the 6th December, 1862, Robert Mecredy again visited his said brother in Dublin, and remained with him until the 13th April, 1863, whence he went to Delgany, and thence to London, and then on a tour through the Continent of Europe, and returned to London in December, 1863. He intended to have again paid a visit to his brother, but on account of the latter at the time changing his residence, he was not in a position to be able to offer him suitable accommodation for some short time, and consequently he remained in London. On the 11th Feb. 1864, and 27th Feb. 1864, his said brother wrote to Robert Mecredy, asking him over on a visit, his house being then quite ready to receive him, but no answer was ever received to either of said letters, and were found unopened at Robert Mecredy's agent's office in London (the Messrs. Barber & Co.) in August, 1864, to which agents he had written on the 4th of February, 1864, desiring them to keep all letters for him until he sent his address; but no address whatever was ever sent to such agents, and he had told them that he was going into Wales. He had drawn from his agents previous to his departure only £6, and had in their hands a cash balance of £700, besides various Indian securities, and no further sum had been drawn by or for him. He had left his lodgings in Bury-street, St. James', on the 4th of Feb., 1866, in a cab, with three articles of luggage, stating that he was going to Ireland by the mail train to visit his brother, but no further trace of him could be discovered. The several offices and agents in England, Wales, Ireland, and Scotland, and the Dublin Steam Packet Company, and also the London Commissioners of Police, and the Detective Office, the Secretary of State for India, and various other persons were applied to for information, besides advertisements inserted in numerous papers, but none could be had either as

to Robert Mecredy or his luggage. In his lodgings some additional luggage was found, and in it was found a will bearing date the 25th Feb. 1857, appointing Noel Kennan, of Dublin, his executor, and dividing between his two sisters all his property, with benefit of survivorship between them. Robert Mecredy was a bachelor, and of very regular and temperate habits, and had besides the said two sisters several other sisters and brothers, who would be his next of kin. His sword and regimentals, and some other articles of small value, were in Dublin, and it appeared that he was always on most friendly terms with all his family, and previous to and up to his disappearance had been in constant communication with them, and also with his agents, as to his money investments. He was highly educated, as a classical and also an oriental scholar, and was qualified to act as interpreter in India, and was very studious in his habits. He was affected with chronic dysentery, which sometimes preyed on his spirits, but when he left his lodgings he appeared in his usual manner. The object in taking the grant here is for the convenience of the parties, as the grant can be resealed in England (Miller's Pr. Pr. 470).

*KEATINGE, J.*—I can entertain little doubt that the unfortunate gentleman has met with some mischance, and that his death may be presumed. The only difficulty is as to the form of the order. The party applying is executor, and would if the grant were taken by him, be exempt from giving security, but I could not make a grant in this case without requiring justifying security. If the executor will renounce, I will give administration with the will annexed to Henry Sandys Mecredy as one of the next of kin on his entering into justifying security. I doubt whether even if an executor consented to give security, the bond would be assignable under the Act.

[The executor consented to renounce, and the order was made.]

IN THE GOODS OF CATHERINE GALLIGAN, WIDOW.—  
July 11.

*Grant of administration—Presumption of death—Grant per saltum not allowed.*

*The Court will not grant administration to the goods of a deceased person who left surviving several children and next of kin, supposed to be dead, but will require the party applying to take out in the first instance a grant to one of such children.*

*Dr. Miller*, on behalf of John Martin Moorhead, a brother of the deceased, moved for a grant of letters of administration to be given to him of her goods on the presumption of the death of her four and only children and next of kin. Catherine Galligan died on the 6th March, 1844, a widow, and intestate, leaving surviving her a son, Edward Galligan, and three daughters. All of those children emigrated in the Spring of 1846 to New York, and had never since been heard of. Advertisements had been in-

serted in several papers in New York in the month of March last inquiring for information of said children, and detailing fully the purpose for which it was required, namely—respecting certain monies in the Landed Estates Court standing to the credit of the personal representative of the said Catherine Galligan, and to which the said children, if alive, would be entitled as her next of kin. No claim or reply had been made by anyone to any of said advertisements. The fund in the Landed Estates Court was a small sum of £69 4s. 7d. and interest thereon, £38 19s. 2d., together making £108 3s. 9d. The party applying was, if the children were dead, one of the next of kin of Catherine Galligan. In some cases Sir O. Creswell had made such a grant, passing over the parties who had a prior right on their renunciation, if alive.—*Goods of Johnson* (2 S. & T. 595); but Sir J. P. Wilde has objected to that practice, and refused in the *Goods of Allen* (3 S. & T. 559) to give a grant *per saltum*. The fund is so small in this case that it will scarcely bear the additional expense of a double grant.

KEATINGE, J.—I don't think that I can avoid requiring the party to take out a preliminary grant to one of the children on the presumption of the death of all of them. I will therefore allow the applicant to apply for and obtain a grant of the goods of Edward Galligan, deceased, making such order, however, in his goods. Then the party can in the office, without any further order, get a grant in the goods of Catherine Galligan.

*Order accordingly, with justifying security.*

Proctor—George Beatty.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

SWEETMAN v. SWEETMAN.—May 2 & 3.

*Will made before Wills Act of 1837—Devise of lands acquired subsequent to making of—Heir-at-law—Election by.*

*W. S. in 1804 conveyed certain premises in two several streets in the city of Dublin of which he was seized, to the Commissioners of Wide Streets, for a sum of £10,579, they paying said W. S. interest at £5 per cent. equal to £528 per annum; and it was covenanted by them, that they, when the said premises should be of the value of £528 a year, would convey so much thereof back to said W. S. his heirs, &c. After said conveyance of 1804, viz. in 1818, W. S. made his will, whereby he devised "all the rest, residue, and remainder of my property, real, freehold, and personal," [the personal amounted to £100,000] "which I shall die possessed of or entitled to, I give and bequeath the same unto my two sons, W. and J. their heirs, &c.*

*in equal shares and proportions." In 1823, the said Commissioners conveyed, in pursuance of said covenant, certain premises amounting to £528 per annum to said W. S. his heirs, &c. W. S. died in 1826, leaving two sons him surviving, namely, W. the elder, and J. the younger. Held, that this will being made before the Wills Act of 1837, the real estates in said premises conveyed by said deed of 1823 were not operated upon by said will, and that therefore said W. S. died intestate as to same, and that the heir-at-law was bound to elect whether he would take under the said will or against same.*

THIS was a cause petition filed by John Stanislaus Sweetman against the respondent, William Andrew Sweetman. The petition prayed for a declaration that petitioner was entitled to an equal moiety of certain plots of ground, hereditaments and premises comprised in and granted by a certain indenture of the 17th October, 1823. The facts, as abstracted from the cause petition, are as follows:—In 1781 William Sweetman, the testator, intermarried with Margaret Cosgrave, by whom he had two sons, William the elder, and John Andrew Sweetman the younger, and two daughters. That said William Sweetman, the testator, in the year 1800 sold certain leasehold premises of which he was then seised in Hawkins'-street and Aston's-quay, in the city of Dublin, to the commissioners appointed by statute for making wide and convenient streets in the city of Dublin, for a sum of £10,579, and by two several indentures of assignment bearing each the same date of 20th February, 1804, by one whereof the said William Sweetman, the testator, conveyed the said premises and all his interest therein to the said commissioners, and by the other said indenture made between three of the said commissioners of the one part, and said William Sweetman, of the other part, after reciting that at the time of the execution of said indenture of assignment the said commissioners had not any funds to pay said sum of £10,579 so agreed upon to be given to William Sweetman, the said testator, and that the said commissioners had in consequence proposed to the said William Sweetman, the testator, that so soon as they should demise and set so much ground then in their possession as that the rents thereof would amount to £528, being equal to the interest at 5 per cent. on said sum of £10,579, the said commissioners would convey the said rents, and the reversion incident thereto, in fee to the said William Sweetman, the testator, and until such conveyance would be so made by such commissioners, that they would pay interest on the said sum at the rate aforesaid, it was witnessed that the said commissioners thereby covenanted that so soon as any of their ground should be set, so that the rent payable thereout to the said commissioners should be sufficient for the payment of said annual sum of £528, they would grant and convey unto the said William Sweetman, his heirs and assigns, so much of the ground so to be demised, and the rents and reversions incident thereto, as should amount to the said annual sum. Said William Sweetman, after the death of the said Margaret Cosgrave, his first wife, intermarried secondly with Charlotte Maria D'Alton, and an indenture

of settlement was made on that marriage, which bore date the 7th of December, 1805, whereby all the interest of the said William Sweetman, the testator, under said deed of 1804 from the commissioners was vested in Arthur Dunne and Patrick Planket as trustees for certain trusts therein mentioned for the benefit of said William Sweetman during his life, and to secure a certain annuity, and subject thereto in case his said wife, Charlotte Maria, survived him, to the intent that she should have an annuity of £400 a year, with an ultimate trust for the benefit of said William Sweetman, the testator, his heirs and assigns. On the 11th of September, 1818, William Sweetman, the testator, made his will duly attested, whereby, after reciting the said deed of settlement of 7th December, 1805, by which the said ground rents of £528 a year were charged with said £400 a year for his wife, he gave her a further annual sum of £200, £128 thereof to be paid out of said ground rent, and £72 out of such fund as his executors should think proper to appropriate for that purpose, and testator then bequeathed to his son John Sweetman a sum of £8,000, and he then made certain bequests in favour of his daughters, and he devised the residue of his estates in the words following—"And as to all the rest, residue and remainder of my property, real, freehold and personal, which I shall die possessed of or entitled to, I give, devise, and bequeath the same unto my two sons, William and John Sweetman, their heirs, executors, administrators, and assigns, in equal shares and proportions, for their own use and behoof." On the 20th of Oct. 1825, said William Sweetman, the testator made a codicil to his will attested by one witness only, whereby he bequeathed a sum of £1,000 to his daughter Mary, but he in no otherwise thereby altered his said will, and in or about the year 1826 the said William Sweetman, the testator, died without having in anywise revoked or altered his said will and codicil, leaving the said William Sweetman, the elder son and heir-at-law, and also the said John Sweetman, the younger son, and the other persons named in the said will, him surviving. That after the making of said will, which will was made before the passing of the Wills Amendment Act of 1837, the said commissioners, by indenture of the 17th Oct. 1823, conveyed to said William Sweetman in pursuance of said agreement of the 20th of July, 1804, certain premises in said deed mentioned, which premises were not the exact premises conveyed to the commissioners by the deed of 1804, the annual profit rent of which was £528. That upon the death of the testator the said two sons, after setting apart funds to meet the pecuniary legacies, divided the entire residue of testator's estate, both real and personal, in pursuance of said residuary devise and bequest between them, and under the said residuary clause the said William Sweetman took and acquired as one of such residuary legatees as aforesaid considerable personal property, especially sums of bank stock and other moneys amounting in value to £35,000, as well as interests of considerable value in houses and other lands and tenements held by the testator. That it was the wish of said testator that his two sons should share equally his property, and so he expressed him-

self in his lifetime, and for this reason he gave his son, John Sweetman, the £8,000 mentioned in his said will in addition to the moiety in his residuary property, inasmuch as he gave to his son William on his marriage, also the sum of £8,000. That it was manifestly the intention of the testator not only to include in said residuary devise the estate he was seized of at the time of the making of his will, but also at the time of his death. That said William Sweetman well knew that it was the intention of his father to give, as petitioner submitted he did give, under the said residuary devise, an equal moiety to his said son, John Sweetman, in said lands, ground rents, and hereditaments so comprised in the before-mentioned indenture of conveyance so made to the said testator on the 17th October, 1823, by the said commissioners in pursuance of the said agreement so previously entered into by them as aforesaid, and by the said William Sweetman at all times acquired therein during his life, and on all arrangements, dealings, and calculations with respect to the said residuary estate and interest so given in equal moieties, that the said two brothers at all times dealt between themselves, on the footing that they had become entitled to the entire of the property which the testator was in any wise possessed of or entitled to as of the entire of the property of which the testator was in any wise possessed of or entitled to at the time of his decease, subject to the payment of his debts and legacies in equal moieties. That the said William Sweetman, the said eldest son and heir of William Sweetman, the testator, on more occasions than one during his lifetime, expressly stated that he was only entitled on the decease of his stepmother, the said Charlotte Maria D'Alton, to enter into possession and receipt of a moiety of the said ground rents and premises, so comprised in and granted by the said indenture of the 17th of October, 1823, and that he at all times acquiesced in, and was satisfied with the provisions of the said will, and acknowledged that all the property of every nature or kind which the testator was possessed of or entitled to at the time of his death passed under the said will, and as evidence thereof amongst other acts and acknowledgments petitioner relied upon recitals and statements in a certain deed of the 9th March, 1827, which was prepared by one Mr. Barry Lawless, solicitor, who also had acted as solicitor for said William Sweetman during his lifetime, by which said deed William, for the considerations therein mentioned, conveyed his said moiety to said John Sweetman, and petitioner also relied on another deed which was executed by said William, wherein he and his brother were described as the only sons and residuary devisees of testator. That in pursuance of the provisions of said settlement and will, said Charlotte Maria Sweetman, otherwise D'Alton, was permitted by the said William and John Sweetman to enter into possession and receipt of the entire of said ground rents and premises so comprised in the indenture of the 17th of October, 1823, and she, under such permission, continued in the sole and exclusive possession thereof down to the period of her death, and each of them the said William Sweetman and John Sweetman during their respective lifetimes paid each out of their own moneys a sum of £35 10s. 6d. by equal half-yearly payments, so as to make up the

annual sum of £71 1s. so directed to be paid by the before-stated will as the remainder or balance of the annuity of £200 as aforesaid mentioned in that will, and given to said Charlotte Maria Sweetman, otherwise D'Alton. The petition then alleged that in all the dealings between the said William and John Sweetman, and the tenants of said plots of ground so granted by the said commissioners to the said William Sweetman, the testator, his said sons after his death, the said William and John Sweetman dealt with the tenants on the understanding, and it was at all times conceded that each of them, the said William and John Sweetman, were entitled in equal moieties to the reversion expectant on the determination of the said leases which had been so granted as aforesaid by the said commissioners, and as evidence thereof petitioner relied on the fact that one Robert Smith, to whom one of the plots of ground and premises so comprised in said indenture of 17th October, 1823, had been leased by the said commissioners for a term of three lives renewable, on or about the 30th May, 1834, applied to the said William Sweetman and to the said John Andrew Sweetman, to grant him a renewal of the said lease of 30th May, 1834, and accordingly, by indenture of the 30th May, 1834, that they, the said William Sweetman and John Sweetman, granted said renewal for the lives in said indenture mentioned to said John Robert Smith, subject to the yearly rent, &c. That said William Sweetman never claimed more than a moiety, and that he claimed as tenant in common. Said William Sweetman, the son of testator, died intestate in 1845, leaving his eldest son and heir-at-law, William Andrew Sweetman, the respondent, him surviving. The petition then stated an indenture of 12th July, 1852, wherein it was recited that John Sweetman was entitled to one undivided moiety of the said houses and premises so conveyed by said commissioners, and that he thereby granted unto his nephew, the present petitioner, his aforesaid moiety; and he the said John Sweetman subsequently by will confirmed said deed. That after the decease of said William Sweetman in 1845 his said son, William Andrew Sweetman, the respondent, acknowledged that John Sweetman, during his life, and petitioner, as representing his estate, was entitled to one equal moiety with the respondent of the lands comprised in said indenture of 17th October, 1823. That respondent never claimed up to the month of September, 1860, to be entitled to more than a moiety of the reversion in said hereditaments, or otherwise than as tenant in common, and that then for the first time such claim was made by said respondent, who, upon making said claim, served notices on the several tenants of the premises that he was legally entitled, not alone to his own moiety, but to the whole thereof. That in consequence of such notices served by the respondent, nearly all the tenants had declined to pay the petitioner his demands upon them.

Petition then alleged that it had been pretended by the respondent that said William Sweetman, the testator, died intestate as to the hereditaments and premises so comprised in said indenture of 17th Oct. 1823, and that same did not pass under said residuary clause contained in said will, and that he the respondent is now entitled thereto as heir-at-law of his said

father, but petitioner insisted that the premises passed according to the expressed intention of said testator under his said will, and that said William Sweetman and his brother, John Sweetman, became on the decease of their father, the testator, entitled thereto in equal moieties, and that the petitioner and respondent were now entitled thereto as tenants in common; and further also it was insisted upon by petitioner that even if William Sweetman died intestate, as to the hereditaments and premises, and that same descended to the said William Sweetman as his heir-at-law, yet that as the said William Sweetman received bank stock and other moneys left by the testator to an amount far exceeding the saleable value of the said moiety of the said hereditaments and premises left to his said brother John, and as he also received personal property and chattels real under the said will of considerable value, he was bound to elect whether he would take under the will, and confirm the residuary clause so made by the said testator; and that said William Sweetman did in fact, as it was his interest to do, so elect. And further, if the said William Sweetman did not elect that the respondent is bound now to elect. The petition also charged that the late William Sweetman and John Sweetman, on a settlement between themselves of the properties derived under and from their father the testator, agreed to accept, and hold the aforesaid premises in equal moieties as tenants in common, and the petition prayed that such arrangement should be carried out.

The petition then prayed that it might be declared that petitioner was entitled to one equal moiety of the plots of ground, hereditaments, and premises so comprised in and granted by the said indenture of the 17th October, 1823, and that if William Sweetman, the father of the respondent, had or acquired as heir-at-law of the testator or otherwise any right, estate or interest which the testator disposed of or assumed to dispose of by his said will, it might also be declared that the said William Sweetman was bound to elect conformably to the intentions and provisions expressed and contained in the said will, or to renounce the benefits and interests thereby given to him, and that the said William Sweetman had in fact so elected and that the respondent as his heir-at-law is bound by the election so made by his said father, and if no election has been made, that the respondent is now bound to elect, and that a partition be made between the petitioner and respondent, and that the respondent might be ordered to do all such acts and deeds as might be requisite to confirm the petitioner in the undisturbed possession of his said moiety. The petition also prayed for an injunction to restrain the respondent from serving notice on the tenants, or in any way interfering with petitioner's moiety.

The respondent, on the other hand, submitted as a matter of law that the intentions of the testator could only be collected from the four corners of the will, and not as alleged in petition, and that there were no words in the will from which there could be collected any intention specifically to dispose of any interest in said testator's covenant or contract with said Commissioners of Wide Streets, with the exception of the interest thereunder of said Charlotte Maria Sweetman, and further also, even if such intention appeared on the

face of said will, or if such an interest was capable of being devised, which the respondent insisted it was not, yet that the subsequent deed of 17th Oct. 1823, and another deed of 10th May, 1824, herein-after mentioned, entirely rendered said will inoperative as to the land conveyed by said deed of the 17th October, 1823, and he denied the allegations that the said William and John Sweetman ever treated those lands as if they were tenants in common under said will, and that therefore no election had been ever made. That said deed of 10th May, 1824, was a conveyance of the said plots of ground to trustees upon the trusts therein mentioned. The respondent also insisted that the will was wholly inoperative to pass real property acquired after making the said will, and consequently that testator died intestate as to the premises, and that said respondent was not bound to elect now.

*Brewster, Q.C., Warren, Q.C., Lawless, Q.C., and P. Martin*, appeared for the petitioner.—The question before the Court arises on the construction of a will made before the late Wills Act of 1837. What meaning will the Court put upon the testator's expression? Will the Court hold that this will speaks from the time of the making of the will, or from the time of the death? This will shows a clear intent on the part of the testator to devise all freehold estates which he "might *die* possessed of or entitled to." It was not shown that the testator was entitled to any other freehold estates, and under these circumstances the words of the will were sufficiently large to carry property acquired subsequent to the making of said will. But if the after-acquired property in the lands do not pass under the will, and the property is not divisible between the said two brothers, the heir is put to his election as to whether he will take under or against the will. If he takes under the will, he takes a moiety of the lands and a moiety of the money; if he takes against the will, he must take the entire lands and give up so much of the money as the moiety of the land he takes is equivalent to in value. This, then, is a question of election. Here the heir, through the bounty of the testator, received a sum of £50,000 worth of personal assets. The dealings between the parties, and the deeds executed between the two sons of the testator, show, we contend, that such election has in point of fact been made. But if not made it must be made now, and the respondent deriving through the heir-at-law is bound either to bring in the sum received by his father, namely, the £50,000, or that this property shall be held according to the intent of the testator. That the testator intended that all the property should pass that he might be seised or possessed of at the time of his death is clear, and if cases were wanting on this point none could be more in point than *Churchman v. Ireland* (1 Russel & Mylne, 250) a case on a will made before the Wills Act of 1837. There the words were very similar. The marginal note is, "A devise and bequest 'of all my estate and effects both real and personal, which I *shall die* possessed of' extends to lands purchased by the testator after the date of his will; and therefore the heir taking benefits under the will must elect."—*Schroder v. Schroder* (1 Kay, 578). *Hance v. Truwhitt* (2 Johns. & Hem. 216) was upon the construction of a will. The marginal note there

is as follows:—"A devise before 1838 of all my freehold, hereditaments, and all my goods, chattels, 'and generally all other my real and personal estate and effects whatsoever.....whereof I, or any person or persons in trust for me, am, is, or are or shall or may be seised or possessed'—Held, to put the heir to his election as to after-acquired lands." All the authorities on election by the heir under such a devise, are reviewed here by Sir Page Wood.

*J. E. Walsh, Q.C., Hemphill, Q.C., and Litton*, were for the respondent.—The effect of the conveyance of 1823 from the Commissioners of Wide Streets, and also the conveyance to trustees by the deed of 1824, had the effect of revoking this devise, and therefore the testator died intestate. This doctrine of revocation is discussed in *Brydges v. Duchess of Chandos* (2 Ves. Jun. 417). That was where there were "articles to settle the estates of the husband, subject to certain uses and trusts, on the first and other sons in tail male, remainder to the husband in fee. The husband confirming the articles devised the same estates, in case he should die without issue male, or on failure of issue male in the life of his wife, and by a subsequent settlement in performance of the articles conveyed to trustees and their heirs (after certain uses and trusts) to the use of the first and other sons in tail male, remainder to himself in fee, the whole fee being conveyed; and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estates; and evidence here to prove the intention of the parties to a settlement was refused." This is the root of all decisions on revocations. The conveyance of 1824 revested the estate in the testator, and consequently produced a total revocation of the will. So in *Cave v. Halford* (3 Ves. 683) parol intention not to revoke was rejected. And any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or a general purpose.—*Harwood v. Oglander* (6 Ves. 221 a, and decided on appeal—8 Ves. 125 to 127), where the authorities up to 1803 are reviewed. The above cases then go to show that even supposing the words of the will are large enough to carry after-acquired property, yet that the alteration in the estate by the conveyance to trustees by the deed of 1824 was in itself a revocation of the will. The heir will not be put to his election in cases of revocation by alteration of the estate.—*Plowden v. Hyde* (2 Sim. n. s. 171); *Tenant v. Tenant* (Ll. & Goold. 516). In the discussion of *Thellusson v. Woodford* (13 Ves. 209, 1 Dow. 249), Sir Samuel Romilly put it as a doubtful point whether the heir must elect where a legacy is given to him and an estate to a stranger, and after the will a recovery is suffered by the testator, whereby the will is revoked and the estate descends to the heir, and he thought the heir could not be put to his election. Sir Edward Sugden, commenting on this case in 2 Sugden on Powers, 7th ed. 147, says "the point seems very doubtful, for notwithstanding that the testator intended the estate to go to the devisee, yet the will being revoked as to the devise, there seems to be no equity attaching to the conscience of the heir. *Schroder v. Schroder* (Kay, 578, s. c. 24 L. J. Ch. 510) does not assist the petitioner here, inasmuch as it is not a question of revocation.—*Power v. Power* (9

Ir. Ch. 178); *Walker v. Armstrong* (21 Beav., 284).

**THE LORD CHANCELLOR.**—Having heard this case at great length I am of opinion that the property acquired after the making of the will did not pass by the terms of the will, the will being made before the recent Wills Acts, 7 Wm. IV., and 1 Vic. c. 26, ss. 24-34. Those estates were acquired under the conveyance by the Commissioners of Wide Streets to Mr. William Sweetman; if the property did not pass by the terms of the will, it descended to the heir-at-law beneficially; that is, the real estates acquired by the testator between the date of the execution of his will and the day of his death passed to his heir-at-law, and he is now bound to elect, if he, or if his father, have not as yet elected, whether he will take those real estates as heir, or whether he will accept his interest under the will; and I shall therefore declare that the father of the respondent was bound to make election between those premises granted and conveyed by the deed of the 17th of October, 1823, and the benefits in the real and personal estate given to William Sweetman by the will of his father. Should it, however, appear to me that no election has been heretofore made in the lifetime of William Sweetman, the father of the respondent, William Andrew Sweetman, or by the respondent himself, then I shall declare that the respondent is bound now to elect whether he will take under the provisions of the will or against it. I have considerable doubt just now on my mind whether such election has as yet been made, and I shall therefore—inasmuch as the respondent has denied that any election has been made—refer it to the Master of the Court in rotation, to inquire whether the respondent, or his father, has elected to take under or against the said will. This is the order then I shall make. On the first point that has been argued, that is—that the after-acquired property was operated upon by the will, I am clearly of opinion that it did not pass under the terms of the will, this will being made before 1838. That being so, then is the heir bound to elect? Clearly he is. In *Hance v. Truwhitt* (2 Johns. & Hem. 216) the testator made a will very similar to the one now before the Court. There the testator in his will, made before the passing of the late Act, devised all property he might be seised of at his death. And it was there held that the heir was put to his election; and so I think that this is a case of clear election. Conceding now that the testator had an equitable estate in those lands under the agreement between him and the Wide Street Commissioners, did he not deal with that estate, was not that estate altered by his several acts and deeds? Clearly it was. He gave himself quite another estate; it is the same estate so far as his mind is concerned. But no matter what his mind was, I am of opinion that the petitioner is entitled to the relief he seeks here, and also to his costs up to and including the hearing.

The Court then made the following order:

“His lordship doth declare that William Sweetman, the eldest son and heir-at-law of William Sweetman the testator in the cause petition mentioned and the father of said respondent, was bound to elect between the estate and interest as heir-at-law in the lands and premises granted and con-

veyed by the deed of 17th of October, 1823, in the cause petition mentioned, and the interests and benefits in the real and personal estate given to the said William Sweetman by the will of his said father; and it is further declared that in case it shall appear that no election has been heretofore made in the lifetime of William Sweetman, the father of the respondent William Andrew Sweetman, or by the said respondent, then the said respondent William Andrew Sweetman, as eldest son and heir-at-law of his said father William Sweetman, is bound to elect whether he will take under the provisions of said will or against the same, and the said respondent denying that any such election has been made, his lordship doth order that it be referred to the Master of the Court in rotation to inquire whether the said William Sweetman, the son of the testator William Sweetman, in his lifetime elected to take under or against the said will, or whether the respondent William Sweetman, since the death of his father, elected to take under or against the said will as aforesaid; and his lordship doth declare, that the petitioner is entitled to the costs of this suit up to and including this hearing and decretal order. And it is further ordered, that the respondent William Sweetman do pay to the petitioner John Stanislaus Sweetman the amount of said costs when taxed and ascertained.

Solicitor for the petitioner—Mr. John Martin, 45 Lower Gardiner-street.

Solicitors for the respondent—Messrs. John Vincent & Co., 31 South Frederick-street.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

**LEVINGSTON v. BOARD OF GUARDIANS OF THE LURGAN UNION.**—April 24.

*Trespass—Liability of Poor Law Guardians to be sued for an act done in their corporate capacity.*

*To an action brought by the plaintiff, a linen manufacturer, against the defendants, the Poor Law Guardians of the Lurgan Union, for opening a sewer and causing impure matter to be discharged into the stream of a river, the water of which the plaintiff was entitled to have flow past his premises, the defendants pleaded—1. That the Poor Law Commissioners had issued a general order which directed the defendants whenever there should be such a defect in the drainage of the Lurgan Union Workhouse as might tend to injure the health of the inmates, to remedy such defect; that such defects had arisen; that it was necessary that they should open a sewer, &c., and that they did so; and that in no other way could they have remedied the de-*



fects so existing; and that they acted *bona fide*, with due skilfulness and without negligence. 2. That under the powers conferred by 1 & 2 Vic. c. 56, the defendants ordered one R. M. to construct a sewer, &c., which he did; and that that order made by the defendants had not been quashed. Upon demurrer held, 1. that the pleas were bad, but 2. that the action was unmaintainable, as the damages, if recovered, could not be levied out of the rates of the union, and that there must be judgment for the defendants.

THE first count of the summons and plaint complained that the plaintiff was possessed of a certain messuage and lands, and was entitled to have the water of a certain stream or water-course run and flow to and past his said premises, and to have the use of the same for the purpose of his business as a linen manufacturer, and for other purposes, without being injured and polluted as thereafter mentioned, yet the defendants, while the plaintiff was so entitled as aforesaid, wrongfully opened a sewer into the said stream at a point higher up than where it flows past the plaintiff's land, and caused large quantities of filthy and impure matter to be discharged within the said stream, whereby the water thereof had become greatly fouled and polluted, and rendered unfit and unsuited to be used by the plaintiff as theretofore in his said business and for other proper and necessary purposes, by reason whereof the plaintiff had been deprived of the use and benefit of the said water as he formerly enjoyed.

The second count complained that the plaintiff was possessed of such messuage and lands as in the first count mentioned, with the appurtenances, and was entitled to have the water of the stream or water-course run and flow to and past the same as therein mentioned, and without being injured and polluted as thereafter stated; yet the defendants, on divers days and times, wrongfully and injuriously caused and procured to be discharged into the said stream divers large quantities of filthy and impure matter, and rendered the water of the said stream offensive and impure, and unfitted and unsuited for the use of the said plaintiff in his business of linen manufacturer, and for other lawful and proper purposes as it had theretofore been used, and by reason whereof the plaintiff was deprived of the benefit of the said stream as theretofore enjoyed, and to which he was lawfully entitled, and had been otherwise greatly injured.

The fifth defence pleaded to these two counts was as follows:—That before the doing of any of the acts in the said counts complained of the commissioners for administering the laws for the relief of the poor in Ireland, and according to the forms of the statutory enactments in that behalf, made and issued a general order under their hand and seal, and which was approved of by the then Lord Lieutenant-General and General Governor of Ireland, according to the form of the said enactments; and by the said order they, the said commissioners, ordered and directed the said defendants if and whenever there should be or otherwise any such defect in the drainage of the workhouse of the Lurgan Union as might tend to injure the health of the inmates thereof, without delay to

remedy such defects. And the defendants say that immediately before the doing of the several acts in the said several counts in the said summons and plaint respectively complained of, certain defects had arisen and did exist in the drainage of the said workhouse, and which defects then tended to, and, in fact, did injure the health of the inmates thereof, and they say that thereupon and by virtue of the said order and of the statute in that case made and provided, it became and was their duty without delay to remedy such defects, and that to remedy same it became and was necessary that they should open and construct a sewer from the said workhouse to and into a certain stream commonly called the Union Stream, which flows through and past the ground belonging to the said workhouse, and thence onward till it falls into a certain river called the Pound River, which is the stream or water in said counts mentioned; and that they should cause the drainage of the said workhouse to pass away from the same and flow through the said sewer so constructed by them into said union stream. And the defendants say that accordingly, and for the purpose of remedying the said defect so existing in the drainage of the said workhouse as aforesaid, they did open and construct a certain sewer from the said workhouse to and into the said union stream, and thereby to some extent did necessarily and unavoidably cause filthy and impure matter to be discharged into the said union stream or water-course in the said summons and plaint mentioned, which are the opening of the sewer and the causing filthy and impure matter to be discharged into the said union stream or water-course in the said counts respectively complained of. And the defendants say that in no other way than by the means aforesaid could they have remedied the defects so existing in the drainage of the said workhouse as aforesaid, and that in so doing they acted *bona fide*, with due skilfulness and without negligence, and with the sole object of remedying the defects in the drainage in the said workhouse, as they were bound to do for the cause aforesaid.

The sixth defence was as follows:—That under the powers conferred upon them by the statute of 1 & 2 Vic. c. 56 they duly made an order and thereby ordered one Robert M'Connell to construct a sewer from the said workhouse to and into the said union stream, the said union stream being a stream which flows into the said stream or water-course in the said counts respectively mentioned, and to discharge the drainage and sewage of the said workhouse through the said stream into the said union stream. And in pursuance of and in conformity with the said order the said Robert M'Connell did construct a sewer for the said workhouse to and into the said union stream, and did discharge the drainage and sewage of the said workhouse through the said sewer into the said union stream so flowing into the stream or water-course in the said counts respectively mentioned as aforesaid, and thereby did necessarily cause some filthy and impure matter to be discharged into the said last-mentioned stream or water-course, which are the opening of the sewer, and causing filthy and impure matter to be discharged into the said stream or water-course and polluting the same and the water thereof, and other matters in the said counts respectively complained of. And the de-

defendants in fact say that, save by the making of the said order, they did not do or cause to be done the matters in the said counts complained of, or any of them; and that the said order has not been quashed, but, on the contrary, is still in full force and effect. To these defences the plaintiff demurred. The following were the

*Points of demurrer.*

1. That it does not by the said defence appear that defendants had under said order or otherwise any statutable or other authority to cause the said sewage to flow into plaintiff's stream.

2. That it does not by said defence appear that either the said commissioners or the defendants had any lawful authority to cause the said sewage to come into plaintiff's stream or water-course at such a level or in such a manner as might prejudice or injure the plaintiff.

3. That the necessity in the 5th defence alleged is no sufficient defence or justification of the grievances complained of.

4. That it does not appear that the order of the commissioners and the statute therein referred to directed and authorized the said alleged defects in the drainage of the workhouse to be remedied in the manner complained of.

5. That the statute in the sixth defence referred to did not authorize the making of the said defence therein stated.

6. That it does not appear that the defendants had any statutable or other authority to do any act which would cause the sewage matter of the workhouse to flow to the plaintiff's premises.

7. That it does not appear by said defence that defendants had any authority under the statute or otherwise to send the sewage matter of the workhouse into the river therein mentioned, so that the same would come to plaintiff's premises.

*Ferguson* (with him *Harrison*, Q. C.) for the demurrer.—The General Orders published in 1844, art. 61, art. 62, direct that cesspools shall be cleaned, and that when there is any defect in the ventilation or drainage of a workhouse, it is to be remedied. These orders do not justify the defendants in turning the contents into the plaintiff's river. Independently of that the orders of the commissioners could not direct what was not in accordance with the law. The commissioners have no power to order this to be done in violation of the rights of third parties. The 28 & 29 Vic. c. 75 authorizes full compensation for injuries done under it.—*Cator v. Lewisham Board of Works* (34 L. J., Q. B., 74); *Spokes' case* (1 Law Reports, Equity Series, 42). The sixth defence relies on an order made by the defendants themselves; but the Poor Law Guardians have no power to make orders, they can only carry them out. *Dudden v. Clutton Guardians* (1 H. & N. 627) was brought for diverting a water-course, but the law must be the same in respect to fouling it. *Southampton Bridge Co. v. Lamb* (8 Ell. & Bl. 801) is precisely in point.—*Gibbs v. Trustees* (3 H. & N. 164); *Whitehouse v. Fellowes* (10 C. B. n.s. 765); *Goldmid v. Tunbridge Wells* (35 L. J. Ch. 88.)

*Law*, Q. C., and *Monroe*, contra.—The demurrer admits that the order to drain was made by the commissioners. It further admits that the health of the

paupers was liable to be injured. It further admits that a sewer was necessary, and that in no other way could this have been done. It further admits that it was done *bona fide*, and that there was no negligence. Where trustees in exercise of a public function without emolument do something *bona fide*, they are not liable in an action for damages. In 11 & 12 Vic. c. 73 there is a provision to punish the guardians when they do not obey the orders of the commissioners. It is their duty to drain the workhouse, and that includes the grounds of the workhouse.—*Sutton v. Clarke* (6 Taunt. 29). A writ of *certiorari* is the method of quashing this order if it be illegal; it cannot be done by action.—*Meredith's case* (4 T. R. 796). The only way of testing whether they have exceeded their authority is by *certiorari*. Again, the summons and plaint is bad. The damages could not be levied but out of the rates; and where the damages cannot be recovered the action is unmaintainable.—*Coe v. Wise* (5 B. & Smith, 475) shows that where only trust property can be taken in execution the action is not maintainable.—*Duncan v. Findlater* (6 Cl. & Fin. 907); *Trustees v. Ross* (12 Cl. & Fin. 512). In all the cases referred to on the other side there was authority to give compensation. The rates are exempted from anything but supporting the inmates. The party has his remedy by proceeding against the individuals who have exceeded their legal powers if they have done so—ss. 102, 114, 117.

*Harrison*, Q. C. in reply.—There was no power in the defendants to do this. As to what is said about *certiorari*, the order is good on the face of it; it is an order to drain the workhouse, and no one could quarrel with it. In an action against the same board brought for a similar thing, and tried before *Hayes, J.*, the guardians undertook to abate the nuisance. *McDonnell v. Guardians of the Cork Union* (5 Ir. C. L. R. 108). The defendants are authorized to levy a rate to recoup the plaintiff, as well as a rate to recoup the labourer who makes the works.—*Doe v. Parr* (1 Geale & Davis). In *Kemble v. Kean* (17 C. B. 483) it was held that though the judgment be not available, the plaintiff was entitled to have his judgment. What was said in *Coe v. Wise* was not necessary to the decision there as will be seen from the judgment of *Blackburn, J.* in that case. If judgment be not given for the plaintiff, a board of guardians may do anything they please.—*Crawford v. Corporation of Dublin* (10 Ir. Jur. n.s. 109.)

*Cur. adv. vult.*

*Monroe* on a subsequent day called the attention of the Court to *Richardson v. Corcoran* (7 I. C. L. R. 131).

*May*.—*MONAHAN*, C. J.—In this case the action was brought by Mr. Levingston, who is a linen manufacturer, residing in the county Armagh, against the guardians of the Lurgan Union to recover damages for the pollution of a stream which had been always used by him for the purposes of his business, by opening a sewer into it at a point above that at which it reached his premises. The defendants have, [among other defences, pleaded that certain defects having arisen in the sewage of the workhouse injurious to the health of the inmates, it became their

duty, under an order of the Poor Law Commissioners previously issued, in pursuance of the statute, forthwith to remedy such defects; and that such defect could be remedied only by opening a sewer from the workhouse into the said stream, which was accordingly done; and that the guardians had all through acted *bona fide*, and with the sole object of remedying the defects in the drainage. They also pleaded that under the powers conferred on them under the statute 1 & 2 Vic. c. 56, they duly made an order directing one Robert M'Connell to construct such a sewer, and that M'Connell accordingly did so, which necessarily produced the pollution in the plaint complained of; and that except by making such order they did not do or cause to be done any of the matters complained of, and that the said order has not been quashed, but is still of full force and effect. A demurrer has been taken to these two defences; and it has been argued that the commissioners had the power under the Act of Parliament to make this general order, and that the guardians were bound to obey it; and further, that if anybody wished to find fault with that order, their course should have been to have it quashed by the Court of Queen's Bench. The answer to this is, that the order as it stands is merely an innocent one; but it would be perfectly unjustifiable that they would have a right to do any injury to another person. We cannot see the slightest pretence for any such authority. No doubt, there are very many Acts of Parliament that do authorize interference with the rights of third parties; but there is not to be found any Act of Parliament that does not provide compensation to the party injured thereby. Can it then be supposed that either by an order of the Poor Law Commissioners, or by a supposed order of a board of guardians themselves that board could authorize themselves to commit a trespass by the act of another? If any such power was given, compensation would surely have been provided. We are therefore of opinion that the only power they have is the same as that of any private person. In point of fact the learned counsel who argued the case can scarcely be said to have relied seriously upon these points, but availed himself of the privilege to which he was entitled of turning round upon the plaintiff itself, and contending that the summons and plaint itself would have been bad upon general demurrer and cannot now be maintained when judgment is to be given upon the entire record. It is true that this point has not been noted upon the demurrer books. There was, however, evidently no surprise upon the other side caused by the omission. The question, then, is whether or not if the board of guardians had done such an act any action could be maintained against them in their *quasi* corporate capacity for such an act. The argument in favor of the plaintiff is—that the general principle is that where any act is committed by anybody, that person is liable to make compensation for any injury resulting from the act; but can it again be said that such an action should lie when it is conceded that if judgment followed the only property liable to satisfy that judgment will be the *quasi* corporate property? It is not contended that either the property or persons of the guardians themselves could be taken in execution under such a

judgment. I believe that the real property of the union is vested in the commissioners; and though the bedding, furniture, &c., are said to be vested in the guardians, it is quite plain that this property must in the event of seizure be replaced from the rates. Well, then, the question that arises is whether or not the rates or proceeds of the rates are properly applicable to discharge a liability of this kind. The 61st section of the 1 & 2 Vic. c. 56 is the section which gives power to the guardians to levy rates for the purpose of defraying expenses incurred in the execution of the Act. Again, the 51st section makes provision for the levying of certain rates for the purpose of facilitating emigration under certain circumstances; and in the following section (52) it is enacted and declared that "It shall not be lawful for the commissioners or any guardians, or other persons acting in the execution of this Act, to apply directly or indirectly any money raised under the authority of this Act to the relief of the destitute poor in any other manner than is herein expressly mentioned, or to any purpose not expressly provided for in this Act." In the note to this section in the book that I am reading (Moore's Irish Poor Law, p. 42) several cases are referred to. Then the 94th section expressly directs "that all payments, charges, and allowances made by any guardian or other person, and charged upon the rates for the relief of the destitute poor contrary to the provisions of this Act, or at variance with any order of the commissioners made under the authority of this Act, are hereby declared to be illegal, and shall be disallowed accordingly." Therefore it is plain that if we were to allow a judgment to be recovered, and execution to issue in this case, we should be directly bringing about an application of the rates contrary to the provisions of the Act. What, then, is to be done? Has the plaintiff any right to recover any damages against anyone? Were I disposed to make a great display of legal learning I might quote many cases bearing upon the point, and might attempt to reconcile them. Anyone who refers to the case of *Coe v. Wise* (5 B. & S. 475) will find a page and a half completely occupied in enumerating the different authorities. The judges there differed in opinion. [His Lordship stated the facts of that case.] The majority of the Court held that the plaintiff was remediless, on the ground that it would be a disgrace to the law if an execution should be allowed to issue when it would be of no use. They also expressed an opinion that the parties would have no remedy against the commissioners in their individual capacity as being a body acting gratuitously in the discharge of a public trust. Blackburn, J. differed from the rest of the Court. He was of opinion that under the terms of the Act of Parliament it was open to them to levy a rate for the purpose of indemnifying themselves against such liabilities. And partly on that ground, and partly on the ground that there was an express duty imposed on them by the Act of Parliament, he held that an action was maintainable. [His Lordship quoted the opinion of Lord Cottenham in *Duncan v. Findlater* (6 Cl. & Fin. 907), and referred to *Richardson v. Corcoran* (7 I. C. L. R. 131), which had been cited in the argument.] In *Richardson v. Corcoran* the judgment went upon the assumption that the act was the

act of the commissioners in their individual capacity. It is impossible for me to go through all the cases. The result of our judgment is, that though we hold the pleas to be bad, still, as the action is in its nature unmaintainable, the judgment upon the entire record must be for the defendants.

*Judgment for the defendants.*

THE EARL OF MAYO V. BENTLEY.—*May.*

*New Trial—Surprise—Absence of a material witness.*

*The defendant in an ejectment on the title having directed a subpoena to be served on the plaintiff requiring him to attend at the trial, which subpoena was not personally served on the latter, but left at his house, and kept back from him by the members of his family, the Court, upon the defendant's affidavit that she had so caused the subpoena to be served, and that she relied upon his evidence to prove the existence of an equitable agreement which would be a bar to the ejectment, made absolute a conditional order for a new trial, although the plaintiff made an affidavit denying the existence of the agreement.*

*Semble—The rule that a new trial will not be granted on account of the absence of a witness, when there appears no reasonable probability that his attendance would lead to a different verdict, does not apply to a case in which the absent witness is not a third person, but one of the parties in the action.*

THIS was a motion to show cause against making absolute the conditional order which had been obtained by the defendant for a new trial, on the ground of surprise, and of the absence of the plaintiff, who was a material and necessary witness for the defendant. The action was one of ejectment on the title, brought to recover possession of the lands of Harristown, in the County Meath, and was tried before Monahan, C.J., at the preceding Trim Assizes, when a verdict was directed for the plaintiff, but leave was reserved for the defendant to apply for a new trial. The defendant relied on an equitable agreement alleged to have been entered into by Lord Mayo, whereby, in consideration of certain moneys expended by her and her deceased uncle on the premises, she was to be allowed to continue in possession during life. The defendant had made an affidavit stating that on the 27th February last she caused a subpoena to be served on Lord Mayo, requiring him to attend the trial, and state on oath whether he had not entered into the agreement on which the defendant relied; that, on 28th February, notwithstanding the service of the subpoena, Lord Mayo left his residence in the county Meath and went to London, and was absent from Ireland on the 1st March, when the trial took place; that the defendant believed she would have had the benefit of Lord Mayo's evidence at the trial, and believed he would have admitted the agreement if he had been asked about it; and that his absence at the time of the trial was a great surprise to her. Lord Mayo had made an affidavit to discharge the rule, in

which he stated that for a considerable time past he was afflicted with severe illness, and that for some months before the trial it was arranged that, if possible, he should be removed to London about the 1st March, for the purpose of getting medical advice; that, accordingly, he did leave for London on the 28th February, but was so infirm that he was unable to enter or leave his carriage without assistance; that up to the 28th February he never heard or suspected that his presence would be required at the trial, or that any subpoena had been served, in any manner, and that, in fact, no personal service of any subpoena had ever been had; that after the trial and after his arrival in London he was informed for the first time that a subpoena had been left at his residence in the County Meath on the evening of the 27th February, but that, in consequence of the state of his health, and the orders of his medical adviser, who had directed that all matters of business should be kept from him, the members of his family did not communicate to him the fact of the subpoena having been left at his residence; that he believed, if his presence had been *bona fide* required at the trial, the subpoena would have been left at his house at an earlier period; that his intended journey to London was well-known to his neighbours long before the 27th February, and, he believed, to Harriet Bentley, who lived within a mile of his residence; that on the previous Sunday he attended church, but was unable to reach his own pew owing to his illness, and was obliged to sit in another part of the church; that he never knew or heard that Harriet Bentley ever advanced or lent £500 or any other sum to George M'Vittie, her uncle, or expended it on the farm as alleged, or that any agreement existed between the defendant and her uncle about the farm or money, nor did he ever know or suspect that she and her uncle were joint occupiers of the lands, or that she had any interest whatever therein; that she lived with her uncle upon sufferance, and that no promise, directly or indirectly, had ever been made to M'Vittie or the defendant for a lease of any kind whatever, nor was any agreement of any sort ever made with M'Vittie or the defendant concerning the lands, or that they should hold the lands during their joint lives and the life of the survivor, as alleged, or at all; that no agreement such as was put forward by the defendant was ever contemplated or thought of by the plaintiff, or heard of by him, and no such sum of money as the defendant alleged had ever been spent by M'Vittie in permanent improvements thereon; that he did not spend more than £20 upon the permanent improvements of the cottage in which he lived, and, had any such improvements been effected at the expense of the defendant, as alleged by her, the plaintiff would have made her due compensation on the decease of her uncle; but, for reasons well known to the defendant, it was his intention not to allow her to occupy any land or premises on the estate should she survive her uncle, and such intention was well known to M'Vittie in his lifetime. The defendant had made an affidavit in reply, in which she stated that the subpoena was served in the *bona fide* belief that the plaintiff would in his evidence, admit the matters alleged in her defence; that she had no idea that the plaintiff's condition was such as

to render him incompetent to attend the assizes, as he was in the habit of taking exercise on horseback, and frequently after service of the summons and plaint she was anxious to meet the plaintiff, but on every occasion he urged his horse to a gallop, as she believed, to avoid holding conversation with her; and, as a test of the plaintiff's willingness to compensate her for any improvements she had made, she offered to have an issue tried at the next Meath assizes as to the amount of expenditure made by her uncle in improvements during the period of his occupation and that of the defendant, and she was willing to surrender the farm on payment of the sum that might be ascertained to have been expended by her. Dr. Radcliffe, of Cavendish-square, London, had also made an affidavit, stating that he found Lord Mayo suffering from a threatening of paralysis, and a very weak state of the heart, and he believed it would have been dangerous for him to have attended at the Court-house on the trial of the action.

*Battersby, Q. C., and Palles, Q. C. (with them O'Driscoll) for the plaintiff.*—There were two defences pleaded, the common one and a special one, upon which the parties went at the trial. Ferguson's Practice lays it down that the subpoena must be served within a reasonable time, and that the Court will judge of the notice. There are three grounds upon which the application for a new trial is resisted. 1. The defendant during the trial was aware that Lord Mayo was not in attendance, and ought to have asked for a postponement. 2. Upon all that transpired at the trial there is no reasonable probability that the attendance of Lord Mayo would lead to a different verdict. [*Monahan, C.J.*—That is the rule where the witness is a third person, but I doubt if it applies where the witness is a party.] 3. The agreement alleged is not such an agreement as would be a bar to the ejectment.—*O'Grady v. Dwyer* (10 Ir. C. L. R. 441). [*Monahan, C.J.*—I would have postponed the trial if an application had been made to me before it commenced, but I had not the power to do so when it had commenced. The question then is if the party knew of this before the trial commenced. *O'Hagan, J.*—The defendant denies that she knew it and you have only the inference that she must have known it.] We are in the position of a person against whom a petition for specific performance has been filed, and where is the evidence upon which the Court of Chancery could grant specific importance? [*Monahan, C. J.*—The question is, has the defendant not a right to have Lord Mayo before the jury, and to have his memory refreshed. It would have been a very rude thing for a process-server to have insisted on seeing Lord Mayo in his delicate state of health, and serving him personally.] The defendant did not serve a notice on the plaintiff's attorney requiring Lord Mayo's attendance, but treated him as an ordinary witness, and having done so must prove service in the ordinary way. There was no obligation on any member of Lord Mayo's family to give him the subpoena.—*Rice v. O'Connor* (11 Ir. Chan. Rep. 510); *Colles v. Prendergast* (10 Ir. C. L. R. 336.)

*Montgomery and S. Walker, for the defendant, were not called on.*

*MONAHAN, C. J.*—We do not entertain any doubt.

According to the ordinary principles, there must be a new trial. The defendant swears she believes she has a defence, and that the evidence of the plaintiff will support the case. I was under the impression that the subpoena had been properly served. The case went on, and the senior counsel for the plaintiff stated the inability of Lord Mayo to give evidence. The defendant was about giving evidence of an interview between her uncle and Lord Mayo, but it appearing she was not near enough to Lord Mayo to hear what was said, or Lord Mayo sufficiently near to her uncle to hear what passed between him and her, I rejected the evidence. I directed a verdict for Lord Mayo; I stated that if before the commencement of the trial an application had been made to me, I would, as of course, have postponed it, and in making an order of that description, I would exercise my discretion in a very different way if the absent witness was a third person, and not a party. Not being able to postpone the trial, I did the only thing I could do, i.e., stay execution to give an opportunity to move for a new trial on the ground of surprise. The case has been argued. This party wishes to have the advantage or disadvantage of Lord Mayo's evidence. Personal service was unable to be effected, and the members of his family send him away in disobedience to the order of the Court. I do not say intentionally. If Lord Mayo had been at home, I would have postponed the trial to the next day, or from day to day, but I had not authority to adjourn it until the next assizes. The defendant having done all she could to secure the attendance of the plaintiff, we are following the ordinary well-settled principles of the Court in saying that there shall be a new trial.

*KEOGH, J.*—I think Lord Mayo would have been the first person to obey the writ if he had got it, and there is no imputation on him of refusing to obey it, because it appears that some members of his family kept it from him. I entertain a hope that the opposition to the new trial which we have heard argued is also without his knowledge, and is directed by some member of his family, for if there is a man who for the sake of his own reputation and honour should be the most anxious to appear at the trial, and give his evidence, it is Lord Mayo.

*O'HAGAN, J.*—I entirely concur in the judgment of the Court.

*Rule absolute.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE JAMES YOUNG.

*Death of insolvent before adjudication—Dismissal of petition.*

*Where an insolvent dies before adjudication, and his petition is dismissed, although the order of dismissal*

*sal is of record, the Court will re-instate it so as to have the estate of the insolvent administered as if no dismissal had taken place.*

*Thomas Lynch*, on the part of the assignee, applied to have an order of the chairman of sessions of the County of Antrim corrected, and to have a sum of money in Court to the credit of the matter distributed amongst his creditors. It appeared that in the month of April, 1861, the insolvent, who was confined in the Belfast prison, petitioned the Court to be discharged as an insolvent. Having filed his schedule he was discharged on bail. Several adjournments subsequently took place, and when the case came on to be finally heard in April, 1865, the insolvent's attorney announced to the chairman that his client had recently died, and asked to have the petition dismissed, which the chairman did dismiss, and which dismissal appeared on record. The insolvent at the time of his insolvency was in possession of certain lands and houses in the County of Down and in Belfast, which were mortgaged, and the mortgagee having petitioned for and obtained a sale of the mortgaged property in the Landed Estates Court, there was a balance in Court, after paying off the mortgage, amounting to six hundred and fifty pounds, to which the insolvent's creditors would be instantly entitled but for the dismissal of the petition. If the petition had been dismissed whilst the insolvent was living, and before adjudication, the effect would be to annul the vesting order, and restore the insolvent's estate back to himself. If adjudication has taken place, then a re-vesting order should be obtained according to the course of the Court, but where the discharge takes place before adjudication, the mere dismissal of the petition re-vested the property in the insolvent. Mr. Lynch contended that what the chairman had done was wholly beyond his jurisdiction—he had no power whatever to dismiss the petition, the effect of which, if valid, would be to deprive the creditors of the insolvent of his estate, to which they were entitled. There was a considerable sum of money in Court that ought to be divided amongst them. The Court should regard what the chairman had done as a nullity, and deal with the fund in Court as if no dismissal had taken place. [*Lynch, J.*—Here I have on record a dismissal of the petition—the cause is apparently out of Court.] The chairman acted in error, in mistake of law, and it was wholly out of his power to correct that mistake, for after the sessions were over his jurisdiction was wholly at an end. He asked the Court to deal with the case as if no dismissal of the petition appeared on record; in fact, what was done was a perfect nullity. The only case to be found where an attempt was made to get a petition of an insolvent dismissed who died before adjudication was that of *Re Bianconi* (10 Law Times, 283), where the application was refused.

JUDGE LYNCH said it appeared to him that the proper course to pursue was to reinstate the petition, and let the estate be administered as if no dismissal had taken place, but he thought the heir-at-law and personal representative of the insolvent should have notice.

*Kernan, Q.C.*, said he was for the heir-at-law, and he thought he could not object to have the peti-

tion re-instated, and the estate administered by the Court.

JUDGE LYNCH said—As the heir-at-law was represented, and as he thought he had jurisdiction to correct the mistake that had been made by the chairman, he would direct the petition to be re-instated, and that would give the creditors all the rights to which they were entitled.

The petition was accordingly re-instated.

#### [BEFORE BERWICK J.]

##### RE AN ARRANGING TRADER.

*Paying a portion of trader's debt in full—Equitable jurisdiction of the court.*

*The Court has an equitable jurisdiction to direct that a particular creditor should be paid a portion of his debt in full if the proposal of the trader would not be reasonable or proper as regarded that creditor, to be executed under the directions of the Court, and such time may be given for the payment as the Court shall direct.*

THE arranging trader in this case was opposed by Bergin, solicitor for a creditor named Graham, whose debt was contracted under the following circumstances:—The opposition was to get paid in full one portion of the debt, and that he would then come in with the other creditors and take a composition of five shillings in the pound, which was the proposal made by the arranging trader. Graham, who was a bricklayer, was employed by the trader, who was building four houses; and a sum of seventeen pounds having accrued due to him, he went on a Saturday by appointment to meet the trader at a hotel, to be paid what was due to him, or at least something on account; but he was not there, and Graham went to another hotel where he was, and, having seen him, some altercation took place between them about the work; and it was alleged by Graham that the trader assaulted him by giving him a blow of his clenched fist. Graham then commenced two actions against the trader, one for the balance due for his work, and another for the assault. Defence was taken to both, and when the case was ready for trial a compromise was entered into between the parties and the proceedings stopped, the plaintiff agreeing to take £20 damages for the assault, to be paid at the rate of a pound a week. One instalment was paid and no more, when in some weeks afterwards the trader presented his petition under the arrangement clauses, offering five shillings in the pound upon both debts. Bergin contended that the Court ought not to sanction the principle of permitting a man to commit an assault or any other trespass or fraud, and when the plaintiff was entitled to judgment and execution permit the party thus offending to present his petition under the arrangement clauses of the Bankrupt Act, and pay the aggrieved party a composition of five shillings in the pound on the damages to which he was entitled.

*Kernan, Q.C.*, for the arranging trader, contended in the first place that the action for the assault was a paltry affair, instituted for the purpose of creating costs; that in fact no assault had been committed; and that it was oppressive to institute two actions in the superior courts for what could be tried for a few shillings in the Recorder's Court; and in the second place the Court had no power whatever to direct that one creditor should be paid more than another; doing so would not only be contrary to the spirit of the law of debtor and creditor, but a direct violation of the statute. The creditor was therefore entitled to no more than any other creditor, and the court ought not to direct that he should be paid any part of his debt in full. The trader had a large majority of creditors, much larger than the statute required, and those creditors objected to any one particular creditor getting more than they got, and he contended that the Court had no power to give it.

*BERWICK, J.* said he could not fully agree in the propositions submitted by counsel. First, that there was no ground for an action; but whether there was or not, the party had given a consent to settle it, and entered into an arrangement that the Court could not then go behind. With regard to the power of the Court to give more to one creditor than another, it was the practice of the Court to give costs to a creditor who brought an action for the recovery of his debt, which was subsequently stopped by the arrangement proceedings; and doing so was exercising an equity in favour of the creditor. He believed that under the 353rd section he had power to make an equitable order if it appeared to him that the proposal made even as regarded a particular creditor was not reasonable or proper to be executed under the statute. He did not think it reasonable that an arrangement entered into by the debtor by which he compromised an action and prevented the proceeding to obtain judgment and issue execution should be treated as an ordinary trade debt contracted perhaps after a long course of mercantile transactions. He was inclined to think that the action for the assault was a very trivial affair; and whatever motive may have induced the plaintiff to bring the action, he subsequently entered into an arrangement with the defendant, who paid one of the instalments agreed upon and then filed his petition for arrangement. And he did not think the defendant should be permitted to go outside of that arrangement, and he would allow the composition to be carried, the trader undertaking to pay one part of the debt in full according to the original undertaking. On looking at the account he was entitled to credit for a sum that would reduce the claim to about fifteen pounds, which should be paid in two and four months.

#### IN RE A DISPUTED ADJUDICATION.

*Committal of bankrupt pending proceedings to show cause against the adjudication, on the ground that no act of bankruptcy was committed—Arbitration between alleged bankrupt and the petitioning creditors—Annulling adjudication.*

*Although a bankrupt has a bona fide intention of shewing cause against his adjudication, on the ground that he has committed no act of bankruptcy, and has taken the necessary proceedings to do so, still he may be committed for unsatisfactory answering, and for not giving up money in his possession, before the validity of the adjudication is decided: ¶ Where there is a dispute between the petitioning creditors and the alleged bankrupt, the matter may be referred to arbitration with the consent of the Court, pending the proceedings to show cause, and upon the arbitrators making their award, the bankruptcy will be annulled.*

In this case the alleged bankrupt was a cattle dealer, and having on a Thursday, a market-day, purchased in Smithfield cattle amounting to six hundred pounds, he took them to Liverpool to be sold, and was, according to the course of the trade, to leave Liverpool on the following Monday, be in Dublin on Tuesday, and pay for the cattle. He sold the cattle in Liverpool on Monday, and arrived in Dublin on Tuesday, but instead of going to the factors to pay for the cattle, he went to his attorney, and instructed him to demand a settlement from the factors before he would give up the money, as he alleged that on an account being taken between them he would be entitled to a considerable sum, and he thought it a favourable time to get a settlement whilst he had the money in his possession. The attorney refused to undertake the case until he got some outline of the account between them, which appeared to have been going on for at least five or six years. The interview with his attorney was on Tuesday, the day of his arrival in Dublin, and it was agreed that he should call at ten on the next morning, when he would have his papers in order. The man then went to a friend of his who understood the cattle trade, and appeared to have been conversant with accounts, and it being very late at night when they had gone over the papers, his friend suggested that he would remain all night with him, and he accordingly did so, but was with his attorney early the following morning. In the meantime the clerk of the factors called at his lodging to look for him, but he was not there. The same person called again on Wednesday, and was informed by the man's wife and son that he had not slept at home the previous night, that they did not know where he slept, or where he was (although at the time he was in his attorney's office giving instructions with regard to the taking of the account between himself and the factors), whereupon the wife and son were brought to the Bankrupt Court, and made depositions to that effect. A petition for adjudication having been filed, *Kernan, Q.C.* came in to ask the Court to adjudge, on the ground of absconding, and also for a warrant for the bankrupt's arrest if he could be found. *Kernan* relied on the fact of his fraudulent intention from the large sum of money he had in his possession, and his never having gone near his creditors. The Court adjudicated. In the meantime the man went home to his place of residence, and on the way met his wife and son, who informed him of what had been done. He then went back to his attorney, who forthwith served notice of shewing cause against the adjudication.



The bankrupt attended in Court next day, and Kernan, Q.C. was prepared to examine him with a view to ascertain what had become of the money, and to have him committed to prison unless he gave it up or lodged it in Court.

Levy objected to such a course of proceeding where notice was served to show cause against the adjudication. There was not the most remote notion to commit an act of bankruptcy, as was evidenced by the incontrovertible facts of the case.

The objection was overruled, and the bankrupt having been examined at considerable length, he said he had given bills and cheques to his attorney to collect to the amount of about three hundred pounds; the remainder he had got perfectly safe, and he would keep it until he got what he called a fair trial. He was committed for unsatisfactory answering. Affidavits as cause were then filed, which detailed the foregoing facts at considerable length. The bankrupt still retained the money, but offered to leave his case to the decision of two arbitrators, and offered to give the money into the hands of one of them until the case was decided, the whole to be with the approval of the Court. The money was accordingly handed to one of the arbitrators, and the bankrupt discharged from custody.

The case was brought before the Court on the following day, and the arbitrators made their award that the petitioning creditors should pay the bankrupt one hundred pounds, and all his costs, and consent to have adjudication annulled.

BERWICK, J., said although the man had taken a very wrong course simply in not going to his creditors to ask a settlement before he went to his attorney, he firmly believed that he did not intend to defraud his creditors, or commit an act of bankruptcy, and that he left the Court without any imputation on his character. His Lordship annulled the bankruptcy.

#### RE JOHN LAMBERT.

#### *Landlord and tenant—Election—Giving up possession—Certificate.*

*Where the assignees elect not to take an interest held by the bankrupt, although the bankrupt has got his certificate, the Court will make an order on him to give up the possession to the landlord, and thus prevent the necessity of bringing an ejectment on the title.*

THE 27th section of the Bankrupt Act provides that if the assignee shall not, within a reasonable time after being thereto required, elect whether they will accept or decline such lease, or conveyance, or agreement, or such lease, or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect, and may order the lessees or the bankrupt, or insolvent, to deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or make such other order as it shall think fit.

Kernan, Q.C., now applied for the landlord, for an order to give up possession of a house and premises in Temple Bar, which was agreed to be leased to him by a Mrs. Cranston, who had the house in right of her husband, who was dead. Mrs. Cranston was also dead, and he appeared for the executors of the wills of both, and for the landlord, Mr. Ryan. The usual notice was served on the assignees, calling on them to elect under the statute, and they in reply stated that they claimed no interest in the premises, and would have nothing to say to them. The bankrupt was called upon to give up the possession, which he refused to do, although he never paid any rent for a year that he was in the house. If possession were not given, the landlord would be obliged to bring an ejectment on the title, and thus lose, perhaps, another year's rent.

SEEDS, for the bankrupt, stated that counsel for the landlord disclosed his real object, which was to try an ejectment on the title by the summary mode of getting an order on the bankrupt to give up possession, which he could not do, as it was let by him to a sub-tenant. In the second place he contended that the Court had not power to make such an order, inasmuch as the bankrupt had obtained his certificate, and was, as regarded the house in question, out of the jurisdiction of the Court. The time for the landlord to make the application was on the passing of the final examination of the bankrupt; but he could not do so at present—the Court had not jurisdiction, and there was another party in possession. Let the landlord bring his ejectment on the title.

Kernan, Q.C. said, with regard to the sub-letting, the landlord would take the possession subject to any interest created by the letting of the bankrupt. The bankrupt still occupied a room in the house, and all that was required was, that he should give up the possession, and let the landlord deal with the sub-tenant.

LYNCH, J., said, any difficulty that might have existed with regard to the interest of a third party, was removed by the landlord taking the possession subject to it. He could not agree to the proposition that because a bankrupt got his certificate the Court had lost jurisdiction over him under the 27th section. The assignees had elected to have nothing to do with the premises in question, and the order to give up the possession to the landlord was an honest and proper one, and he would direct that the bankrupt give up the possession within a week.]

### Court of Exchequer Chamber.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE LEFROY, C.J., MONAHAN, C.J., KEOGH, O'BRIEN, FITZGERALD, and O'HAGAN, JJ.]

WRENFORDSLEY v. O'CONNELL.—May 31.

*Practice of Office for the Registry of Deeds—Fees—Stat. 2 & 3 Wm. 4, c. 87, ss. 21, 22, and Schedule B.*

*The decision of the Court of Exchequer (ante, Vol. 10, p. 317) affirmed.*

THIS was an appeal from an order of the Court of Exchequer. The case below will be found reported in 10 Ir. Jur. N. S. 317, where the facts and the sections of the Acts of Parliament upon which the question turned are fully given.

*Ball, Q.C., and Vereker*, for the appellant.—Stat. 2 & 3 Wm. 4, c. 87, s. 11, states what the abstract book is to contain. Section 14 indicates the names to be kept. Supposing you were making a search now, you would get among the acts an act done by Mr. Wrenfordsley about these lands, and connected with it the very same numbers, by which you will get the very same information as by the other book. I am not to be charged for looking into the other book. As well might I be charged if the officers chose to have several searches and cross searches by different clerks.—*Warburton v. Ivis* (1 Huds. & Br. at page 660); 8 G. 1, c. 82; 25 G. 3, c. 47. Under 2 & 3 Wm. 4, c. 22, you may have a search against lands alone or names alone. Why should I pay ten shillings for searching against premises in Dawson-street, when I can have a search all over Ireland for five shillings? If the statute intended that the normal fee was to be ten shillings, it would have said so.

*Heron, Q.C., and Watere*, contra, were not called on.

*MONAHAN, C.J.*—The schedule to the statute is a legislative declaration that a common search in the form in which you have sent in your requisition is to cost five shillings; otherwise, if it is against the lands only, or names only. The fees are doubled in the case of a negative search, for the sake of the responsibility and on account of it.

*LEFROY, C.J.*—We are all of opinion that the order of the Court of Exchequer shall be affirmed.

#### CARLETON v. HERBERT.—June 1.

##### *Lease—Clause of surrender—Notice—Sufficiency of.*

*A lease contained a clause that it should be lawful for the tenant at the expiration of the three first years of the term "to surrender and deliver to the landlord possession" of the premises demised, he, the tenant, first giving to the landlord "six calendar months' previous notice in writing of his intention so to surrender the said premises." The tenant sent to the landlord a notice, directed to him "and all whom it may concern" of intention on a day named to surrender and deliver up "to you the quiet and peaceable possession of All That and Those the house and lands of A. which I hold from — as tenant." This notice was not signed by the tenant, nor did it in any part contain his name, but when it was delivered the landlord was told what it was, and from whom it came. On the day named, the tenant attended on the lands to give up possession, but no one attended on behalf of the landlord, and the tenant then put a caretaker into*

*possession, and left the place. Held (Fitzgerald, J. dissenting), that the notice of surrender, though unsigned by the tenant, and not containing his name, was sufficient.*

*Held also (Fitzgerald, J. offering no opinion on the point), that the tenant did all that in him lay by attending on the day named to deliver up possession, and by subsequently leaving the place, and that no formal deed of surrender was necessary. And therefore, that the term had been determined, and the landlord could not bring an action to recover rent which, but for that, would have accrued after the day named in the notice.*

APPEAL from the Court of Exchequer. The case stated by way of appeal was as follows:—The following case is stated pursuant to the Common Law Procedure Amendment Act (Ireland), 1856, sections 40 and 41, by way of appeal by the plaintiff from a decision of her Majesty's Court of Exchequer made on the 17th day of February, 1866, discharging with costs the following conditional order of the said Court of Exchequer dated 22nd April, 1865. "On motion of Mr. Chatterton of counsel on behalf of the plaintiff, and on reading the certificate of counsel in this cause, it is ordered by the Court that the verdict had for the defendant at the last assizes for the city of Cork be set aside, and instead thereof a verdict be entered for the plaintiff with £70 damages and 6d. costs, pursuant to the leave reserved by the learned judge who tried the cause, or that the said verdict for the defendant be set aside, and a new trial had, on the ground of misdirection of the said learned judge, and for the reception of illegal evidence on the said trial, unless cause be shown to the contrary in four days after the service of this rule."

This action was commenced on the 26th October, 1864, by a writ of summons and plaint which was filed on the 22nd day of November, 1864, and was in these words, "Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith and soforth, to Gustavus Herbert, the defendant, greeting: Gustavus Herbert, the defendant, is summoned to answer the complaint of John Parker Carleton, the plaintiff, who complains that the defendant is indebted to the plaintiff in the sum of £70, for that the plaintiff, by deed bearing date the 17th February, 1862, let to the defendant All That and Those, the dwelling-house, out-offices, gardens, lands, and premises, known as Altavilla, containing about twenty acres, English statute measure, be the same more or less, as then in the possession of the said Gustavus Herbert, situate in the parish of Douglas, barony of Cork, and County of Cork, for the term of thirty-one years, to hold from the 25th March, 1861, at the rent of £140 sterling, payable half-yearly, of which rent one half-year's gale, amounting to the sum of £70, is due and unpaid, the particulars whereof are hereon endorsed, and the plaintiff prays judgment," &c.

On the 1st December, 1864, the defendant appeared and filed a defence set out in the appendix hereto, and marked A, on which defence the following issue was knit—"Is the defence true in substance and in fact?"

The cause came on to be tried before the Honourable Judge O'Brien, at the Spring Assizes, 1865, held at Cork, in and for the city of Cork, when, on the application of the defendant's counsel, the learned judge ordered that the said defence should be amended as in the said order specified, and that the pleadings and record should be further amended by adding a second defence herein-after set forth, and that the plaintiff should be at liberty to file to the said first amended defence the replication herein-after set forth, and also to demur to the same defence; and that the second issue herein-after set forth should also be added to the second defence, pursuant to the said order at Nisi Prius. The first defence (amended) was as follows:—

The said defendant, Gustavus Herbert, appears and takes defence to the action of the said John Parker Carleton, the plaintiff, and says that it was provided by the deed mentioned in the plaint that it should be lawful for the defendant to surrender and deliver unto the plaintiff the possession of the premises hereby demised at the expiration of the first three years of that term, and also at the expiration of every successive period of three years, to be computed from the 25th day of March, 1861, he, the defendant, his executors, administrators, or assigns, first giving unto the plaintiff six calendar months' previous notice in writing of his or their intention so to determine the said term, and also first paying unto the plaintiff all rent and arrears of rent, rates and taxes, which should or might be due and payable by, or to which, as occupier, the defendant and his executors, administrators or assigns, should be liable up to the day of such determination of the said term; and the defendant avers that afterwards, to wit—on the 24th day of September, 1863, the defendant gave the plaintiff six calendar months' previous notice in writing pursuant to the provisions of the said deed of the intention of him, the defendant, to surrender and deliver unto the plaintiff the possession of the said premises on the 25th day of March, 1864, the last-mentioned day being the day of the expiration of the first three years of the said term from the 25th day of March, 1861, and that the defendant, before the expiration of such period of six calendar months, paid all rent due to the plaintiff by the defendant under the said deed up to and for the said 25th day of March, 1864, and also all rates and taxes required to be paid as aforesaid; and that thereupon, on the 25th day of March, 1864, and before any of the rent claimed by the plaintiff fell due, the said term ceased and determined by such notice and payments, and therefore he defends the action.

In further pursuance of the said order at Nisi Prius the following defence was added to the record:—

And for a further defence the defendant says—That it was provided by the deed mentioned in the plaint that it should be lawful for the defendant at the expiration of the first three years of that term, and also at the expiration of every successive period of three years, to be computed from the 25th March, 1861, to surrender and deliver unto the plaintiff, his executors, administrators, and assigns, the possession of the premises thereby demised, he, the defendant, his executors, administrators, or assigns first giving to the

plaintiff six calendar months' previous notice in writing of his or their intention so to surrender the said premises, and also first paying unto the plaintiff all rent and arrears of rent, rates, and taxes, which should or might be due or payable by, or to which as occupier, the defendant, his executors, administrators, or assigns, should be liable up to the day of such determination of said term; and the defendant avers, that afterwards, to wit—on the 24th September, 1863, the defendant gave the plaintiff six calendar months' previous notice in writing of the intention of him, the defendant, to surrender and deliver the possession of the said premises unto the said plaintiff on the 25th day of March, 1864; and that the defendant, before the expiration of such period of six calendar months, paid all rent due to the plaintiff by the defendant under the said deed up to and for the said 25th day of March, 1864, and also all rates and taxes required to be paid as aforesaid; and the defendant avers that on said 25th March, 1864, in pursuance of said notice, he did surrender and deliver up the possession of the said premises to the plaintiff, and before any of the rent claimed by the plaintiff fell due.

Pursuant to the said order at Nisi Prius, the following replication was filed to the said defence as amended:—

"The plaintiff by way of replication to the defendant's first defence, and by leave, says, that the said first defence is not true in substance and in fact."

Pursuant to the said order at Nisi Prius, the plaintiff also filed a replication in the nature of a demurrer to the said first defence (as amended), and the said demurrer was allowed by order of the Court of Exchequer, dated the 10th day of November, 1865.

The issues on the pleadings, as amended, were as follows:—

1st issue—Is the defendant's first defence true in substance and in fact?

2nd issue—Is the defendant's second defence true in substance and in fact?

No. 1.—The defendant commenced and produced and proved the lease mentioned in the plaint, dated the 17th February, 1862, made between the plaintiff of the one part, and the defendant of the other part, of the premises mentioned in the plaint, for the term of thirty-one years, from the 25th March, 1861, at the yearly rent of £140, payable half-yearly, on 29th September and 25th March. And said lease contained a provision in the following words, "Provided always, and it is hereby declared and agreed upon by and between the said parties hereto, that it shall and may be lawful to and for the said Gustavus Herbert, his executors, administrators, and assigns, at the expiration of the first three years of the term hereby granted, and also at the expiration of every successive period of three years, to be computed from the said 25th March, 1861, to surrender and deliver unto the said John Parker Carleton, his executors, administrators, and assigns, the possession of said premises hereby demised, he, the said Gustavus Herbert, his executors, administrators, or assigns, first giving unto the said John Parker Carleton, his executors, administrators, or assigns, or leaving at his or their usual or last known place of abode in Ireland, or leaving same with his or their known agent or receiver six

calendar months' previous notice in writing of his or their intention so to surrender the said premises, and also first paying unto the said John Parker Carleton, his executors, administrators, or assigns, all rent and arrears of rents, rates and taxes, which shall or may be due or payable by, or to which, as occupier, the said Gustavus Herbert, his executors, administrators, or assigns, shall be liable up to the day of such surrender."

Eyre Powell, Esq., first witness for defendant.—"On the morning of 24th September, 1863, I was going to hunt, and got from defendant two documents, one written and one partly printed. The latter was not then signed; I did not observe that neither was signed. I went to plaintiff's house, about three and a-half miles from Altavilla, and sent in word I was there. Plaintiff appeared at the window; I saluted him, and said, I suppose you have heard that Mr. Herbert is about to leave Altavilla; plaintiff said he did not; he was sorry to hear it as he liked the family; he asked me to go into the house; I said I could not as I was in a hurry, but that I had a notice from defendant for him. Plaintiff came down to the door afterwards; I was outside the house on horseback the whole time, and I handed to plaintiff the written notice." The notice was produced, and was as follows:—

"Notice of surrender. Sir,—I hereby give you notice that I will surrender and deliver up to you, on the 25th day of March next, the quiet and peaceable possession of All That and Those, the House and lands of Altavilla, which I hold from as tenant. Dated the 22nd day of September, 1863. To John Parker Carleton, Esq., and all whom it may concern." "I told plaintiff to read the notice which he did."

No. 2.—The defendant then proposed to give in evidence a conversation which occurred on that occasion between the said Eyre Powell and the plaintiff in explanation of the above-mentioned notice, which was objected to by counsel for the plaintiff; firstly, on the ground of its being irrelevant to the issue, because the notice of surrender was either a sufficient notice in itself or insufficient, and if insufficient it could not be aided by any such conversation; and, secondly, because the acquiescence or assent of the plaintiff in or to the notice, even if such were proved by the proposed evidence, could not supply the defects in that notice.

The learned judge admitted the evidence subject to the objection, and the said Eyre Powell then continued.

No. 3.—"After plaintiff read the notice, I asked plaintiff was all right—he said, 'It is; it will do, Powell;' I then handed to him the printed document and told him to read it. He said there was no occasion, and that the other one would do. I then said—'Herbert (defendant) told me (Powell) to tell you to read it to show that it was a true copy, and to get it back from you (plaintiff) again, and that I (Powell) was to leave you (plaintiff) the written one;' plaintiff then read the printed document, and handed it back to me, and I said—'I suppose you will see Herbert when he comes back.' He said—'I suppose so,' or to that effect." On cross-examination witness said he did not remark at the time that neither document was signed.

No. 4.—The printed document was a duplicate of the above notice of the 22nd September, 1863.

No. 5.—The defendant, Gustavus Herbert, was then examined on his own behalf; and, the aforesaid notice and the duplicate notice, partly written and partly printed, having been produced to him, said—"The written notice and all the other, except the printed part, are in my handwriting; I sent them both to Eyre Powell in a letter."

The defendant also proved that he had paid all rent, rates, and taxes, up to the 25th day of March, 1864.

That on the 27th October, 1863, the plaintiff was requested by the defendant's attorney to accept a perfect notice, signed by the defendant, instead of the firstly above-mentioned notice, to which request the plaintiff declined to accede, by a letter dated the 27th of October, 1863, marked "B," and set forth in the appendix hereto.

No. 6.—That following notice was also proved by defendant to have been served by the defendant on the plaintiff, on the 27th of February, 1864. "Sir,—I hereby give you notice that the house and lands of Altavilla, which I hold from you as tenant, and for the surrender of which, and the determination of such tenancy, on the 25th day of March next, you have been already served by me with due notice, will be ready for you to take possession of upon the 25th of March next, and that I shall be prepared to give you up such possession, and to pay all rent due to that date in respect thereof. And I further apprise you that if you refuse to take up such possession on that day, or in case you shall not attend upon the premises on said 25th day of March next, for the purpose of taking such possession, I will, in either of such cases, then leave the premises, putting a caretaker in charge thereof at your expense. Dated this 27th day of February, 1864. Gustavus Herbert. To John Parker Carleton, Esq."

No. 7.—The following notice in reply was also proved to have been served by the plaintiff on the defendant on the same day (the 27th February, 1864). "Sir,—Not having received due notice of your intention to surrender Altavilla, rendered necessary on our agreement, I cannot take up possession thereof on the 25th of March next, as required by your notice of this day. And I hereby give notice that I will hold you responsible, not only for the rent, as it shall fall due until our agreement shall be terminated legally, but also for any damage or injury the place may sustain during such time, and use this notice as I may be advised in any proceeding that may be necessary for me to take in the premises. Dated this 27th February, 1864. J. P. Carleton. To Gustavus Herbert, Esq., Altavilla."

No. 8.—After the proof of the foregoing documents the defendant then proved that he attended at Altavilla on the 25th March, 1864, until 5 p.m. to give up possession, but no one attended on behalf of the plaintiff, and defendant then put a caretaker into possession and left the place. [This evidence was objected to on behalf of the plaintiff.] Defendant also proved that he saw plaintiff at an auction which defendant had at Altavilla on 21st and 22nd of March, 1864, and that all defendant's property was removed from Altavilla before the 25th of March, 1864.

Henry Walker was the next witness—He proved payment by the defendant of all rates and taxes assessed on the demised premises up to and for the 25th day of March, 1864.

Counsel for defendant then, by leave of the Court, examined the plaintiff, and asked him whether when he received the notice of surrender of the 22nd of September, 1863, he knew the handwriting of the said notice, and the handwriting in the said printed duplicate thereof, to be the defendant's handwriting.

Counsel for the plaintiff thereupon objected to the question on the ground that it was irrelevant to the issue. The learned judge admitted the evidence, subject to the objection; and the plaintiff then stated that, to the best of plaintiff's belief, the said notice of 22nd September, 1863, and duplicate were in the defendant's handwriting.

The defendant read the foregoing documents and elicited.

Counsel for the plaintiff then required the learned judge to direct a verdict for the plaintiff on the ground that the original defence as pleaded was not proved.

Whereupon, on the application of the defendant's counsel, the learned judge having made the aforesaid order at Nisi Prius, and the pleadings and record having been amended accordingly as above set forth, counsel for the plaintiff required the learned judge to direct a verdict for the plaintiff on both the said issues on the ground that the notice of the 22nd September, 1863, was not in compliance with the lease of the 17th of February, 1862, and also required the learned judge to direct a finding for the plaintiff on the said issue knit on the second defence on the ground that there was no evidence of a surrender of the possession of the premises to the plaintiff on the 25th March, 1864.

But the learned judge refused so to do, and left the following question to the jury:—Whether at the time that plaintiff got the notice of the 22nd September, 1863, as mentioned in the evidence, he was aware they were in defendant's handwriting.

Counsel for the plaintiff objected to this question being left to the jury, as irrelevant to the issues, and the learned judge ruled against the objection, but took a note of it.

The jury found the question so left to them in the affirmative; and the learned judge then directed the jury to find for the defendant; but reserved leave to the plaintiff to move to have the verdict changed into a verdict for the plaintiff for £70, if the Court should be of opinion that the learned judge should have directed a verdict for the plaintiff on the aforesaid ground relied on by plaintiff's counsel as above mentioned, or to enter a judgment for the plaintiff on either of the said issues, in case the Court should be of opinion that the learned judge should have directed a finding for the plaintiff on either of the said issues. The jury found accordingly for defendant on both issues.

Within the time in that behalf allowed by the rules and practice of the said Court, viz., on the 22nd day of April, 1865, the plaintiff, by his counsel, applied to the said Court of Exchequer, pursuant to the leave so reserved at the said trial as aforesaid, and obtained the conditional order of the 22nd of April, 1865, above stated.

Afterwards the Court of Exchequer, by the order of the 17th February, 1866, above stated, discharged the said conditional order with costs.

The plaintiff appeals from said last-mentioned decision and order pursuant to the provisions of the Common Law Procedure Amendment Act, 1856.

Due notice of this appeal has been given pursuant to the said Act.

The question for the Court of Appeal is, whether the said order of the 17th February, 1866, ought to have been made on all or any of the grounds aforesaid, or whether the conditional order of the 22nd of April, 1865, ought to have been made absolute?

The Court of Appeal to make such rule upon the appeal as it shall think fit, and to proceed thereon pursuant to the provisions of the Common Law Procedure Act (Ireland), 1856.

## APPENDIX "A."

### COURT OF EXCHEQUER.

*Thursday, the First day of December, 1864.*

JOHN PARKER CARLETON,  
Plaintiff;  
GUSTAVUS HERBERT,  
Defendant.

The said Gustavus Herbert appears and takes defence to the action of the said

John Parker Carleton, the plaintiff, and says that it was provided by the deed mentioned in the plaint that it should be lawful for the defendant to determine the term thereby granted at the expiration of the first three years of that term, and also at the expiration of every successive period of three years, to be computed from the 25th day of March, 1861, he, the defendant, his executors, administrators or assigns, first giving unto the plaintiff six calendar months' previous notice in writing of his or their intention so to determine the said term, and also first paying unto the plaintiff all rent and arrears of rent, rates and taxes, which should or might be due or payable by or to which, as occupier, the defendant and his executors, administrators and assigns, should be liable up to the day of such determination of the said term; and the defendant avers that afterwards, to wit—on the 24th day of September, 1863, the defendant gave the plaintiff six calendar months' previous notice in writing (pursuant to the provisions of the said deed) of the intention of him (defendant) to determine the said term on the 25th day of March, 1864, the last-mentioned day being the day of the expiration of the first three years of the said term from the 25th day of March, 1861, and that the defendant before the expiration of such period of six calendar months, paid all rent due to the plaintiff by the defendant under the said deed up, to, and for the said 25th day of March, 1864, and also all rates and taxes required to be paid as aforesaid, and that thereupon on the 25th day of March, 1864, and before any of the rent claimed by the plaintiff fell due the said term ceased and determined by such notice and payments, and therefore he defends the action.

CHARLES HENRY WOODROFFE.

JAMES LANE, Attorney for Defendant,  
33 North Great George's-st., Dublin

"B."

22 Marlboro'-street, Cork,  
October 27th, 1863.

Dear Sir,

In reply to your application on behalf of Mr. Herbert about Altavilla, I regret I cannot take up possession of Altavilla on the 25th of March next, as I have not received notice to that effect.

A report of the case below was in Court, and by it it appeared that Fitzgerald, B., differed from the other Barons of the Exchequer.

*Chatterton, Q.C., and Wm. Johnson* for the plaintiff.—The first question here is as to the validity of the notice of the 22nd September, 1863. It will be observed that it is not signed, and that there is a blank left where the name of the plaintiff ought to appear. It does not contain the name of the tenant from beginning to end. The defence is in effect an allegation that a subsisting legal estate has been determined formally as required in the lease. This is a question of title, and the Court is bound to say whether as a matter of title this is a sufficient notice to determine the lease. It must turn on the question what is the meaning of the clause of surrender in the lease. The onus of proving the determination lies on the tenant. The landlord has stipulated that any surrender must be by reason of a notice in writing given six months before. It was reasonable that the notice should be in writing for the sake of certainty. It is quite reasonable that the notice in writing should bear the sign manual of the party who is to determine the estate by giving the notice. [*Monahan, C. J.*—There is nothing here requiring the notice to be in the handwriting of the tenant himself, though it is to be in writing. Suppose his agent, by his direction, wrote a letter giving notice, would not that be sufficient?] That is just the question. There is not a single case deciding that a notice without a signature is good. Suppose an attorney serves notice of trial without signing it, that would be bad. The authentication of the notice is a most important part of it, and if that is omitted can it be said that the notice is good? [*Monahan, C. J.*—Notices given in the course of causes are all regulated by the rules of the Courts. Ordinary notices to quit need not be signed at all. The notice here must no doubt, according to the proviso in the lease, be in writing, but there is nothing in the terms of that proviso requiring it to be signed.] But what is a notice? Is it not required by the contract that the notice as a complete thing is to be in writing? Where are you to stop? Suppose the names of the lands were left out. [*O'Hagan, J.*—The difficulty I have is this, that taking the whole notice together it is quite clear and strong. It says, "I give notice that I will surrender." That word of itself imports a certain relation between the parties, and there is no evidence that there are any lands of Altavilla but those named here.] Suppose the notice was in the handwriting of a third person, not in that of Mr. Herbert, and that the notice was handed by a stranger to Mr. Carleton, would that be good, the notice being simply in the terms used here, but not naming the premises?

[*Monahan, C. J.*—That might be bad, because there would be nothing on the face of it to show what the lands were, or impliedly to shew from whom it came.] Could parol evidence be given to shew those matters? The question is not what the party intended to do, but what the landlord would be safe in acting on. [*Fitzgerald, J.*—What you say is, that the notice itself must shew from whom it comes, and to whom it is sent.] The notice might be given by an assignee. Surely, the landlord is to know from whom it comes. Is the landlord to be driven to the danger of parol evidence? [*O'Brien, J.*—If the notice was signed by an agent having authority, would not the authority have to be proved by parol evidence, and would not that involve the same danger?] Where a written notice is defective, the jury may not be asked whether from the landlord's conduct they believe that he understood it to refer to the right person.—*Cadby v. Martinez* (11 A. & E. 720); *Smith Landl. & Ten.* p. 327. Then it is said that the plaintiff is estopped from disputing the validity of the notice by his saying that it was all right. (Defendant's counsel stated they did not desire to argue that point.)—*Doe v. Milward* (3 M. & W. 328); *Bessel v. Landsberg* (7 Q. B. 638); *Johnston v. Huddleston* (4 B. & Cr. 922); *Doe v. Johnston* (M'C. & Y. 141); *Mollet v. Brain* (2 Campb. 103) are important on the question how far a landlord is bound by an imperfect or wrong notice. Then what is the effect of the clause in the lease, supposing a good notice was given? We say the defendant has made a mistake as to the way in which he has put forward his defence. We do not say that a landlord can prevent his tenant from taking advantage of such a proviso as this; but the case made here by the defendant is, that he did in point of fact in pursuance of the notice, surrender and give up possession. We say that he did not give up possession. A notice was indeed served on the 27th October, to which a cross-notice was served, declining to attend on the premises, and take up possession. The distinction between the two sorts of proviso for surrender is well known. The question is, whether the defence that defendant did surrender is sustained. The mere notice could not operate as a surrender. *Doe v. Milward* (3 M. & W. 328) decides that. What the defendant must rely upon is, that the plaintiff not having attended, all that the defendant had to do was to leave, and put a care-taker in possession. At all events that is not a surrender; a surrender must be in writing—stat. 23 & 24 Vict. c. 154, s. 7. [*Le-froy, C. J.*—If the landlord does not come, what more can the tenant do than what was done in this case? There is a maxim—*Lex neminem cogit ad impossibilia.*]

*Brereton, Q.C., and C. H. Woodroffe* for the defendant.—The only question here is, whether within the four corners of the notice there is what makes it sufficient. We do not mean to contend that parol evidence should be admitted to supply its defects. We must make the document out to be sufficient to bind the party who served it. Anyone of ordinary understanding reading it must see that it is a notice from the lessee of Altavilla to the landlord, to surrender on a particular day. It could not have misled Mr. Carleton. Any notice which does not deceive

the party upon whom it is served is good. It need not mention the premises. *Doe dem. Morgan v. Church* (3 Campb. 71). Where it is intended that a notice or other document should be signed, that intention should be specified. The Legislature does so. Thus sec. 4 of the Statute of Frauds expressly says that the instrument is to be signed by the party, and s. 7 of the Landlord and Tenant Act provides in the very same terms. There is no need for the name of the party being in the notice. He is sufficiently identified by being described as the tenant of the premises. If Mr. Herbert had come himself and given the notice, stating that it was from himself, that would have been good. Powell was his accredited agent, so that there is no real difference; it is only a question of degree. Suppose the case was inverted, and that it was in these terms "I, Gustavus Herbert give notice," without addressing it to anyone, would not that have been a good notice if given to Carleton by Herbert or his agent? Then it is contended that a further act was required beyond the notice. The clause is "to surrender and deliver up possession." The notice is to be of his intention "so to surrender," referring manifestly to the delivery up of possession. It might be doubted whether merely executing a deed of surrender on the day would have been sufficient. Herbert might have sublet the premises, or he might have assigned them. If he had done so, merely executing a deed would not have been a compliance with the proviso, the object of which was that he should give up the possession. The effect of a notice of this kind in determining an estate, is stated in 1st Furl. Landl. & Ten. 618. If the landlord had attended, and possession had been given up to him, that would have been an act inconsistent with the continuance of the tenancy. It would have amounted to a surrender by operation of law, and no deed would have been necessary.

*Chatterton, Q.C.*, replied.

O'HAGAN, J.—My opinion is that of the majority of the Court of Exchequer, which I think was right upon both points. Those points are substantially two in number, because as to the question on the admission of evidence that is not much to be considered. The questions are, first, whether this notice was sufficient according to the terms of the contract of the parties in the lease, and next, whether anything further was to be done, or, if to be done, whether it was done. I think that the notice was sufficient, and that what the defendant did was all that he was required to do. The argument was that this notice required either the signature of the defendant, or at least that his name should appear in some part of it. Now, looking to the proviso in the lease, although it is required that the notice is to be in writing, there is no provision in it that it is to be signed by the party, or that his name is to appear in it. I think the substantial question is, whether on the face of the notice itself, the character and relation of the parties, the lands, and the object of the notice itself, with reference to the quitting of the premises, sufficiently appeared. I think it impossible to read this notice which purports to be a promise of surrender of the lands in question to the person to whom it is addressed, by a person calling himself the tenant, and to

say that it did not sufficiently indicate that the person giving the notice was the tenant, and no one else. Then the word "surrender" itself implies that the one was the landlord, and the other the tenant. The man was described as tenant, and the premises are described distinctly, and there is no reason to suppose that there is any other Altavilla in the world than that mentioned in the notice. Well, then, as to the parol evidence, that could not vary the case, could not supply any defect in the case. It seems to me that when the notice was handed by Powell, saying that he was acting for the defendant, to say there was any doubt about it is impossible. Then, as to the delivery of possession, it appears to me impossible to contend that it was intended by the word "surrender" that there was to be any technical surrender. What was intended was, that there should be a delivery of possession, and as the defendant did all he could to give up possession, the non-attendance of the landlord could not interfere with the act of the tenant. Under those circumstances, my opinion is on both points with the judgment of the Court of Exchequer.

FITZGERALD, J.—I propose only to give an opinion on one point, namely, whether this notice was sufficient, and it seems to me—and I should have thought the point clear—that it was not a sufficient notice, and that the judgment of Fitzgerald, B. was correct. By this lease the tenant is enabled to determine his interest, on the condition of serving a notice in writing of his intention to determine that interest and surrender to the landlord. I think that means a notice expressing on the face of it the tenant's intention by name—expressing his intention in writing to deliver up to the landlord by name the premises. I think this notice does not do that, and therefore, on the face of it, is defective. I do not intend to go into any other question, or to say, if the question had been submitted to the jury, whether there was evidence on which they might have determined that there was an agreement on the part of the landlord to accept the notice as a binding notice.

O'BRIEN, J.—I think that the judgment of the Court of Exchequer should be affirmed, and I fully adopt the reasons given here by O'Hagan, J., and by the Chief Baron below. With respect to any other question, nothing was suggested at the trial; it was said that the case was ripe for directing a verdict for one party or for the other, and I did so.

KEOGH, J.—I cannot but entertain some doubts on the case, seeing the dissent of my brother Fitzgerald here and of Fitzgerald, B. below, but I concur with the judgment of the Court of Exchequer for the reasons given by O'Hagan, J.

MONAHAN, C. J.—I have no doubt that the true construction of the clause was, that the party was to have power to surrender and give up possession of the lands, and that it has all reference to the possession, and not to the estate and interest, and that the true construction is that he can do that on giving six months' notice. I think the parties used the words "surrender and deliver up possession" as synonymous. Then what is the meaning of "notice in writing?" It is that there must be a written notice that will satisfy the landlord, so that he shall have



no doubt as to its coming from the tenant. The notice is proved to be in the writing of the tenant with the knowledge of the landlord. When he gets that, he knows that he is told so, that it is given to him by the direction of the tenant for the purpose of determining the tenancy. I lay no stress on the conversation that passed, but the parol evidence is, I think, clearly admissible to show that when he received the document he knew from whom it came, and on whose behalf it was served. The only question then is, does it contain everything sufficient to satisfy the landlord and bind the tenant. It is, "I will deliver up to you on the 25th March next the quiet and peaceable possession of All That and Those the house and lands of Altavilla, which I hold from ——— as tenant." If the word "you" is not in it you must reject the word "from" as superfluous, and read simply "which I hold as tenant." The lands and premises are named. Carleton is the landlord of these premises. It is a notice to him as landlord, and it purports to come from the person who holds the land as tenant. He knows that that is Herbert, and in my opinion it is no more necessary that the name of the party should appear than that the names of the lands should appear. All that is required is a notice that may merely convey to the landlord notice of the intention of the tenant.

LEFROY, O. J.—It appears to me that this notice contains everything which was required to enfile the tenant to make a surrender and give up the lands. If it were necessary to go further with respect to giving up to the landlord the actual possession, it was the landlord's own default that the condition was not performed, and he cannot take advantage of that, as it would avail himself of his own default. All the other conditions on which the tenant was entitled to surrender have been substantially complied with, as Monahan, O. J. has shewn, by the very nature of the notice itself, and it is impossible that we can import into the proviso a provision which is not annexed to it. Therefore the signature by the party is no part of the notice.

*Decision of the Exchequer affirmed.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

M'GRATH v. SHANNON.—April 21; May 4; June 12.

*New trial motion—Ejectment on title—Notice to quit—Surrender of lease by operation of law—Estoppel.*

*A lessee holding under a sub-lease containing a proviso that he would yield up possession of the lands on receiving notice of the lessor's intention to surrender his term, acquired the interest of one of the co-owners of the reversion expectant on his lessor's term. The lessee also acquired the interest of a co-owner. A partition suit was instituted to ap-*

*portion in severalty the interests of the different co-owners, and the report treated the lessee as tenant from year to year; and the agent of the lessor applied for the rent apportioned for the part of the demised lands allotted to lessor. Held.—That the statement in the decree (founded on the report, to which the lessee had objected) did not operate as an estoppel, and that the application did not bind him to a new tenancy.*

*Semble—The question as to his intention in paying rent subsequent to the partition, was properly left to the jury.*

*Held, further, That in order to effectuate a surrender of his lease, the lessor should fulfil every condition in the clause of surrender; when therefore the rent due before the notice was served had not been paid, no surrender was effected.*

This was an ejectment on the title brought against defendant to recover 78a. 1r. 14p. of the lands of Caherderry in the County of Clare. The case was tried at the Limerick Summer Assizes, 1865, before the Lord Chief Baron. The jury, by direction of his Lordship, found for plaintiff, and leave was reserved for defendant to move to change the verdict into one for defendant on the grounds of misdirection of the learned judge, and that the verdict was against evidence and the weight of evidence. The summons and plaint and defence were the ordinary ones. The following is a summary of the facts material to the motion. On April 25, 1800, a lease was executed by Jonathan Ashe, James Fitzgerald Massy, William Parker and Peter Morgan, (being the representatives of Anthony Hickman referred to afterwards) to Charles O'Callaghan, his heirs and assigns, of the lands of Caherderry, consisting of 228a. 2r. 24p. at £1 6s. per acre. There was a clause of surrender in the lease in the following words—"And lastly, it is hereby declared and agreed upon, by and between the said parties to these presents, that it shall and may be lawful to and for the said Charles O'Callaghan, his heirs and assigns, on any 25th day of March, during the continuance of this devise, to yield up and surrender these presents, and the premises, unto the said Jonathan Ashe, J. F. Massy, William Parker, and Peter Morgan, their heirs and assigns, or such other person or persons as shall be entitled to the rent or reversion of the said demised premises, as co-heirs or representatives of the said A. Hickman, deceased; first giving unto the said Jonathan Ashe, James F. Massy, William Parker, and Peter Morgan, their heirs or assigns, six calendar months previous notice in writing, of such his or their intention to surrender the same, paying off all rent and arrears of rent that shall and may be due to, and including the day of such surrender taking effect, and performing and fulfilling all and singular the clauses, covenants, conditions, and agreements hereinafter on his or their part or behalf mentioned or contained." The interest of Charles O'Callaghan in the above lease was assigned to Cornelius O'Brien. By lease of January 29, 1825, Cornelius O'Brien demised to Patrick Shannon his heirs and assigns, 225 acres of the lands demised by the lease of 1800 for three lives at £1 7s. per acre.

There was a clause in this lease in the following words:—"And it is hereby agreed upon by and between said parties, that the said C. O'Brien shall be at liberty notwithstanding this demise to surrender the entire of said premises; and the said P. Shannon doth covenant to and with the said C. O'Brien, his heirs and assigns, that he will upon receiving due notice of such the intention of the said C. O'Brien, his heirs or assigns, to surrender said premises, yield and deliver up the part hereby intended to be demised accordingly." There was also a clause of surrender on any 1st of May, on giving twelve months previous notice, paying rent, and performing covenants, &c. Patrick Shannon died in 1845. Defendant is his heir-at-law. Plaintiff (as will be seen afterwards) became assignee of Cornelius O'Brien, and it was the case of the plaintiff that the lease of 1825 having been determined under the clause of surrender contained in it, and defendant having refused to give up possession of the lands demised by the lease of 1825, the present ejectment lay. The plaintiff deduced his title thus—By a lease dated 9th December, 1687, one Henry Lucas became possessed of the lands of Caherderry for lives renewable for ever. The interest of H. Lucas in the said lands vested in Anthony Hickman above-mentioned. The interest of the latter vested in his five daughters, named—(1) Henrietta Hickman; (2) Barbara; (3) Helena; (4) Margaret; (5) Anna Maria. Henrietta married James Fitzgerald Massy above-mentioned, and by their marriage settlement a term of 500 years was created in Henrietta's share of the lands. A bill was filed in Chancery for a sale of the term, and a decree for the sale made in December, 1826. At the sale under the decree, Cornelius O'Brien purchased the residue of the term in Henrietta's share (being one-fifth of the lands) including the subject of the present ejectment. A conveyance to him was made by the Master in Chancery 31st October, 1828. By a settlement bearing date 30th January, 1856, Cornelius O'Brien conveyed his estate in the lands to plaintiff, and A. Lysaght (since deceased) as trustees in trust for Charles O'Brien, his son, for life, remainder in default of issue to George O'Brien. A petition was filed in Chancery 24th January, 1857, by William Fitzgerald, and others for a partition of the Hickman estate including the lands of Caherderry. An order of reference was made 18th June, 1857. Cornelius O'Brien died 30th May, 1857. Plaintiff and Lysaght made parties by suggestion. A report was made 21st July, 1859, that plaintiff and Lysaght were entitled to Henrietta's fifth, and that John Moore Mulcahy, Margaret Mary, his wife, and Lovat Ashe, were entitled to a moiety of Margaret's fifth. On 8th May, 1861, John Moore Mulcahy, Margaret Mary, his wife, and Lovat Ashe, conveyed their interests to defendant. On 17th December, 1862, defendant was made a notice party. A writ of partition was issued on 2nd September, 1859, to three commissioners; one of them was defendant's land agent. Sept. 1859, Lysaght died. In pursuance of the clause of surrender in the lease of 1800, notice was served by plaintiff, as trustee to George O'Brien, in September, 1862, on defendant and others entitled to the reversion expectant on the lease of 1800. Defendant was also

served with notice, pursuant to the lease of 1825, of plaintiff's intention to surrender his lease of 1800. The return to the writ of partition was filed 19th Feb. 1863. It stated that defendant was tenant from year to year of the said lands, and allotted 78a. 1r. 14p. to plaintiff, remainder to James Tymons, who represented the interest of Helena Hickman. To that report objections were filed by the defendant, but his objections were overruled after argument. A decretal order was made 30th April, 1863, confirming the return, and appointing Charles Mahon trustee for conveying the shares in severalty, and referring it to the Master to find who were the proper parties to convey. The Master found estates outstanding in persons not parties, and directed that a deed should be executed by them conveying the said estates to Mahon. A deed was executed on 27th Feb. 1864, by certain parties, including certain mortgagees of defendant's share. A conveyance was made by Charles Mahon on 4th Apr. 1864, to plaintiff of 78a. 1r. 14p. of said lands for the residue of the terms on the trusts of the settlement of 30th Jan. 1856. Defendant refused to surrender possession in March, 1863, and paid the rent reserved in the lease of 1800 as apportioned by the return between Tymons and plaintiff. Notice was served by plaintiff on defendant September 4, 1864, to quit on March 25, 1865, possession was refused, and the present ejectment brought.

At the trial it was admitted that defendant had been served on September 6, 1862, with notice of the surrender of the lease of 1800, and the notice was produced. Thomas Greene, land agent of plaintiff, proved the signature of Cornelius O'Brien to the lease of 1825. John White proved the service of a copy of the notice of surrender August 11, 1862, on defendants, and various other parties entitled to the reversion in lease of 1800. Greene was recalled, and proved that he knew Mahon, and had seen him acting as agent on the lands, had paid him rent for Cornelius O'Brien till his death; since that plaintiff gave up possession to Mahon of other lands held by Cornelius O'Brien. On cross-examination he proved that he had a power of attorney from O'Brien, but had none since his death. That it was not true that defendant was tenant from year to year in February, 1863. The notice would not expire till March. Charles Mahon proved he was agent of the co-heiresses, Hickman. After the former agent, F. Fitzgerald's death in 1853, he acted as agent to the whole of the parties, and received rent from all; had no power of attorney. Before Sept. 29, 1862, received notice of the surrender of the lease of 1800; has not notice. (It was objected here that a copy of the notice could not be given in evidence, but his Lordship received it reserving leave to defendant to move (in the event of the jury finding against him) that the verdict be entered for him, if the Court should be of opinion that the copy was not evidence). I sent my nephew to receive possession. Received no rent from March, 1863, under lease of 1800.

Cross-examined—After Mar. 25, 1863, ceased to be agent—considered his authority at an end; appointed agent by letter; continued to receive rent, and send it by letter; mentioned the receipt of notice and the surrender to most of the parties. Septem-

ber, 1862, head rent was paid, I think, before March, 1863, not since. Did not receive March, 1863, rent, when I sent my nephew to take up the lands. The documents referred to of the proceedings in Chancery, &c., having been put in, plaintiff's case closed.

Defendant's counsel submitted—1. That there was no evidence of sufficient service of the notice of surrender pursuant to the lease of 1800 on all the parties entitled to the reversion. No personal service proved, only on Mahon. That the authority proved by Mahon was merely an authority to receive rent, and not to receive a notice of surrender of the lease of 1800. An agent to receive rent has no authority to receive a notice to quit; neither has he to receive a notice of surrender. 2. That there was no evidence to trace the interest of the lessee in the lease of 1800 to Cornelius O'Brien or to plaintiff. 3. That if the said interest be traced to Cornelius O'Brien, the deed of January 30, 1856, took it out of him, showing by its recital that the legal interest was outstanding in a mortgagee. 4. That there was no evidence that the parties served were the heirs or assigns of the lessors in the lease of 1800. 5. That the deed of Feb. 27, 1864, showed that previous to the service of the notice of surrender an assignment to mortgagees of defendant's interest took place, and the notice was not served on them as representing the legal estate. 6. That an actual surrender by deed was necessary in order to put an end to the lease of 1800. 7. That plaintiff was entitled to one-fifth of the reversion in the lease of 1800, and that defendant was entitled to one-tenth of same. That the condition of surrendering became apportioned, and that a merger took place. 8. That it was a condition precedent to the clause of surrender taking effect, that the rents should be paid. The rent of March, 1863, was proved not to have been paid or tendered. 9. That the legal estate was not deduced to plaintiff. 10. That the report of the commissioners was no evidence of a tenancy from year to year, and not binding on defendant, because the matter in controversy was confined to the reversion, and had no dealing with tenancies. 11. That the habendum in the lease of 1825 was to hold from the date Jan 29. The notice proved was served in September, and this would not terminate a tenancy commencing in January. The tenancy must be considered as springing from the date of the lease.

The learned judge then permitted Thomas Greene to be recalled.—Notice to quit served by Tymons produced; paid rents for lands of Caherderry to Mahon for plaintiff before March, 1863; rent £283 16s. 6d. for year, being £1 6s. per acre for 228a. 2r. 24p. Paid up to March, 1863, not since. Prior to March, 1863, received rent from defendant, £275 1s. yearly. Paid rent under lease of 1825 up to March, 1863. On May 14, received one year's rent up to March, 1864, from defendant, and £83 15s. 6d. for plaintiff in respect of 78a. 1r. 14p. of Derry. Received from Tymons a cheque for £200 sent by defendant for remainder of land in lease of 1800. Passed receipts to defendant for plaintiff.

Cross-examined—Assumed notice of surrender to be valid, and acted on it. Applied to defendant for rent under the partition. Never entered into any new con-

tract of tenancy unless by my application for rent by letter of May 12, 1864. When defendant's relations were changed, I considered it a new letting. Applied for £83 15s. 6d. due plaintiff, while previously the whole rent was paid. Plaintiff became owner of the land for which rent used to be paid by the representatives of O'Callaghan. I received from defendant an aliquot part of the rent payable under the lease of 1800, but not under that of 1825. The commissioners settled it with reference to the lease of 1800, not of 1825. They treated that lease as at an end.

The defendant's case was then proceeded with:—Defendant examined—Paid rent after March, 1863. Made no new contract with plaintiff or Tymons. Paid rent reserved in lease of 1800, not knowing the effect of the notice. Did not agree to make surrender of my former lease. Made no surrender to plaintiff. The life in the lease of 1800 was an old one, and I did not think it worth while to dispute with Tymons, while I considered that the merger in plaintiff would continue during the term of the lease of 1825. Was never asked by plaintiff or Greene to take a new letting.

Cross-examined—Read the two notices of Sept., 1862. In my affidavit in support of objections to report, I objected to the correctness of the return, and as an example of the errors, I mentioned that the commissioners had returned me as tenant from year to year, while I held under a lease.

Re-examined—Paid the rent, £283 15s. 6d. with the object of keeping up the lease of 1800.

The documents referred to were put in, and defendant's case closed.

The Chief Baron announced that he would ask the jury with what intention the defendant had paid the rent. To this plaintiff objected.

The jury found that the payment of rent was made under the lease of 1800, and not under a new tenancy.

HIS LORDSHIP directed a verdict for plaintiff with liberty to defendant to move to change the verdict into one for defendant on the points reserved, or on the finding of the jury.

Brevelton, Q.C. (with him *J. E. Walshe, Q.C., and Cree*), now showed cause against the conditional order obtained in pursuance of the leave reserved. He referred to the facts and evidence given at the trial as above. As to the clause in the lease of 1825, it was necessary to give notice only of the intention to surrender. The agent had agreed to accept the surrender. The lessors could waive any objection to the mode of surrender of lease of 1800. The subtenant could not take advantage of any informality in the surrender. The ejectment was brought by plaintiff as reversioner expectant on the determination of the lease of 1800, and defendant being only tenant from year to year, his estate was determined by the notice to quit. Defendant had obtained an advantage as owner by his tenancy being valued on the assumption of his being tenant only from year to year. As to service of notice, I rely on the service proved on the agent of the owners. The agent taking up possession operated as a surrender. Payment of the rent allotted by the commissioners of partition estopped defendant from denying that plaintiff was his

landlord. Mahon had good power to convey.—Trustee Act, 1880, ss. 20, 30, 34; *Huncox v. Spittle* (3 Sm. & Giff. 478). It cannot be said that a tenant can pay rent for his landlord.—L. & T. Act, 1861, s. 82. It was improperly left to the jury to say with what object defendant paid the rent. The surrender to Tymons assumed that defendant was tenant from year to year. The facts as proved show that there was a valid legal surrender, but whether or not, defendant's lease of 1825 is gone. *Duchess of Kingston's case* (2 S. L. C. 714); *Lyon v. Reed* (13 M. & W. 285). Estoppel works by wrong to all parties, defendant having got the benefit of it. *Phene v. Popplewell* (12 C. B. n. s. 334) *Cornish v. Abingdon* (4 H. & N. 547).

*Jellet, Q.C.* (with him *O'Hagan, Q.C.*, and *Mark O'Shaughnessy*) contra, in support of the order.—The clause in the lease of 1800 was not a conditional limitation enabling the lessor to terminate the estate which he had himself granted; it served only to protect him from being obliged to keep up the estate longer than his own estate lasted; it was a covenant, not a condition.—Co. Lit. 203. b.) *Doe d. Wilson v. Phillips* (2 Bing. 13); 4 Jarman Blythwood, 362, 493. The doctrine in 1 Furlong, 618, was not warranted by the authorities, *vid.* 5 Jarman Blythe, 493). A right to surrender his own lease cannot be created under a common law grant. Every formality should be strictly complied with.—Cole Ejectment, 397. No service but personal can be sufficient. The original notice should have been produced.—3 Stark. Evid., Notice, 730. There was no evidence of payment of rent to all the parties from 1827 to 1853, so as to deduce title. Mahon's evidence was not sufficient to show that Fitzgerald and he received the whole rents. *Delap v. Leonard* (5 Ir. L. R. 292, 306). C. O'Brien had purchased only a term of years; there was no evidence who it was that represented the reversioner of that term.—*Doe d. Rutten v. Lewis* (5 A. & E. 277); *Denny v. O'Connell* (Long & Towns. 629). With regard to the report of the commissioners, the nature of the tenancy could not be the subject of objection by defendant *quâ* tenant. Defendant resisted the report, and the surrender of his lease in every way he could. Surrender by operation of law has never been worked except through a change of possession, or by a new lease.—*Crawley v. Vitty* (7 Exch. 319); *Foquet v. Moor* (ib. 870). As to the apportionment.—*Twynam v. Pickard* (2 B. & Al. 105); *Grey v. Friar* (4 H. L. 565); *Moore v. Butter* (2 Sch. & Lef. 267). It was a question for the jury what was the nature of the equivocal acts of plaintiff and defendant. Payment of a reduced rent was not sufficient to warrant a judge in giving a direction, when at the same time the rent was attributable to another lease.—2 Tayl. Evid. 926.

*O'Hagan, Q.C.* on same side.—The express words in clause of lease of 1825 must be followed. The cases in Furlong were all of provisions framed to determine the estates at the expiration of 6 months' notice.—*Cadby v. Martinez* (11 A. & E. 720); *Doe d. Rodd v. Archer* (14 East. 245). There is a difference between freehold and chattel leases.—*Thomson v. Leech* (2 Vent. 208; s. c. 3 Lev. 284); 4 Jarman Blythwood. Disaffirmance by the grantee is neces-

sary to give effect to a surrender.—*Doe d. Murrell v. Millward* (3 M. & W. 328). It is impossible for a lessor to reserve to himself the right to defeat the grant.—Co. Lit. 237, a. (n). The common law will allow no one but the tenant to defeat the estate.—Sugd. on Powers, 140; 1 Saund. Uses, 163. As a power this clause would have no effect.—*Gorman v. Byrne* (8 Ir. C. L. R. 394); Co. Lit. 214, b. An estate of freehold cannot be put an end to without a ceremony. There was no re-entry here.—1 Saund. Uses, 155 (Ed. 1844). The notice could not determine the lease. It was not a notice of surrender, but of an intention to surrender, and that was not effected and could only be by deed, as O'Brien's estate was an incorporeal hereditament. The purchase by O'Brien of one-fifth created a merger as to so much of the lease of 1800; he could not surrender to himself, and the condition to defeat the estate was gone.—*Doe d. Rodd v. Archer* (12 East. 245). Is a tenant to be obliged to hold a part only of his estate at the will of his landlord? Before 1845 he would have held free from rent. There is no evidence of service on the proper parties. Mahon in his evidence does not of his own knowledge prove who were the persons Fitzgerald had received for up to 1853, nor was there any evidence of Mahon having power to receive a surrender.—Taylor's Evid. 112. This was not evidence sufficient to direct a jury on the deduction of title. There was no legal proof of the service of notice so as to put an end to the lease. The document to be proved was not in the possession of an adversary.—Taylor on Evid. 420, 421; *Lanauze v. Palmer* (Moo. & M. 31). Each owner had a separate estate; it was not a lease of joint tenancy. A land agent has no authority to terminate a tenancy by notice to quit.—*Frewen v. Ahern* (4 Ir. L. R. 281). The payment of rent was a condition precedent.—*Grey v. Fryer* (4 H. L. 555). Even as between themselves, the parties could not substitute for a contract under seal an agreement not under seal, *a fortiori* they could not prejudice third parties.—*Doe d. Murrell v. Millward* (3 M. & W. 328). As to conditional limitations—Smitte Landlord and Tenant (2nd ed.) As to the general principle of surrender by operation of law—4 Bacon's Abridg., Leases, 5; 1 Furlong, 212; Sm. Landl. & Ten. 22; 20 Viner's Abridg., Surrender, F. The absence of an express contract pending the lease of 1825 prevented a surrender.—*Lefroy v. Walsh* (1 Ir. C. L. R. 312); *Thomas v. Cook* (2 B. & Al. 119); *Lynch v. Lynch* (6 Ir. L. R. 131). The intention of one party is material.—*Lyon v. Reed* (13 M. & W. 306). As to an implied tenancy—*Crowley v. Vitty* (7 Exch. 319); *Foquet v. Moor* (ib. 879). As to the reversion—*Neale v. Mackenzie* (2 Cr. M. & R. 84, 97; s. c. in error, 2 M. & W.); 8th & 9th Vict. cap. 106. Though there were *prima facie* evidence of a new contract, defendant's evidence put an end to it.

*J. E. Walsh, Q.C.* in reply.—1 Platt Leases, 131; *Cutting v. Derby* (2 W. Bl. 1077). The clause should be construed according to the intention of the parties.—*Doe d. Gardner v. Kennaird* (12 Q. B., 244; 4 H. L. 566); *Friar v. Grey* (5 Exch. 584, 594). As to the service on Mahon—*Papillon v. Branton* (5 H. & N. 518); *Doe d. Fleming v. So-*

merton (7 Q. B. 58); *Herbert v. Hedges* (10 Ir. Eq. 479). [*Pigot, C.B.*—As to ejectment by tenants in common on breach of covenant, you will find a case—*Doe d. Campbell v. Hamilton* (13 Q. B. 977).] The acts done by defendant must be taken to interpret his intention. [*Pigot, C.B.*—See *Bishop v. Howard* (2 B. & C. 100)] As to surrender of incorporeal hereditaments—*Petes v. Kendal* (6 B. & C. 703). Effect on this point of Landlord and Tenant Act, 1861, ss. 2, 3, 4—*Bayley v. Marquis of Conyngham* (15 Ir. C. L. R. 406).

*Cur. adv. vult.*

June 12.—FITZGERALD, B., now delivered the judgment of the Court.—He said on all the main points the other members of the Court, including his brother Deasy, who was not present, concurred. The question at the trial was whether the defendant held the lands, the subject of the ejectment, as tenant from year to year to the plaintiff. A notice to quit had been served and the action was founded on that. The defendant claims to be tenant under the lease of 1825. The plaintiff's case was, firstly, that this lease was put an end to by the acceptance by the defendant of a tenancy from year to year. The lease of 1800, under which the plaintiff derived, was made by four tenants in common—a clause was in it which enabled Mr. Cornelius O'Brien to surrender that lease, and in the lease which he granted in 1825 was a clause in such terms that the lease was to last for the term in it only if the estate of O'Brien should so long last. He afterwards acquired the interest of one of the co-owners. There was a suit in Chancery for a partition. In August, 1862, the plaintiff says he served a notice, with a view to putting an end to the lease of 1800. In the partition suit, part of the lands in the defendant's lease were allotted to Mr. Tymons, the rest to the plaintiff. It appears that the defendant, who was also a co-owner, was dissatisfied with the particular lands allotted to him in the partition, and in this affidavit in the motion to upset the Commissioners' return, he stated that he had been incorrectly called in a tenant from year to year. There was no surrender, in fact, of the lease of 1800. The defendant refused the possession to the plaintiff.—There was a demand of rent by a letter, but in it there was no mention of what the tenancy was, the payment being of a sum different from that in the lease of 1825; that was relied upon as evidence for the plaintiff of there being a new tenancy. At the trial the defendant gave evidence explaining why he paid the sum in question. He never informed the plaintiff that he was relying on the lease of 1800. The question was then left to the jury as to the intention of the defendant in paying that rent. The jury found that the money was paid, the defendant intending to support the lease of 1800. It was impossible to say that the judge should have directed the jury that a new tenancy had been created; the payment was an act capable of being explained. As to the decree in the partition suit, it was impossible to say that the defendant appearing therein as tenant from year to year was binding on him. It could not operate as an estoppel on the defendant. It was a matter merely collateral. The plaintiff, therefore, failed in his first contention. His second contention was founded on the proviso in

the lease of 1825 [his Lordship read the clause]. This seems to have had operation no further than to give effect to the surrender by Mr. O'Brien [his Lordship then read the clause in the lease of 1800]. The latter part of the sentence formed all one sentence, and the word "first" ("first paying all rent," &c.) governed the whole. Now, undoubtedly, on the 25th March the rent under the lease of 1800 was not paid by the plaintiff. The case of *Grey v. Friar* (4 H. of L. Cas.) was express on this point, and thus the second contention of the plaintiff fails. The verdict for the plaintiff, Mr. M'Grath, entered upon at the trial must be changed into a verdict for the defendant, Mr. Shannon.

PIGOT, C.B. said that he was not satisfied, if a tenancy from year to year could have been created by payment of rent, whether the statement of the tenant was sufficient to rebut the presumption from the fact of such payment. He was clearly of opinion that no estoppel was created by the commissioners' return. He preferred to rest his judgment on the view presented by Mr. O'Hagan, that the lands had been in the possession of undertenants, that the plaintiff and defendant were owners of reversions, and that the possession was not changed or affected by the dealings between the plaintiff and defendant.

*Rule absolute to enter the verdict for defendant.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE AN ARRANGING TRADER.

*Fictitious marriage settlement—Untrue statement in affidavit to verify petition—Turning arrangement into bankruptcy, although the composition is paid.*

Where an arranging trader presents his petition to the Court, and files the usual affidavit of assets, which partly consist of an interest in a valuable house of business, said to be made the subject of a marriage settlement, the trader having received four hundred pounds as a marriage portion, which is made a charge on his property, and the settlement is submitted to creditors and believed to be genuine, and a composition of ten shillings in the pound is agreed to, and actually paid, but it is afterwards discovered that no marriage took place, the man having at the time of the alleged marriage a wife living, the arrangement proceedings will be set aside, and the case turned into bankruptcy, although the composition has been paid.

*Purcell, Q.C.* (with *Seeds*) applied to have the proceedings set aside, and the case turned into bankruptcy, on the ground that the affidavit filed in support of the petition was wilfully untrue, so far as concerned the assets ready to be produced by him, and that, in the words of the statute, he had not made a full disclosure of his debts, credits, estate and effects, and that he did not make a bona fide arrangement with his creditors, and that, under the true circumstances

of the case, his proposal was not reasonable, or proper to be executed under the direction of the Court. The present case was very fraudulent and very peculiar in its circumstances. The trader was the owner of a very valuable house of business, which he got rebuilt. Owing the builder about a thousand pounds, he presented his petition offering a composition of ten shillings in the pound, the house in question forming a large item in the assets intended to pay the composition; but he produced a marriage settlement executed in 1857, by which the house was charged with the fortune which he got with his alleged wife. The Court directed a valuation to be made, both of the chattels and the premises, in which, according to the settlement, the trader had but a life interest, and the valuation was accordingly made on that basis, and the creditors, believing his statement to be true, took the ten shillings in the pound, which was paid to them soon after. The house was going on with a prosperous business—a new lease had been obtained of it, and it would at present sell for a sum that would pay all the creditors twenty shillings in the pound, and leave a surplus. Things were thus circumstanced when the real wife of the bankrupt returned from America, and made an affidavit disclosing all the facts connected with her marriage, and it now turned out that the alleged second marriage was all a sham, and the alleged marriage settlement a fraudulent concoction used to deceive and defraud creditors. Under these circumstances the Court could have no hesitation in turning the whole proceedings into bankruptcy. There was a case precisely in point, with the exception that the present case was much stronger—the case he meant was *Re Hume*, decided by his Lordship, and reported in 9 Ir. Jur. 120. There the trader had actually obtained his certificate, and yet it was set aside, and the case turned into bankruptcy. Counsel read the judgment of his Lordship in the matter of *Hume*, and asked his Lordship to turn the case into bankruptcy.

*Kernan*, Q.C. for the arranging trader.—The application should be refused. The real question for the Court was—did the trader make such a representation to the Court as deprived his creditors of the benefit of his estate to the fullest extent it could be realized. Whether the settlement were valid or not, the few hundred pounds were paid by the grandmother of the woman who believed that a valid marriage had taken place. That money was expended by trader on the premises in question, and beyond all doubt that woman or her representatives would have an equitable charge upon the premises to that extent, so that in point of fact the creditors lost nothing by that settlement, and if the case had gone into bankruptcy they never would have got ten shillings in the pound. The case of *Re Hume* was totally different from the present case. There a fraud was committed on creditors by the concealment of a leasehold interest to which the trader was entitled, and which, if disclosed and made available, would pay the creditors a much larger dividend. In the present case there was no concealment whatever, and suppose no marriage had taken place, still the money was paid and laid out by the trader in his trade. The settlement was made in 1857, and could not have been said to have been prepared for

the purpose of defrauding creditors. In a word, the creditors lost nothing whatever by the settlement, and then the whole property was mortgaged to a party who advanced the money to the composition, and who should be paid what was due to him.

*Purcell*, Q.C. said that after paying the mortgagee there would be a surplus that would pay the creditors in full.

*Kernan*, Q.C. concluded by saying that his Lordship had not, in his opinion, jurisdiction to set aside the proceedings.

*LYNCH*, J., said he would hear him on the question of jurisdiction if he thought proper.

*Kernan*, Q.C. said that with the decision in *Hume's* case before him he would not venture to ask his Lordship to review that case, but he intended to appeal, and he would ask the Court not to gazette the adjudication in case he turned the case into bankruptcy.

*LYNCH*, J. said he saw no course open to him but to turn the case into bankruptcy. There was no doubt that the case was very fraudulent, and that a fraud had been committed on creditors. A deed in the nature of a post-nuptial settlement was produced which was admitted to be false and fraudulent as regarded his creditors. That deed gave him a life estate, and if that life estate did not exist, it was sworn that the house would sell for £2,500, and to that the creditors were entitled. His Lordship reviewed the facts of the case, and concluded by turning it into bankruptcy, but allowed the place to be kept open upon security being given for the property in the concerns.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

CARSON v. M'KENZIE \*—May 3, 1865.

*Mandatory injunction—Ancient lights—Obstruction of, by building upon the opposite side of a street in a town—Damages—21 & 22 Vict. ch. 27—25 & 26 Vict. ch. 42.*

*Where certain premises lay upon one side of a street in a town, and where the owner of said premises raised buildings thereupon, which buildings when raised to the eavestone, obstructed an ancient light in a house upon the opposite side of said street, by reason of which obstruction the owner of said last-mentioned house was prevented from using his ancient light in examining colours, &c., for which examination said lights are essential. Held, that the Court would issue a mandatory injunction to take down said buildings.*

*Held also that the Court would itself assess damages without the aid of a jury.*

This was a cause petition presented by the petitioners, William Carson, Robert Carson, and John Gar-

\* This case was accidentally permitted to remain unreported for the past year. The reporter's attention was called to the omission by Mr. Brewster, Q.C., in his argument in *Dockett v. Findlater*, supra, p. 161.

son, against the respondent, Robert M'Kenzie. The petition stated that the petitioners were co-partners in trade, and carried on the business of general merchants, wholesale grocers, wine merchants, and commission agents in the town of Belfast, petitioner's premises consisting of a counting-house or shop with stores above, situate in, and opening into the street now known as Corn Market, in said town, and herein after distinguished as the Corn Market premises; and also of offices, ware-rooms and stores opening into an entry called Hodgson's Entry, which entry was parallel to and to the rear of Corn Market, and opened into High-street. Said Corn Market premises and Hodgson's Entry premises which now are parallel to and adjoin each other were formerly entirely distinct and separate, and were built at different times, and held under different landlords, Corn Market premises being built in 1811, and Hodgson's Entry long previously, and the only communication between those premises was on the ground and first floor. Of those Corn Market premises petitioner, William Carson, is the owner in fee, he having purchased same from the Marquis of Donegal. The title of petitioners to Hodgson's Entry premises was under a lease dated 31st October, 1839, made by one Robert Alexander Gordon to petitioners for lives renewable for ever, at a rent of £18 per annum. This said lease of 1839, after describing the boundaries of said premises in Hodgson's entry therein granted, thus proceeds, "together with the full and free liberty of ingress, egress, and regress for the said William Carson, his heirs and assigns, and his and their servants and workmen, along said entry leading from said demised premises to High-street being the entry marked on the map as Hodgson's Entry in common with the tenants or occupiers of the premises at present demised to John Hodgson, together with all the rights, members, and appurtenances to said premises or tenements belonging or appertaining, or with the same or any part thereof heretofore usually held, occupied, possessed or enjoyed as heretofore in the possession of, &c.".....To hold to petitioner William Carson, for the lives therein named, with a covenant for perpetual renewal, and subject to a rent. Petition stated that by indenture of fee-farm grant dated 20th Dec. 1852, said Gordon conveyed said premises granted as aforesaid for lives renewable for ever to petitioner, William Carson, in fee-farm, by the same words of description as are used in the indenture of 31st of October, 1839; that previous thereto, viz., from 1819, said William Carson had been in possession of the said premises thereby demised when the same were held under a sub-lease from one Hyndman to John Morrow for 30 years, which lease was dated 18th July, 1810, and which sub-lease became vested in said year 1819 in William Carson, in whom also has since vested the interest of said Hyndman, the lessor; that from 1819 up to the time of said co-partnership with the co-petitioners, and since then, in conjunction with said co-partners, he has continuously used and enjoyed same, with the appurtenances, for the purpose of his trade as aforesaid. That by an agreement in writing, dated November, 1855, and signed by petitioner, but not under seal, said William Carson entered into partnership with his co-petitioners, who are his sons,

whereby he now holds one undivided one-fourth part of the said premises demised by indenture of 31st of October, 1839, and one other fourth part he held in trust for co-petitioners, and the remaining half for his own benefit. That said premises have, during all the time aforesaid, been lighted by said passage called Hodgson's Entry, and have enjoyed light and air from the same, being, in fact, the only direct communication for light and air to said Hodgson's Entry premises. The petition then averred that said premises so demised have always been of great importance to petitioner, William Carson, and to all the petitioners since said co-partnership, and they, their servants, clerks, and workpeople have been in the constant habit of passing to and from the said premises by the passage known as Hodgson's Entry, by which passage also merchandise has been constantly conveyed to and from petitioner's said stores.

Petition then stated that they the co-partners, since the co-partnership, have been in the habit of using that part of the ground floor of said Hodgson's Entry premises opening into Hodgson's Entry for a long series of years, as the place for examining and testing the samples of the different kinds of merchandise which from time to time, in the course of petitioner's trade, were brought in for the purpose of being examined before purchases were made, as well also as for comparing the bulk of said articles themselves when delivered, with the samples by which same were purchased, and which examination is and has been always carried on on the lowest floor of the said Hodgson's Entry premises, and part of which is fitted up with the fixtures and appliances necessary for the aforesaid purposes. That for the purpose of examining and testing the said article in which petitioners traded, and which were principally teas, sugar, wine and flour, light is absolutely necessary, and petitioners show that light was absolutely necessary, inasmuch as the colour of said articles is one of the most important tests for ascertaining their respective qualities, and they were usually compared with other articles of known value; that the light which is the best adapted for the purpose is daylight, artificial lights being wholly unsuited to the ascertainment of colours; that the solar light was indispensably necessary therefor, as also for the washing of the bottles, which was also a portion of petitioner's trade in his capacity of wine merchant. That a portion of the ground floor of said Hodgson's Entry premises is lighted from said Hodgson's Entry by a glass door  $4\frac{1}{2}$  feet by  $2\frac{1}{2}$ . That another portion of said ground floor is lighted from said entry by two windows, one thereof being  $3\frac{1}{2}$  feet by 2 feet 3 inches, and the other being  $4\frac{1}{2}$  feet by  $2\frac{1}{2}$  feet, said two windows having been of these dimensions ever since 1819, and the glass door of its present dimensions since 1835, during which times the light and air entering there-through have been always used for the purposes aforesaid, without any interruption whatsoever; that said apertures are the only means of lighting said premises, with the exception of a small aperture through which a miserable and insufficient amount of light came from the said Corn Market premises. That said Hodgson's Entry passage where it opens into High-street, is  $10\frac{1}{2}$  feet wide; that farther down, at a point opposite said glass



door, said passage narrowed to  $8\frac{1}{2}$  feet in width, while at that said point previous to the buildings herein-after mentioned Hodgson's Entry was  $22\frac{1}{2}$  feet, and the wall opposite thereto was merely 8 feet high, enclosing a yard of 11 feet across, so that with the exception of said 8 foot high wall, there was an open space of  $33\frac{1}{2}$  feet, across which space to said glass door an abundant flood of light entered into said glass door, as also into said two windows on the ground floor; that opposite said two windows the light also entered uninterrupted, save by a low building, whose wall was 7 feet high to the eave-stone; that the very highest building on the opposite side of the same entry or lane then was only 25 feet high to the eave. That petitioner's said Hodgson's Entry premises, and also the grounds of the said entry, and the said open space, and also the premises occupied by the respondent are the fee-simple estate of Robert Alexander Gordon and Catherine Anne Gordou, and subject to said Robert M'Kenzie's and petitioner's fee farm grants and leases. That the premises adjoining Hodgson's Entry premises are held in fee-farm by the respondent, into which fee-farm grant a certain lease of lives renewable to one Hudson was converted; that said open space is not included therein, and a right of way over said Hodgson's Entry is expressly reserved out of said leases and grants for the use of petitioner, William Carson, and that therefore respondent had no right whatever to build thereupon. That from and previous to 1819, and at the date of petitioner's lease of 1839, and up to the date at which said Robert M'Kenzie commenced to pull down the said buildings opposite to petitioner's Hodgson's Entry premises, the light and air entered in manner aforesaid for a period of 40 years.—The petition then stated that in the year 1834 said John Hodgson, through and under whom the respondent, Robert M'Kenzie, now derives his title, was living in said building at the other side of Hodgson's Entry, and he, by indenture of 1st of October, 1834, demised to petitioner, William Carson, a certain store situated at the end of said Hodgson's Entry, together with other premises in lease mentioned, to hold for 30 years, which lease expired on the 1st of November, 1863, after which petitioner delivered up the store and premises to said Robert M'Kenzie as the representative of said John Hodgson. That by a clause in said lease Hodgson agreed to remove a certain passage or angular encroachment at the foot of Hodgson's Entry, so as to enable a window to be placed in said Carson's premises looking into Hodgson's Entry, which encroachment was made for the purpose of giving an entrance to said William Carson from his premises in Corn Market; that before said encroachment a window existed in that very place which on the removal of the encroachment was to be restored and which was just adjoining said glass door, and said glass window had existed there from and previous to 1819 up to said 1st October, 1834, and which window was, on the construction of the passage, taken out, but a window was inserted in said passage, and remained therein until after the expiration of this said lease, when Robert M'Kenzie took down said passage or angular encroachment, and with it the window inserted therein as aforesaid, and thereupon petitioners inserted a window in the same

place that said former window had existed before the building of said passage or encroachment. The petition then stated that in the month of September, 1864, Robert M'Kenzie (having as aforesaid become entitled to the interest of said Hodgson) threw down said low wall and buildings fronting said premises, and commenced to erect new buildings thereupon, and carried them to a height far exceeding the old height, and obstructed the passage of the light, so that gas has now to be burned, nearly during the entire day, and, as before explained, that gas light was quite useless for the petitioners in the examination of colours. The petition then prayed that the respondent, his servants, agents, and workmen, might be restrained by the decree of the Court from proceeding with said new buildings in petition mentioned, or from erecting any other buildings whatsoever so as to darken, or obstruct, or injure the ancient lights or windows in petitioners' said buildings, as the same were enjoyed by petitioners previously to the taking down of the former buildings on the other side of Hodgson's Entry by said respondent, whereby the free access of light and air to the same as so previously enjoyed may be in any way obstructed, interfered with, or prejudicially affected; and also that in so far as said new buildings have been erected beyond the former altitude of the buildings so taken down as aforesaid, or upon the portion of Hodgson's Entry called the open space, in such a manner as to obstruct petitioners' said ancient lights, &c., that his Lordship "may be pleased to award damages to petitioners for the injuries already sustained by petitioners by reason of the wrongful acts in the cause petition complained of in addition to the relief above prayed for, and that damages may be assessed in such manner" as the Court might direct.

The respondent filed an answering affidavit denying the alleged obstructions of light and air, and urging his perfect right to raise the buildings in question on his own ground, and submitted that no case had been presented to the Court to justify it in awarding damages, or to grant an injunction, and as to the insufficiency of light, the affidavit alleged that the petitioners could with ease increase the amount, for as the windows now stood they were filled with muffled glass, which stopped the free access of the light, which would have uninterruptedly passed through, had the said windows been filled with transparent glass; and further that the said buildings had increased the value of petitioner's property.

*Brewster, Q.C., Chatterton, Q.C., and Falkner*, were for the petitioners.—The petitioners are entitled to an injunction to restrain the building of these premises, and also to a mandatory injunction to tumble those already built, and the Court is also asked to give and measure damages for itself without the aid of a jury. We ask the Court here for an injunction to restrain the respondent from further erecting, and from keeping even erected premises that completely ruin us in our trade. Take away the solar light, and it is impossible, by any artificial light, to judge of the colours of wines, spirits, sugars, coffees, &c. This building, then, ruins us in our trade if it be permitted to remain. This is a question for the conscience, so to speak, of the Court. No unalterable rule or stand-

ard of the amount of damage that calls for the interference of the Court has been defined with certainty. The equitable rule which should guide the Court to a great extent is laid down in *Jackson v. The Duke of Newcastle* (33 L. J., n. s., Ch. 698)—“In order to justify the interference of the Court by injunction, the obstruction of the ancient lights of a manufactory or business premises must be such as to render the building to a material extent less suitable for the business carried on in them. This obstruction must be one that diminishes the value of the premises for the purposes for which they are used. The standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief, or to prohibit the continuance of the nuisance, has not been defined with certainty.”—*Attorney-General v. Nicholl* (16 Ves. 938). Now, the Court, from the affidavits, must be satisfied that the light has been diminished, and if the Court be so satisfied, it must now, by the inexpensive process of taking the matter into its own hands, determine the damages incurred.—21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42. The Court, even though it refuse an injunction, might direct an inquiry as to damages. *Johnson v. Wyatt* (33 L. J. Ch. 394) is cited with a view to show that “though an injunction be refused, yet, if it appear that damages have been sustained, the Court may, if it think fit, exercise the jurisdiction conferred upon it by Sir Hugh Cairns’ Act, and direct an inquiry as to damages.”—*Wilson v. Townsend* (1 Dr. & Sm. 324; s. c. 30 L. J. n. s. Ch. 25); *Walter v. Selfe* (20 L. J. n. s. Ch. 433; s. c. 4 De Gex & Sm. 315). There are several cases upon the subject of damages, viz.—*Back v. Stacey* (2 Car. & P. 465); *Parker v. Smith* (5 Car. & P. 438); *Pringle v. Wernham* (7 Car. & P. 977); *Tapling v. Jones* (11 Jur. N. S. 309). The marginal note there is as follows—“The right to an ancient light now depends upon the 2 & 3 Will. 4, c. 71 (the Act shortening the time of prescription), and not upon any presumption of grant or fiction of license; and being an absolute, indefeasible, and unqualified statutory right cannot be lost by a subsequent intermission of enjoyment, not amounting to intentional abandonment, nor can it be prejudiced by an attempt to extend the access of light beyond that access which has become indefeasible. The right to obstruct light possessed by the owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right. The invasion of privacy by opening windows is not a legal wrong or injury, the opening of new windows being in law an innocent act. Accordingly, where the owner of a dominant tenement, whilst preserving one ancient window, altered old windows, and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged, in obstructing the new and altered lights, also to obstruct the ancient lights—Held; that such obstruction was illegal.”—*Renshaw v. Bean* (18 Q. B. 112; 15 Jdr. 814); *Hutchinson v. Copestake* (8 C. B. n. s., 102; 8 Jur. N. S. 54) overruled.”—*Archedeckne v. Kell* (2 Gif. 683). It is very true that we built up an ancient light, on the insertion of the angular passage, but we submit when our lease was out, and when the angular passage was removed, then we were

entitled to restore the window and have the same right to an ancient light then as we had before it was built up. A plaintiff who, in an insignificant degree obscured the light and air to his own dwelling—Held, not thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air. Nothing short of an act by the plaintiff which will produce somewhat the same amount of injury as that of which he complains, will deprive him of his right to relief in this Court.—*Cooper v. Hubbuck* (30 Beav. 160). We have not delayed a moment in endeavouring to hinder the advance to completion of this building. Where A., being entitled to ancient lights overlooking B.’s property, alters and extends them, and afterwards B. builds up and obstructs the ancient lights, the Court will, at the suit of A., grant an injunction against B. upon the term of A.’s consenting to restore the lights to their former position. There the injunction to restrain the obstruction of ancient lights was refused, on the ground of the plaintiff’s delay, the bill being retained, with liberty to proceed at law.—*Turner v. Spooner* (1 Dr. & Sm. 467).

*The Solicitor-General, Warren, Q.C., and Falloon*, were for the respondent.—The respondent, in raising these buildings, had a perfect right to do so. This is not a nuisance contrary to law, and it is not sufficient to say that it will alter the plaintiff’s lights, for then no vacant piece of ground could be built upon in a city, and confessedly here there is ample distance between the new buildings and those of the petitioner, and the law says that it must be so near as to be a nuisance; and Lord Hardwicke thus expresses himself in *Isenberg v. East India House Estate Company* (33 L. J. Ch. 392; 10 Jur. 221; s. c. 1 Dick. 163), where plaintiff made a brick wall so far as it darkened and obscured the plaintiff’s ancient window—“The value of the plaintiff’s house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man building on his own ground.” A mandatory injunction is sought here which the Court will always hesitate in granting, and this Court is now called upon itself to give and measure damages, which, too, they, the petitioners, never could get had the case been sent to a jury in Belfast. But on principle this injunction must be refused; grant it and it will have the effect of preventing, in nine cases out of ten, in towns, the building of opposite houses in a street or lane. The petitioner cannot prevent his building on one ground.

As to the right to prevent us building on our own ground; vld: *Robert’s v. Macord* (1 Mood. and Rob. 230); marginal note—“The use of an open space in a particular way requiring light and air, does not give a right to preclude the adjoining owner from building on his own land so as to obstruct the light and air.”—*Gale on Easements*, 280. We are clearly entitled to the light and air entering through the window which was stopped up in 1834, and they have lost their right of light there.

This injunction must be also refused on the ground of delay; it was open to them to have applied for an injunction in the first instance, on our commencing the buildings, and not after we had reached the cave stone.—*Cooper v. Hubbuck* (30 Beav. 160.)

*THE LORD CHANCELLOR.*—From the affidavits here

I have no hesitation whatever in saying that those lights are ancient lights. The petitioners here are wine merchants or grocers. Without any doubt the sun's light is essentially requisite to the carrying on that trade; in fact we all know that colours can not be judged, or discerned by any artificial light whatever, and clearly the petitioners have enjoyed this light for the length of time stated in the petitioners' affidavits. Well, the respondent has clearly intercepted that light, and the question now for our consideration is whether respondent was justified in so intercepting the free passage of air and light to petitioners' premises. A great number of cases have been cited here upon what principle should guide the Court in the granting of an injunction in such a case as that now under consideration. However, the standard of the amount of damages has not, as has been said in that case of *Jackson v. The Duke of Newcastle*, been defined with certainty. Next, as to the damages incurred by the petitioner, this is a case where damages must be allowed. By the Act—stat. of 21 & 22 Vict. c. 27, s. 2, the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, and this Court is thereby empowered to award damages to the party injured, either in addition to or in substitution for such injunction, and such damages may be assessed in such manner as the Court may direct. The Court then made the following order:—

“Declare that the new building in Hodgson's Entry in the cause petition mentioned, to have been commenced opposite to and adjoining the petitioners' premises therein mentioned in Hodgson's Entry aforesaid, have been wrongfully erected so far as same darken, obstruct, or injure the ancient lights in petitioners' said buildings in the cause petition mentioned, as the same were enjoyed by the petitioners previously to the taking down of the respondent's former buildings in Hodgson's Entry as in the petition mentioned. and so far as the free access of light and air to the petitioners' said premises, as previously enjoyed by the petitioners, have been or may be obstructed, interfered with, or prejudicially affected, And the Court doth order that an injunction do issue to restrain the respondent from permitting or suffering his said new buildings to remain or continue of an altitude beyond the former altitude of the buildings so taken down as aforesaid, or to continue upon the part of Hodgson's Entry in the cause petition called the open space, in such a manner as by means of such increased altitude, or by being erected in such open space to prejudice or obstruct the access of light and air to the petitioners' premises, as so enjoyed by them as aforesaid, and also to restrain the respondent, his agents, servants, and workmen, from erecting any other building whatsoever so as to obstruct such access of light and air to the petitioners' premises. And the petitioners so consenting, by their counsel, in open Court, his Lordship is pleased to award to the petitioners the sum of one shilling as and for their damages in respect of the injuries already sustained by them by reason of the

wrongful acts of the respondent complained of in said cause petition; and it is further ordered that the respondent do pay to the petitioners their costs of this suit when taxed.”

Solicitor for the petitioners—William Carson, 34 Dawson-street, Dublin, and Belfast.

Solicitors for the respondent—McClean and Boyle.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

CROWN SIDE.

[BEFORE LEFROY, C.J., O'BRIEN, AND FITZGERALD, JJ.]

THE QUEEN AT THE PROSECUTION OF M'KIM v. GILLMOR.  
May 4.

*Information in nature of a quo warranto—Office not corporate—Pleading double—Stat. 9 Geo. 2, c. 12 (Ir.)—38 Geo. 3, c. 2 (Ir.)*

*Upon an information in the nature of quo warranto to try the right to an office not corporate, the defendant obtained a rule to plead several pleas, and filed two pleas, one stating that the office was not one for which a quo warranto would lie, the other setting out his title to the office. Upon motion, the Court discharged the rule, and, defendant electing to abide by his first plea, ordered the second to be struck out.*

THIS was a motion on behalf of the relator in a criminal information in the nature of a *quo warranto*,\* that the rule obtained by the relator on Wednesday, the 25th April, 1866, to plead several pleas, should be discharged, and that one of the two pleas filed by the defendant should be struck out, inasmuch as the office in respect whereof the information in this matter had been brought was not a corporate office. The information, which was filed as of last Hilary Term at the relation of James M'Kim—after averring that the petty sessions district of Sligo, Ballydoogan, and Teevan was and is a petty sessions district duly formed and fixed within the “Petty Sessions (Ireland) Act, 1851,” and the “Petty Sessions Clerk (Ireland) Act, 1858,” and that there ought of right to be a petty sessions clerk serving the said district to be elected in the manner in the “Petty Sessions Clerk (Ireland) Act, 1858,” specified—complained that the defendant, James Frederick Gillmor, on the 21st Nov. 1865, “did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath used and exercised, and still doth use and exercise, without any lawful election, appointment, warrant, royal grant, or right whatsoever, the office and place of petty sessions clerk serving the petty sessions district of Sligo, Ballydoogan, and Teevan, in the county of Sligo, and for and during the time last above-mentioned, hath there claimed, and still doth there claim to be the petty sessions clerk serving the said

\* *Vide ante*, page 78.

district, and to have, use, and enjoy all the duties, emoluments, liberties, privileges, rights and duties of the said office within the said district, or thereunto in anywise belonging or appertaining, which said emoluments, liberties, privileges, and rights the said James Frederick Gillmor, during all the time last above-mentioned, upon our Lady the Queen, without any lawful election, appointment, warrant, royal grant, or right whatsoever, hath usurped, and still doth usurp." &c. Upon the 25th April the defendant obtained a rule to plead several pleas to this information, and as of Easter Term pleaded—1st. "That true it is, and the defendant admits that the petty sessions district in the county of Sligo was duly formed and fixed, as in the information stated, and so forth, and that in pursuance of the acts in said information referred to there ought to be a petty sessions clerk to serve the said district of petty sessions when so formed as aforesaid; but defendant says that under colour of the premises in said information contained, he is grievously vexed and harassed; yet protesting that he the defendant is not bound by the law of the land to answer thereto, yet for a plea in his behalf the said James Frederick Gillmor saith and submits that the said Court should not permit and suffer the said relator to prosecute the said information, inasmuch as the office of said petty sessions clerk mentioned in said information is not an office for which our Lady the Queen will or ought to sue, vex, or harass the defendant in manner aforesaid, because the said office is an office held by the holder thereof for the time being, and during the pleasure of the justices of the district in said information mentioned, and of the Lord Lieutenant of Ireland according to the provisions of the statute in that case made and provided, and not otherwise, all which matters and things the said James Frederick Gillmor is ready to verify as the Court here shall award; whereupon he prays judgment, and that he may be dismissed and discharged by the Court hereof and from the premises above laid to his charge." 2nd. "Protesting that the said information, and the matters therein contained are not sufficient in law, and that though said James Frederick Gillmor is not bound by the law of the land to answer thereto, yet for plea in this behalf the said James Frederick Gillmor saith that heretofore, to wit, since the year 1864, to wit, at Sligo, in the county of Sligo aforesaid, the petty sessions district of Ballydoogan and Teevan were formed and made a petty sessions district in the county of Sligo within the meaning and for the purpose of the Petty Sessions (Ireland) Act, 1861, and also of the Petty Sessions Clerks (Ireland) Act, 1858; and the defendant, James Frederick Gillmor further says that the said office of petty sessions clerk for the said petty sessions district afterwards, to wit, on the 16th day of October, 1865, became vacant, and, it being necessary to elect and appoint a petty sessions clerk for said petty sessions district in consequence of such vacancy as aforesaid, a notice in due form in pursuance of the provisions of the statute in that case made and provided was then and there given by Augustus Knox, the clerk of the peace for said county in which said petty sessions district was situated, and which said notice was published in the manner and form

required by the Act in that case made and provided, informing the justices of said district of the time and place at which the justices of such district were to meet to consider the matter of the appointment of the petty sessions clerk of such district; and the said James Frederick Gillmor says that the justices of said petty sessions district in pursuance of said notice, there duly assembled, to wit, on the 6th day of November, 1865, for the purpose of electing and appointing a petty sessions clerk for said district, the office of said petty sessions clerk for said district having as aforesaid become so vacant as aforesaid; and the said James Frederick Gillmor further says that he was then and there a candidate for said office of petty sessions clerk of said district; and the said James Frederick Gillmor avers that the justices so assembled at said meeting then and there duly elected and appointed him, the said James Frederick Gillmor, to be the petty sessions clerk of said district of Sligo, Ballydoogan, and Teevan, pursuant to the provisions of the statute in that case made and provided, and thereupon by virtue of the said premises, and by force of the statute in that behalf the said James Frederick Gillmor, to wit, on the 21st day of November, 1865, to wit, at Sligo in the county aforesaid, and thence continually afterwards, for and during all the time in the said information mentioned, to wit, at Sligo in the county aforesaid, did use and exercise, and claim to use and exercise, and still uses and exercises, and still claims to use and exercise the said office of petty sessions clerk of said district, and to be the petty sessions clerk of the said district, and to have, use and enjoy all the duties, emoluments, liberties, privileges, rights and duties to the said office belonging or appertaining, as it was lawful for him to do, without this that the said defendant, the said office, privileges, rights, duties, or any of them, did or doth usurp upon our Lady the Queen in manner and form as in said information alleged." Verification and prayer of judgment.

*Brereton, Q.C.* (with him *Gerald Fitzgerald*) for the relator.—The rule to plead several pleas was irregular. It is only in the case of a corporate office that the Court is enabled by statute to give liberty to plead several defences, and in the same case it is provided that costs may be given.—Stat. 19 G. 2, c. 12 (Ir.), analogous to stat. 9 Anne, c. 20 (Engl.); stat. 38 G. 3, c. 2 (Ir.) analogous to stat. 32 G. 3, c. 58 (Engl.) Our proposition is, that this not being a corporate office, this is not a case within those statutes. Stat. 38 G. 3, c. 2 (Ir.), s. 1, is that which allows double pleas; and this case does not come within that Act at all, and the traverser can only file one plea, or demur. This was the law before the statute in all cases.—*The King v. Archbishop of York* (Willes, 533); *The King v. Foley* (Parker's Rep. 10); *The King v. Newland* (Sayer's Rep. 96). Since the statutes the Courts have always decided that in the case of an office not a corporate one, the party is not entitled to costs, and that there is no power to give leave to plead double.—*The King v. Williams* (1 Bur. 402); *The King v. Marsden* (3 Bur. 1812); *The King v. Wallace* (5 T. R. 375); *The King v. Hall* (1 B. & Cr. 287); *The King v. Richardson* (3 East. 469). *The King v. Highmore* (5 B. & Ald.

771) will be referred to on the other side; but see the judgment of Bayley, J. in that case, and also the judgment in *The King v. McKay* (5 B. & Cr. 640). The authority of *The King v. Richardson* is recognised in the Court of Exchequer Chamber in *Lloyd v. The Queen* (2 B. & Sm. 656). In *The Queen v. Darley* (3 Ir. L. R. 334), where there were several pleas and a demurrer, the Court decided on the demurrer, and there was no opinion given as to whether the pleas were regularly filed or otherwise.

*Hemphill, Q.C. and Harkan*, for the defendant.—We submit that on motion at all events, the Court will not interfere in this way. There are two pleas—the first raises the question raised by the plea which was the subject of decision in *The Queen v. Darley*—namely, that this is not an office for which *quo warranto* will issue; the second is simply a plea showing our title, stating a meeting of the magistrates of the district pursuant to the Act of Parliament, that the defendant was a candidate, and was duly elected to the office by a majority pursuant to the statute. Assuming that we have any privilege, we cannot be said to have abused it; the pleas are fair, and not inconsistent. The proper course would be to leave the other side, as in *The King v. Highmore*, to demur on the ground that the plea is double. [*Lefroy, C. J.*—It would be very extraordinary if the party should be at the mercy of the Court on a motion in a matter of this sort, and should not have his writ of error, no matter how erroneous the decision of the Court might be.] *The King v. Highmore*. [*O'Brien, J.*—In *The Queen v. Darley*, Perrin, J. refers to the case of a demurrer taken on the ground that the party did not state that the plea was pleaded by the leave of the Court. If the demurrer did lie for that under the old system, would it lie on the ground that the Court had no jurisdiction to give the liberty, although it was stated that it had given it?] *The King v. Highmore* has never been overruled. By the note to that case it appears that the prosecutor there did not demur, but filed replications to all the pleas. In this very Court we have *The Queen v. Darley*, where seven pleas were put in by leave, and the practice of the Court is the law of the Court. *The King v. Highmore* decided that where the pleas were on the file the party would be left to his remedy. In *Attorney-General v. Snow* (Bunbury, 96), the Court gave leave to plead double in a case which was not one of a corporate office. There is also *Pack's case* (Hardres, 189, pl. 16), referred to in the argument in *The Queen v. Darley*. An analogous case is that of the Petty Bag side of the Court of Chancery. There the statutes as to pleading double do not apply, yet in *The Queen v. Irwin* (9 Ir. Eq. 546) there were two pleas. We have no objection to strike out the statement as to the leave of the Court, and let the relator demur. [*O'Brien, J.*—I doubt whether the first plea as to this office not being the subject of a *quo warranto*, is necessary at all. Will not the point arise upon a motion in arrest of judgment? It is clearly matter of law.] Such a question as this has never been decided on motion.—*The Queen v. Rea* (8 Ir. Jur. N. S. 382). [*O'Brien, J.*—What issue could be taken on the first plea? It proceeds on the Act of Parliament.] They might demur. [*Fitzgerald, J.*—Should we not strike it

out as in effect an abuse of the leave to plead, as it is in fact a demurrer?] It is the very plea which was put in in *The Queen v. Darley*. [*Fitzgerald, J.*—If on obtaining liberty to plead double you had put in a plea and a demurrer, one or other could not have been allowed to stand. That is what you have done in effect.] We do not know whether we could demur to the information. We followed the plea in *The Queen v. Darley*.

*Gerald Fitzgibbon* in reply.—The information in *The Queen v. Darley* did not set out any Act of Parliament; it merely stated that the office was one for which a *quo warranto* would lie, and the defence was merely a defence of a matter of fact, which did not appear upon the information. A demurrer should be to all the pleas; if the defendant leave his pleas separate, and we demur, we shall be beaten; if he consolidates his two pleas, then we can demur, but the demurrer must be a special one for duplicity—the question will be whether this mass of pleading is a double plea or not, and the defendant will be beaten without the real question being raised.—*Chitty v. Dendy* (4 Nev. & Man. 842); *Highrick v. Foster* (4 T. R. 701). We have taken the proper course. They might demur if they wished, or move to quash the information.

The Court gave time to the defendant to elect which of his pleas he would retain, and on May 6 the following order was made:—

PER CURIAM.—It is ordered by the Court that the said rule be and the same is hereby rescinded, and the defendant electing to abide by his first plea, it is further ordered that the second or further plea of the defendant be struck out.

#### CIVIL SIDE.

[BEFORE O'BRIEN, J.]

BLAKE v. LOWRY.\*

*Ejectment—Insolvency of plaintiff—Security for costs.*

*Order made for security for costs in an ejectment on the title, plaintiff being a discharged insolvent, and no new vesting order having been made.*

*Fetherston H. Lowry* moved to stay all proceedings in this action, which was an ejectment on the title, until the plaintiff should give security for costs, on the ground that the plaintiff was a discharged insolvent. Counsel produced the vesting order, and a search and return of no re-vesting order. He cited *Brady v. Hornsby* (3 Ir. Jur. 316); *Perkins v. Adcock* (14 M. & W. 808); *Doyle v. Anderson* (2 Dowl. P. C. 526); *Webb v. Ward* (7 T. R. 296).

THE COURT made the order.

#### CROWN SIDE.

THE QUEEN v. M<sup>C</sup>CARTHY.—June 9, 11.

*Prohibition—Court Martial—Treason—Mutiny—Merger—Statutes 11 Vict. c. 12; 28 Vict. c. 11, s. 15.*

*A soldier was charged before a Court Martial under*

\* Ex relations.

*s. 15 of the Mutiny Act with having come to the knowledge of an intended mutiny, and not having communicated it to his commanding officer. The evidence in support of the charge amounted to evidence of overt acts of treason or treason-felony. The prisoner applied for a prohibition, but the Court of Queen's Bench held that the military offence did not merge in the treason, and that the prohibition should not be granted.*

There was a motion for a conditional order for a writ of prohibition to stay the proceedings of a Court Martial sitting to try the prisoner. The motion was grounded upon the following affidavit:—

I, Charles M'Carthy, now a prisoner in Arbour-hill Military prison, in this city, a color-sergeant of her Majesty's 53rd regiment of foot, make oath and say—That on the 2nd day of February I was arrested in Carrick-on-Suir, in the County of Tipperary, by the military authority. Having been subsequently handed over to the civil authorities, I was brought before Samuel Hanna, Esq., one of the magistrates for the said county, and was by the said Samuel Hanna committed to the county gaol of the County Tipperary at Clonmel, upon an information sworn before him by Thomas Talbot, a member of the detective constabulary. I say I was lodged in Clonmel gaol on the 7th of February, and on the 13th I was brought up to Dublin to Kilmainham, and on the 10th of March I was in that prison brought before William M'Dermott, Esq., one of the justices of the peace for the city of Dublin, and was by him fully committed for trial at the ensuing Commission for the city of Dublin upon a charge of treasonable conspiracy and treason-felony. I say I was so committed upon a second information by said Thomas Talbot, which was returned to the said commission. I say I remained in Kilmainham gaol until the 7th April, when I was removed by a military guard to the prison of Arbour-hill. I say I am unable to set forth the warrant or authority under which I was so removed. I say I have been informed and believe that my name appeared in the calendar of prisoners prepared for the Commission Court of the city of Dublin, and that said Commission commenced its sittings on the 17th day of April. I say that I was furnished with notice of a Court Martial intended to be held for my trial to be had on the 10th May last. I say that the Court Martial did not take place until the 28th of May last. I further say that Michael Brennan is included with me on the charge on which I am now being tried on said 10th May as after mentioned. I say that on Sunday, 27th May, the day before my trial a document purporting to be a statement of what said Brennan would prove as a witness against me was furnished to me by prosecutor, Colonel Fielding. I say I am now on my said trial by Court Martial for having in the month of January, 1866, at Carrick-on-Suir, come to the knowledge of an intended mutiny in her Majesty's troops in Ireland, and not giving information of the said intended mutiny to my commanding officer, and I say that said charge was framed against me entirely on the information given against me by said Talbot. I say the sitting of the Court Martial commenced on Monday, the 28th day of May

last, and its sittings have been continued by adjournment to and on yesterday, the 8th day of June inst. I say the said Court Martial is composed of the following officers:—Colonel Brett, President; Major A. W. Gordon, Major T. M'Bean, Captain E. Cliff, Captain E. M. Beaden, Captain A. T. Tuffnell, Captain V. R. Slacke, Captain R. J. Hickman, Captain A. F. Mackay, Captain T. Z. Bergin, Captain T. Chaplin, Lieut. J. R. J. Bromley, Lieutenant G. W. V. Cotton, Lieutenant T. H. Bailie, and Cornet H. Burnley. I say that on the said 28th day of May I, said Charles M'Carthy, having been brought into the Soldiers' Library in the Royal Barracks in the city of Dublin a prisoner, where said officers were then assembled, Colonel Nugent, acting as assistant deputy judge advocate, read a document purporting, as I understood on hearing the same read, and do believe, to be signed by Sir Hugh Rose as Commander of her Majesty's Forces in Ireland, and as I understood and believe as aforesaid directing the holding of a Court Martial for the trial of me, said Charles M'Carthy, Michael Brennan, and others for the offences with which they should be charged against the rules of military discipline as prescribed by the Mutiny Act and her Majesty's Articles of War, under and by virtue of said Act in that behalf made, said Court to proceed on the trial of such charges and giving of sentence, and awarding punishment according to the rules prescribed in said Act of Parliament and Articles of War. And I further say that thereupon the several persons aforesaid were sworn as members of a General Court Martial to try said Charles M'Carthy upon the charge aforesaid, and I, said Charles M'Carthy, being a prisoner in custody, having been called on to plead, pleaded not guilty to said charge. I further say that Colonel Fielding appeared before said Court as my prosecutor upon said charge, and read a statement containing among other things, the matters following as I best recollect and believe. "The offence upon which the prisoner is arraigned is set forth in the 15th section of the Mutiny Act, and in the 44th Article of War. The conspiracy with which it will be shown to you the prisoner allowed himself to be identified is called 'The Fenian Brotherhood,' and it will be shewn that the objects of the members of this Brotherhood were of a traitorous, seditious, and mutinous character." I have been informed and believe that said statement, having been read, was handed in and filed among the proceedings of said Court. I further say that on the 2nd day of June inst. it was stated in Court by Colonel Nugent as a ground for not acceding to my application for a copy of the file of proceedings and short-hand writers' notes, that same appeared accurately reported in the several newspapers. I further say I have reason to believe that a copy of said Colonel Fielding's statement appears in the *Saunders* newspaper of Tuesday, 29th day of May last, and that the same is a correct copy thereof, and I beg to refer to the said paper for the contents thereof. I say that I have no full or accurate copy of the evidence given before the Court Martial, but I say that the proceedings before the Court Martial were reported in the Dublin morning journals, and among others in the *Saunders's News-Letter*, and that I now endorse my name upon the

numbers of the last-mentioned journal of the 29th, 30th, and 31st days of May, and 1st, 2nd, 4th, 5th, 6th, 7th, 8th, & 9th days of June respectively, and I say that I believe that the said several newspapers contain a substantially correct account of the evidence and proceedings, and I beg leave to refer to said report as if same and the said respective newspapers were incorporated in this my affidavit. I say that it manifestly appears from such proceedings, and especially from the statements of the prosecutor, and the evidence adduced that the charge for which I am now on trial before the Court Martial is the very same charge for which I was so arrested and committed to trial at the Commission Court for the county of the city of Dublin. That I was so removed from the custody of the civil power ten days before the sitting of the Commission, for the express purpose of preventing my being tried by that Court, and substituting a military Court for my trial. I say that I am advised and believe that the Court Martial have no jurisdiction to try me on a charge of treason or treason-felony, and that they cannot assume jurisdiction of such a charge by proceeding on it as a charge of knowing of a mutiny, and not giving information.

I say that the only evidence given to sustain said charge was evidence deposing to my participation and joining in a treasonable conspiracy, and as proof of this I beg to refer to the report of the proceedings. I say that on the 8th day of June a protest was handed in by my counsel to the Court on a copy of which I have now endorsed my name. And for the proceedings on such protest I beg leave to refer to the *Saunders's News-Letter* of the 9th June inst., in which I believe they are truly represented. I say that I was then advised by my counsel that I ought not to apply to the Honorable Court for prohibitions, and that I ought to wait until all the evidence for the prosecution had been given in order to see if any evidence would be adduced to sustain the charge specified against me, distinct and separate from the charges of high treason. I say that no such evidence has been given, and that I am now on my trial before a Court Martial for such charge of treason or treason-felony in the shape and form of concealing a mutiny. I say that at the close of the evidence for the prosecution my counsel handed me a protest upon a true copy of which I have endorsed my name. And for the proceedings upon such protest I beg leave to refer to the *Saunders's News-Letter* of this day, which I believe to contain a true account of same. I say that the Court Martial have now called on me for my defence, and will expect me to go into same on their re-assembling on Wednesday, and that my only defence can be to allege that the evidence does not prove the treasonable conspiracy imputed to me. I say that I verily believe that the Court Martial are now prepared to entertain and adjudicate upon that question, and that unless restrained by the prohibition of this Honourable Court they will proceed to try me really on a charge of treason or treason-felony under the form of trying me for the alleged offence against the Mutiny Act,

Butt, Q.C., and M'Mechan for the prisoner.—All the evidence in the case is evidence to support a charge of treason, and the military offence with which the prisoner is charged, which is under s. 15 of the

Mutiny Act, for not disclosing an intended meeting is merged in the treason which has been proved. The Court Martial is now trying the prisoner for high treason under pretence of trying him for mutiny. There is therefore an excess of jurisdiction on the part of the military tribunal, and where an inferior Court exceeds its jurisdiction this Court will interfere, as it does the moment a question of title is raised before a Petty Sessions Court. So, the moment it appears that an ecclesiastical Court is misconstruing a statute, the Court of Common Law will interfere. If in this case the charge of mutiny merges in the treason, and if the Court Martial goes on nevertheless to try the prisoner for the mutiny, is it not misconstruing the Mutiny Act, and claiming a concurrent jurisdiction with this Court.—*In re Poe* (5 B. & Ad. 681). The charge before the Court Martial is one of misprision of mutiny; if you substitute in the 15th section of the Mutiny Act the words "nearest magistrate" for "commanding officer," you have the duty of all subjects. If this is allowed to proceed, and if the prisoner was acquitted by the Court Martial, and then put on his trial for high treason before a civil Court, he could not plead *autrefois acquit*, though he had in fact been acquitted of the treason.—*Archbold Cr. Plead.* 121; *Grant v. Sir Charles Gould* (2 H. L. 97).

*Cur. adv. vult.*

June 11.—LEFROY, C.J.—This is an application to the Court for a conditional order for a prohibition to stay the proceedings of a Court Martial to try a soldier on a charge of mutiny. Several preliminary matters were stated with respect to his having been first in civil custody, having been charged with treason-felony, and having been taken from the civil custody, and brought for trial before this Court Martial. The objection to the proceedings of the Court was not that it was not properly constituted; no objection of that sort has been made. The person who was charged was a soldier, and to try him as a soldier was the object of these proceedings; to try him for an act of mutiny. There are two statutes involved in the consideration of this question. One is the Treason-Felony Act which applies to every subject of Her Majesty. There is another Act, and an independent Act, which applies only to soldiers, but under that Act the present charge is for a breach of military discipline—mutiny; and the argument is that, this act of mutiny may very well be alleged as an overt act of high treason or treason-felony; that is, having notice of a mutiny, and not giving information of it to his superior officers. Well, then, it is said that that being so, the charge for mutiny is merged in the treason-felony, and that this Court Martial of course cannot proceed, because it would be trying by a Court Martial a party for treason-felony. That would be a very good argument if the facts were that there were not two acts; but if that argument be well founded what have the Legislature being doing since the year 1848, when the Treason-Felony Act was passed, passing a Mutiny Act every year, for the Mutiny Act is only passed every year, being an Act which it was thought for the safety of public liberty, should only grant that authority to the Crown for a



year, while there subsisted a statute which merged that Act the moment it was passed. If this be sound doctrine, it may be that this mutiny might have been laid as an overt act of treason, but *ipso facto*, by the circumstance of its being capable of being laid as an overt act, is that to nullify the Act which the Legislature passed *de anno in annum*, performing, if the prisoner's argument is correct, that nugatory duty of passing a Mutiny Act, which, the moment it was passed, was defeated by the effect produced by the existence of the Treason-Felony Act; for under the general law as to high treason, as well as under the Treason-Felony Act this mutiny might have been laid as an overt act of treason. Now, no authority whatever was suggested for this doctrine of merger as applied to this case; but see what an absurdity we should suppose the Legislature to have been guilty of, the needless absurdity of passing, every year, a new Mutiny Act, which was merged the moment it got the royal assent, by the doctrine. There is also another principle of the law that if two acts are inconsistent, the last act is the act which establishes what the law is, and it supersedes by implication, it is a repeal of the former, so that here if the Mutiny Act is in this inconsistent with the former Act, the result would, in truth be that it would have nullified and made void the former act, for the later act always supersedes the effect of the former act, if the existence of one would merge and destroy the other. Well, I confess I cannot discover any ground whatever for sustaining the argument upon which we spent half the day in hearing this case. But with respect to the charge, the charge itself, there is a special provision in the Mutiny Act, in the very terms of the charge upon which this man is now on his trial. It is in *ipsissimis terminis* that if any soldier, *quæ* soldier, —and there is no pretence that this man was not a soldier, there is no impeachment of the authority of the Court over the object of the jurisdiction,—coming to the knowledge of any mutiny or intended mutiny, shall not without delay give information thereof to his commanding officer shall suffer death. Well, here is a Court duly constituted, here is a crime, a breach of military duty specifically stated in the charge on which he is tried, that he, having intimation that there was this mutiny existing, and that persons were trying to tamper with the soldiers, he having acquired that knowledge, which it was his duty as a soldier to communicate to his superior officers, that he did not make that intimation; that charge is the act of mutiny which the statute makes it specifically; and when we have an act passed *de anno in annum*, making that an act of mutiny, are we to suppose that the effect of all this is a mere idle statute, particularizing the special act of mutiny, and that because that act of mutiny might also be laid as an overt act of treason-felony, therefore the second act was to be null and void. Why, as I said before, if the two statutes are repugnant it is the last act which determines what the law is. I cannot, I confess, add anything to express more fully the grounds on which I have come to the conclusion that the argument upon which the case was rested was an idle and vain argument, without any authority whatever, or a shadow of reason to support it. It would make the Legislature

pass an annual Mutiny Act which was void the moment it was passed. When it is specifically an act specially making it a mutiny, and giving authority to the Court Martial to deal with the mutiny, on what principle is it that we should now interfere about the authority of this Court, no question being raised as to the nature of the charge or the constitution of the Court, or as to the party being a soldier. Then what ground is there for it? We are therefore all of opinion not to grant the conditional order.

O'BRIEN, J.—I shall state very shortly the ground on which I concur in the judgment of the Court. The offence on which this man is charged is in terms within the 15th section of the Mutiny Act, which provides that "if any person, subject to this Act..... coming to the knowledge of any mutiny or intended mutiny shall not without delay, give information thereof to his commanding officer.....he shall suffer death, or such other punishment as by a Court Martial shall be awarded." The offence therefore is clearly within the terms of the Mutiny Act. No objection can be raised to the jurisdiction of the Court, and we are asked to interfere by prohibition on the ground that in proving, on the part of the prosecution, the offence with which the prisoner stands charged, the facts proved shew that he was guilty of high treason, and that according to the doctrine which prevails, the offence with which the prisoner is charged merged in the greater offence of high treason. Now, taking that proposition, it would be difficult to establish it. We have the Mutiny Act here in express terms providing for the trial of this offence, but the section does not confine itself to this particular offence, but provides for the trial of other offences, one of which would in terms be an overt act of high treason, that is to say, holding correspondence with or giving advice or intelligence to any rebel or enemy of Her Majesty. There can be little doubt, and indeed it was not disputed by the prisoner's counsel, that that would be an overt act of high treason. So here we have the Legislature in this Act providing for the trial of such offences as that with which the prisoner is charged, and also in the same section providing for the trial of an offence which would be an overt act of high treason. It would be difficult to contend that whatever be the effect of the doctrine laid down in the books in the ordinary cases, I mean in cases of criminal procedure, that applies to the case of a trial by Court Martial, under the very statute which recognises their power to deal with an offence which, if proved, would constitute an overt act of high treason. But, passing that by, what is the nature of the objection? It is not an objection to the jurisdiction of the Court to try for the offence with which the prisoner is charged. But the objection is one which, if well founded, and if made in the course of a trial before the ordinary tribunals of this country, would, under certain modern statutes, entitle the prisoner to an acquittal, in this way, that if in the opinion of the judge and the jury the greater offence be proved, the prisoner shall not be entitled on that account to an acquittal, but may be convicted of the lesser offence. But assuming a case which would not be guarded against by any of these Acts of Parliament, the prisoner would be acquitted, so that here, assuming the

proposition of law to be well founded, and that the facts proved below would substantiate a case of high treason, still it would be the duty of the Court below to acquit the prisoner. But is the existence of such a state of facts a ground of prohibition? In the case to which we were referred in 2 Henry Blackstone—*Grant v. Sir Charles Gould*, the application for a prohibition was refused, and we were told by the counsel here that that was on the ground that the only objection made by the applicant to the Court Martial was that he was not a soldier, and that the affidavits on that subject were not sufficient, and that the Court came to the conclusion that he was a soldier. But that is not so; other objections were taken, some of them to the reception of evidence; and Lord Loughborough in giving judgment, says at p. 101—"I have stated the observations generally upon the nature of an application for a prohibition. The foundation of it must be that the inferior Court is acting without jurisdiction. It cannot be a foundation for a prohibition that in the exercise of their jurisdiction the Court has acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review; though the sentence of a Court Martial is not subject to a review, there are instances, no doubt, where upon application to the Crown, there have been orders to review the proceedings of Courts Martial." Now that clearly points out what is the subject matter of a writ of prohibition: that it does not apply to a case where the Court below had jurisdiction to try for the offence with which the man is charged. The objection here is, that a state of facts has been given in evidence before the Court which entitled the man to an acquittal; but even assuming that that state of facts did exist, which I am not now considering, I still am of opinion that a writ of prohibition would not lie.

FITZGERALD, J.—I concur in the result which the Court has arrived at, that the rule should be refused; but in consequence of the gravity of the case, and its great importance to the public at large, I wish to state distinctly the grounds on which I concur. Now, the writ has been moved for on the ground, the only ground which would sustain it, namely, that the general Court Martial now sitting for the trial of M'Carthy, was proceeding in excess of its jurisdiction, that it was proceeding in fact to try a charge of high treason, over which it had no jurisdiction. Let us see how far that is sustained, for if it is sustained, or if we thought that there was a fair doubt on the subject, it would be our duty to interfere by prohibition. Let us see whether this Court Martial is so proceeding. Now the actual charge has been stated as, what was called yesterday misprision of an intended mutiny; that is, the charge is that having come to the knowledge of an intended military mutiny, he did not disclose that mutiny to his commanding officer; and, as it has been already well observed, there can be no doubt that the charge is one within the jurisdiction of the Court: it is within the very terms of the Mutiny Act. The Court is properly constituted, and the charge is within the very terms of the Mutiny Act. But then it is said that the statement of the prosecutor, and the evidence, if the evidence is believed, goes beyond the charge, and establishes something

more, that it not only embraces evidence of the charge of concealment of an intended mutiny, but also discloses a case shewing that Colour Sergeant M'Carthy is liable to be tried on a charge of treason or treason-felony; and it is said that this charge of concealing an intended mutiny is so much a portion of the higher charge that it cannot be separated from it, and is merged in it, and that now the Court Martial is really proceeding to try and give judgment, under colour of the lower offence, on a charge of high treason. I agree that if the whole of that evidence is believed, and is to be acted upon, it establishes two things, first, that M'Carthy has involved himself in the meshes of a treasonable conspiracy, and that he may be tried for treason or treason-felony; and, furthermore, it discloses a military offence, namely, that having been himself a party to and inciting this mutiny, or being cognisant of it, he did not disclose it. The argument then has been that the offence with which he is charged has been so merged and extinguished in the higher one of treason, that the jurisdiction of the inferior Court has been ousted, and that it is proceeding in excess of jurisdiction, and that it is our province to restrain it. It is for us to consider whether that argument is well founded. Upon the most calm and careful consideration, and with an anxiety that this question should be further discussed if there is any reasonable doubt upon it, I have arrived at the conclusion that there was no ground for the motion, and that in place of a case of merger, we have before us two offences radically distinct, the offence of high treason, triable by the ordinary tribunals of the country, and not by Court Martial, and also a military offence, properly triable by the military tribunal; and I may observe, that the concealment of an intended mutiny is no offence against the general law, and no part of the offence of treason, and could not be relied on as an overt act of treason, so that the offence of treason stands independent of it, as it of the other. It is true that this is involved in the conspiracy, and that it was intended to carry out the other offence by a mutiny. Now, we can derive from the authorities cited, and from the Mutiny Act itself a great deal of instruction, for I may refer not unaptly to the eloquent preamble to that Act, a preamble which is founded on constitutional principles, and which states what the Act is intended to carry out. It recites that "Whereas the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law; and whereas it is adjudged necessary by her Majesty and this present parliament, that a body of forces should be continued for the safety of the United Kingdom, the defence of the possessions of her Majesty's crown, and the preservation of the balance of power in Europe. .... And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by judgment of his peers, and according to the known and established laws of this realm." That is a fair explanation of the general constitutional doctrine, one that I hope we shall never see trenching upon. But the preamble goes further: "Yet nevertheless it being requisite, for the retaining

all the before mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or shall desert her Majesty's service, or be guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow." Thus in this Act is recited its object—that in reference to certain military offences you are not to wait for the ordinary forms of law, but that in order to preserve military discipline, it is essential that for the military offences created by the Act there should be a more exemplary and speedy punishment. Such is the explanation of the Mutiny Act in its own terms. And in the very case of *Grant v. Sir Charles Gould*, cited yesterday, we find the preamble of that statute anticipated by Lord Loughborough in his explanation of the doctrine on which it ought to be founded. He goes in his judgment into the question as to a standing army and says: "The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept upon it, and that the persons who compose the army for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a Mutiny Act accompanying the army. It has happened indeed at different periods of the government, that there has been a strong opposition to the establishment of the army. But the army being established and voted, that led to the establishment of a Mutiny Act. A remarkable circumstance happened in the reign of George I. when there was a division of parties on the vote of the army: the vote passed, and the army was established, but from some political incidents which had happened, the party who opposed the establishment of the army would have thrown out the mutiny bill. Sir Robert Walpole was at the head of that opposition, and then some of their most sanguine friends proposed it to them: they said as there was an army established, and even if the army was to be disbanded, there must be a Mutiny Act for the safety of the country. It is one object of that Act to provide for the army; but there is a much greater cause for the existence of a Mutiny Act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a Mutiny Act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline. All history and all experience, particularly the experience of the present moment, give the strongest testimony to this. The object of the Mutiny Act, therefore, is to create a Court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his Majesty, to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are

thought necessary to the regularity and due discipline of the army." Since that time the law is altered in this way, that the military offences are regulated by the statute itself, and not by articles of war, and in the 15th section of the present Act we have those offences set out. I think I have shewn that the offence of high treason is totally distinct from the offence with which the prisoner is charged,—namely, the knowledge and non-disclosure of an intended mutiny, which mutiny, if carried out, might, according to its object, be or not be an overt act of high treason. But let us look further and see the consequences which would flow from our granting this prohibition. There are many of the offences defined by the Mutiny Act, which are already high treason. I will refer to one. The offence under the 13th section is defined by a previous Act. The 15th section provides that any soldier who "shall hold correspondence with or give advice or intelligence to any rebel or enemy of her Majesty, either by letters, messages, signs or tokens, in any manner or way whatsoever.....shall suffer death, or such other punishment as by a Court Martial shall be awarded." My brother O'Brien has already stated that that, in its very terms, may be an overt act of high treason. But independent of the nature of the prosecution, what is the offence by statute. In Bacon's Abridgment, Treason (H.), we find it stated— "And from the 2 & 3 Anne, c. 20, s. 34, by which it is enacted 'that if any officer or soldier in her Majesty's army shall give advice or intelligence to any enemies of her Majesty, either by letters, signs, or tokens, or in any way whatsoever, such person shall be adjudged guilty of high treason,' it was inferred that if the giving of such intelligence had before been an overt act in every subject of adhering to the King's enemies, it was unnecessary to enact, by a new statute, that the doing thereof should be high treason in an officer or soldier. But the judges of the Court of King's Bench were clearly of opinion that the sending of such letters is an overt act of adhering to the King's enemies." There you have the two things, one embracing the whole community, but there is the other offence of a soldier only, and if he gives intelligence to the enemy he is guilty of a military offence. I could specify many other cases, but there is one peculiarly remarkable. Exciting a mutiny is one of the offences mentioned in the 15th section of the Mutiny Act. There is a statute on that already, making it an offence punishable by death, namely the stat. 37 G. 3, c. 40 (Ir.) s. 1, analogous to stat. 37 G. 3, c. 70 (Eng.) s. 1; and it has only been altered as to the penalty by the stat. 1 Vict. c. 91, the "Act to abolish the Punishment of Death in certain Cases." It is still an offence, if committed by any one, but the punishment is reduced to penal servitude for life. Again, I would ask in this case is the offence specified in s. 15 of the Mutiny Act merged in the felony created by the stat. 37 G. 3? As my Lord Chief Justice has pointed out, it would be an absurdity to say so. Again, let me refer further to this 15th section. By it if any soldier "shall strike or shall use or offer any violence against his superior officer, being in the execution of his office," he is guilty of a military offence for which he may be con-

demned to death, with a discretion in the Court Martial to award any lesser punishment. But there is also a felony of offering violence of a particular kind. Suppose, now, a soldier stabs an officer, but does not kill him, he is guilty of felony, and may be tried for it, and sentenced to penal servitude. But because of that it is to be said that the military offence of offering violence to a superior officer is merged? I might go on enumerating instances of this kind, where the facts establish a military offence, and also disclose an offence by the civil law, but do not interfere with the jurisdiction of the Court Martial to deal with the military offence. I may put this case. It is said that there is a merger. A merger, as I understand it, exists only where, there having been an offence by common law, some alteration has taken place by reason of a statute changing its character; in a degree it is then merged. There is then but one offence, and it would be absurd to allow a person before the one tribunal to be tried for two offences. But how is this to be worked out? It devolves on the Court to direct an acquittal. I may refer to *Isaac's case* (2 East. P. C. 1081). There was an offence of burning one's own house, which was a misdemeanour—the burning another's house was felony. It appeared that the prisoner had burned his own house, and in doing so had set fire to another. He was indicted for burning his own, and the Court directed an acquittal, because if the man was guilty at all, as he set fire to his own house, the fact, if criminal at all, was felony under the statute, and so the Court held that there was but one offence, and he was directed to be acquitted of the lesser charge in order that he might be tried for the felony. After that it is absurd to say that there is a merger here. I may put it thus—Suppose this prisoner had been in the first instance in the hands of the civil tribunal—suppose he had been tried for treason-felony, and acquitted perhaps on the ground that the jury did not think that he harboured the treasonable design imputed—we can understand that might be. Would that prevent his being tried on the military charge? By no means—the one is treason; the other is what has been called misprision of a military mutiny, the knowledge of an intended mutiny which could not be used as an overt act of treason, which is a charge that knowing of an intended mutiny which might never take place, he concealed it. If he had been acquitted of treason he could be tried for that. Again, my brother O'Brien has pointed out that the objection is one rather to be brought before the Court at the end, that is, that in the case to be made for the prisoner, it may be urged on the Court that it is not fair that they should be really trying them for treason, and loading the case with evidence which does not go to the charge. But that is not ground for prohibition, but ground for calling on the Court trying him, if at all, to acquit him, and remit him to the civil tribunal for the other offence. Again, is it not quite consistent with this that the military Court might disbelieve the evidence of treason, and entertain no doubt whatever that there was an intended military mutiny which he knew, and of which he did not inform his superiors? I allude to this as shewing that the two things in a legal view stand entirely disconnected, and that one cannot merge

in the other. There are two distinct offences, a civil one and a military one, of which we know nothing, and which may be tried by the military tribunal. There may be hardships, and it may be perhaps urged that this man's true offence was that he was a primary mover in the mutiny; but those are matters to address to the tribunal before which he is, and which I have no doubt will exercise its great powers conscientiously. If I thought there was any doubt, I should consider it my duty to hold that a conditional order should be granted; but, being of opinion that there is no doubt, I think we should only be doing mischief both to the prisoner and the public in granting a conditional order which should afterwards be discharged. I am freed from all anxiety by this consideration, that if there is error in any sentence which may be pronounced by this military tribunal, it is open to the prisoner to come here for a prohibition, because there can be no doubt that if error takes place, or if there is excess of jurisdiction in any part of the proceedings even after sentence, it is not too late to come here for a prohibition. There is also this consolation, that the injury to the prisoner is more imaginary than real. We have every confidence in the military tribunal, and also in this, that all that occurs is laid before a supervising tribunal presided over by a great lawyer in whom I for one have great confidence, from private as well as from public grounds.

## Court of Appeal in Chancery

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

NESBITT'S ESTATE.—June 5 & 6.

HENRY NESBITT AND OTHERS, OWNERS; THOMAS CROKER, PETITIONER.

*Will before the Wills Act of 1837—Construction of—Expression “dying without issue.”*

*Testator by codicil dated 1821 to his will dated 1812, devised certain lands of which he was seised in fee to A. C. (a woman by whom he had the hereafter mentioned five illegitimate children) “and to her five children, A., S., Al., J. and M., share and share alike during their lives, or the life of the survivor or longest lives of them the said A., S., Al., J. and M.; and if it happen that any of the said person should die unmarried and without any lawful issue, it is my will that the portion of such person should go to and amongst the survivor of them. And it is my will that the said A. D. and her said children should have, hold, and enjoy the said lands and premises as before mentioned for the natural life or lives of them, or the survivor or longest liver of them.” Held, affirming the order of Judge Dobbs, that the said A. D. and her said five children took merely a life estate with cross remainders among them, and not an estate tail.*

THIS case came before the Court on petition of appeal

aken by Thomas Croker from an order of Judge Dobbs, made on the 15th March, 1866. The petition of appeal stated that Matthew Nesbitt, of Derrycarn, in the County of Leitrim, being seised in fee-simple of several denominations of land, called the Derrycarn Estate, in the County of Leitrim, including the lands of Clonboynagh, situate in the parish and barony of Mohill in said county, duly made and published his last will and testament in writing, dated the 14th October, 1812, and after thereby directing his debts and legacies, and the interest thereof, to be paid by instalments out of the rents of his real estates as therein mentioned, he vested all his real estates, including Clonboynagh, in Matthew Kane and William Pennesfather, and their heirs, as trustees for the purposes in his said will mentioned. He bequeathed to his wife an annuity of £200 a year during her natural life, with liberty to her to enter upon any of his lands except Clonboynagh, should her annuity be in arrear twenty-one days, to distrain for same. He bequeathed to his only son, Francis Nesbitt, all his property of every kind, subject to the bequests, legacies, debts, jointures, and annuities in his will mentioned for the term of his natural life, and then to his heirs male lawfully begotten, and in case of failure of male issue in the said Francis Nesbitt, with remainder as to his real estates, to his daughter, Elizabeth Nesbitt, in tail male; and in case of her death without issue male, the said properties and real estates to be equally divided between his other children; and after certain bequests to his daughter, he bequeathed to Anne Doyle, daughter to James Doyle, of Drumard, miller, the sum of £100, and also an annuity of £30 during her life, the same to be a charge on his real estate, and with right to enter and distrain for said legacy of £100 and her annuity as in his will mentioned. Said Matthew Nesbitt afterwards, on the 3rd of November, 1821, added a codicil to his will duly executed and attested to pass real estate by devise, in the words and figures following:—"I make this codicil to my will. I leave and bequeath to the within-mentioned Anne Doyle, in lieu and instead of the within-mentioned legacies, All That and Those the entire of the lands of Clonboynagh within mentioned, containing one hundred and fourteen acres, with the bogs, loughs, and appurtenances thereunto belonging, and to her five children, Anne, Susan, Alexander, John, and Matthew (who are to be called by the surname of Doyle), share and share alike during their lives, or the life of the survivor or longest liver of them, the said Anne, Susan, Alexander, John, and Matthew. And if it should happen that any of said persons should die unmarried, and without any lawful issue, it is my will that the portion of such person should go to and amongst the survivor of them. And it is my will that the said Anne and her said children should have, hold, and enjoy the said lands and premises as before-mentioned, for the natural life or lives of them, or the survivor or longest liver of them, this bequest being intended as a provision for them, subject only to the annuity of sixty pounds a year secured to my brother, John Nesbitt, during his life, and after his death to hold said lands as before-mentioned, free from all rents, incumbrances, debts, or demands, quit or crown rent

only excepted." Said Matthew Nesbitt died shortly after making the codicil, and on the 3rd day of Mar. 1823, administration of his goods and chattels, with his will and codicil annexed, was granted to his son, Francis, by the Prerogative Court. After the testator's death, Anne Doyle married one Henry Nesbitt, Anne Nesbitt married one George Nesbitt, Matthew Nesbitt also married, Susan Nesbitt married Michael McDermott, John Nesbitt married, and Alexander Nesbitt died unmarried and without issue. On the 25th March, 1837, said Francis Nesbitt executed a mortgage of his estate to one Maxwell Hamilton, in which mortgage was included the lands of Clonboynagh. On the 25th March, 1850, Maxwell Hamilton presented his petition to the Commissioners for Sale of Incumbered Estates in Ireland, in the matter of the estate of Francis Nesbitt, owner; Maxwell Hamilton, petitioner, for the sale of the lands contained in his mortgage; and having obtained an order for sale, the owners in this matter, on the 27th June, 1850, served notice of an application to the Commissioners to discharge the order for sale so far as it related to Clonboynagh; and the motion having been heard by the Commissioners, they, on the 6th July, 1850, made an order in the words and figures following:—"And it appearing to the Commissioners that the said testator, Matthew Nesbitt, in and by a codicil of his will, directed his debts and legacies should be paid out of certain lands other than the said lands of Clonboynagh, and that the incumbrance in respect of which the petition in this matter is presented was created by Francis Nesbitt, the devisee of the said Matthew Nesbitt. It is ordered by the Commissioners that the said lands of Clonboynagh, otherwise Clonboynagh, be struck out of the absolute order, and that the said order be discharged so far as the same directs a sale of said lands. It is further ordered that the said petitioner do pay to the said applicants their costs of this motion, and that the said petitioner do have such costs so paid, together with his costs of this motion as costs in this matter." The owners in this matter executed a disentailing deed dated the 9th June, 1855, which was duly enrolled in Chancery on the 18th August, 1855, whereby the lands of Clonboynagh were conveyed to the use of the said Anne Nesbitt, Susan Nesbitt, John Nesbitt, Matthew Nesbitt, and Alexander Nesbitt, their heirs and assigns, for ever, discharged of all estates, tail and remainders over. By indenture of mortgage dated the 28th day of July, 1856, the owners in this matter conveyed the lands of Clonboynagh to petitioner in fee-simple, subject to redemption on payment of the sum of £640 12s. 6d. and interest as therein mentioned. On the 20th May, 1863, petitioner presented his petition in this matter to the Landed Estates Court for the sale of said lands, and on the 29th July, 1863, Judge Dobbs made an absolute order for sale of said lands. Said Francis Nesbitt died some years ago leaving Francis H. W. Nesbitt, his only son and heir-at-law, him surviving. On the 22nd January, 1866, a notice of an application to Judge Dobbs, on behalf of Francis H. W. Nesbitt, was served on the petitioner to vary the order for sale in this matter, bearing date the 29th July, 1863, so far as it directs a sale of the fee of the lands of Clonboynagh, and to

amend same by limiting a sale of the lands to the sale of the life estates therein of Susan M'Dermott, Anne Nesbitt, John Nesbitt, and Matthew Nesbitt, or other the survivors of the five children of Anne Doyle, the devisee named in the will and codicil of Matthew Nesbitt, deceased, and the lives and life of the survivors and longest liver of them. This motion was heard before Judge Dobbs on the 31st of January and 1st of February last, and on the 15th day of March last he made the following order:—"It is ordered by the Court that the estate of Doyle family be declared limited to a life estate only with cross remainders among them. And it is further ordered that Captain Nesbitt be declared entitled to his costs of this motion against the estate in this matter, and that the petitioner do have his costs in this matter." Petitioner submitted that the order of Judge Dobbs of the 15th day of March last was erroneous and ought to be reversed, and that the application of Francis H. W. Nesbitt to vary the order for sale in this matter ought to have been refused, with costs.

To the above petition of appeal the respondents replied, and no controversy being raised as to the facts, submitted, that the decision of the Court below ought to be affirmed.

*Lawless, Q.C.*, and *John MacMahon* were for the appellants.—The order of the Court below was erroneous, and ought to be reversed, because under the codicil of the will of Matthew Nesbitt, Anne Doyle, together with her five children, took the lands of Clonboynagh as tenants in common for life, the words of the codicil being—"I leave Anne Doyle.....the entire of the lands of Clonboynagh.....and to her five children [naming them] share and share alike during their lives, or the life of the survivor of them," her said children. Clearly, this constituted them, the five children, as tenants in common for life, with cross-remainders between them for life; and under the limitation in the codicil, "if it should happen that any of said persons should die unmarried and without lawful issue, it is my will that the portions of such persons should go to and amongst the survivor of them," the children took estate tail in the lands, and further, too, the limitation of the lands to the trustees was to them in fee by the terms of the will itself, and therefore the portion thereof, that is, the portion of the fee, or the proportion thereof of each of the children was to them in ultimate remainder in fee. The contention here, then, is, whether this is an estate tail or not. If the estate in the lands was an estate tail, that entail was barred by the disentailing deed of 9th of June, 1856, executed by the said Anne, Susan, John, Matthew and Alexander, and they then having so cut off the entail mortgaged to us. This will and codicil were both made before the Wills Act of 1837, and the unbroken current of decisions in those times was that such an expression as "dying without issue" imported an indefinite failure of issue, or in other words an estate tail. It is a well-established rule of law that the restriction of words to a failure of issue at the death of a devisee of real estate can only be effected by showing either that such was clearly the testator's intention, in other words, that the cutting down of an estate tail to a life estate, which it is

sought here to do, can only be effected by shewing that the testator clearly meant to cut same down.—*Roë v. Jeffreys* (7 T. R. 589); *Haddelsley v. Adams* (22 Beav. 266); *Roddy v. Fitzgerald* (6 H. L. Cases, 823). No doubt, here there is a limitation for a life estate, but there is a subsequent limitation, and that enlarges the life estate into an estate tail. The interpretation sought for on the other side is quite untenable.—*Lee's case* (1 Leon. 285); *Daintry v. Daintry* (6 T. R. 307); *vid.* rule laid down in 2 Jarman on Wills, chap. xli., that the established legal interpretation of the expressions "'if he die without issue,' or 'if he die before he has any issue,' or 'for want,' or 'in default of issue,' unexplained by the context.....are construed to import a general indefinite failure of issue," when such will is made before the Wills Act of 1837.—*Vanderplank v. King* (3 Hare, 1).

*Brewster, Q.C.*, *Walsh, Q.C.*, and *Samuel Walker*, for the respondent, submitted that the construction put upon this will by Judge Dobbs was the only one that the terms of the will could bear, and not a single authority cited on the other side was in point. The question for the Court to consider was—how much of his estates here did the testator mean to dispose of. We submit that the testator meant merely to carve out of the fee what would provide for the woman Doyle, and for her five children, and that what was so carved out should only continue during the life of the longest liver of the six, and if even a testator conveyed his meaning with precision it was the testator here.—*Jones v. Randall* (1 Jacob & Walk. 100). In many cases the word "issue" is construed to mean children, in fact the construction entirely depends upon the context.—*Doe d. v. Frost* (1 Barn. & Cress. 638). The limitation in this will of Mr. Matthew Nesbitt to the survivor is merely a limitation to the survivor for life. The mortgage, then, of the 28th of July, 1856, on foot of which it is sought to have a sale of the "fee" of the lands of Clonboynagh is not a charge on the inheritance. The very words of the will impart a life estate *verbatim*.

THE LORD CHANCELLOR.—I think that Judge Dobbs has taken the correct view of this case. In order to understand the case, it is absolutely necessary to go through every word of the will and codicil. Here a testator made a will devising to trustees certain lands in trust to pay this lady with whom he lived an annuity of £200 a year for her life. In the codicil the testator did not interpose trustees at all, and he bequeathed to this lady, the mother of his five children, and to those five children (who were to be called after the mother by the surname of Doyle, though now called Nesbitt after their father) those lands, share and share alike, "during their lives or the life of the survivor or longest liver of them, the said Anne, Susan, Alexander, John and Matthew. And if it should happen that any of said persons should die unmarried and without lawful issue, it is my will that the portion of such person should go to and amongst the survivor of them." Now, can any words be plainer than those? the portion of the child that died was clearly only a portion to which he was entitled for life. But all doubt, if any could exist is dissipated by the expression in the very next sentence—"It is my will that the said Anne Doyle and her children should

hold and enjoy the said lands for the life or lives of them, or the survivor of them." I am of opinion, therefore, that they took as tenants in common for life only, and that the survivor of them merely takes as tenant for life, and not an estate in tail. In the first devise there is not anything that creates an estate tail. The case of *Taafe v. Conmee* (10 H. L. C. 84) has been relied upon by the appellants. That case, however, is distinguishable from that now under consideration, inasmuch as therewere no cross-remainders there. The Lord Justice of Appeal is of the same opinion. Affirm the decision of the Court below.

THE LORD JUSTICE OF APPEAL entirely concurred in what had fallen from the Lord Chancellor. In all the cases cited by the appellants the expression "dying without issue" was not qualified by the expression "survivor," which was to be found in this will. "Dying without issue" here clearly had reference to dying without issue at the death, and not to an indefinite failure of issue, for the direction in the will is if any of his children should die without issue, then the portion or proportion of that person should go to the survivor. This clearly fixes the time of failure of issue to the death of any of his children.

*Order affirmed.*

Solicitor for the appellants—Thomas Croker, 87 Lower Dominick-street, Dublin.

Solicitor for the respondents—William Lawder, 29 North Great George's-street, Dublin.

**SHORTT'S ESTATE.—June 7 & 8.**

*Lease—Cestui que trust—Statute of Limitations, secs. 2 and 25.*

J. S. in pursuance of a covenant contained in his marriage settlement, by his will made just previous to his death in 1826, devised all his interest in the lands of S. of which lands he was seised of one undivided one seventh, to trustees, to pay his widow two annuities of £100 and £40 a year for her life, and subject thereto to permit W. T. S. to receive the rents, &c. during his life, with remainder to his heirs for ever, first paying the head rents and the aforesaid annuities. Afterwards said W. T. S. (and not said trustees) in 1839 made a lease to certain tenants then in possession of 42 acres of said lands at a nominal rent of £9 a year. On a sale being ordered by the Landed Estates Court of said lands, said tenants were stated to be merely tenants from year to year: to this statement said tenants objected, and insisted that the lands should be sold subject to said lease, and relied upon the Statute of Limitations, sec. 25. Said objection having been argued, the judge of the Landed Estates Court allowed said objection, and ordered the lands to be sold subject to said lease. Held, reversing

said order, that the lands should be sold discharged from said lease.

THIS case came before the Court on appeal taken by the petitioner, Jane Shortt, of Nenagh, in the county of Tipperary, widow. The petition of appeal stated, that by articles of agreement made prior to petitioner's marriage, the 13th day of April, 1805, between John Shortt, of Liskeen, in the county of Tipperary, petitioner's late husband, of the one part, and Thomas Fowles, petitioner's father, and petitioner by her then name of Jane Fowles, of the other part, in consideration of petitioner's fortune of £500, and for the other considerations therein, the said John Shortt covenanted with the said Thomas Fowles and petitioner to settle a jointure on petitioner of £100 a-year in case she should survive her then intended husband the said John Shortt, to be issuing and payable out of the said John Shortt's proportion, (which was one seventh) of the lands of Summerhill, in the county of Tipperary, and the said lands of Liskeen, to be paid to petitioner by two equal half-yearly payments as therein, with power of distress, and said articles also contained a covenant by the said John Shortt for further assurance, which articles were duly registered in the Office for Registering Deeds in Ireland upon the 9th day of May, 1805. That in pursuance of the said covenants the said John Shortt, by his last will duly executed, and bearing date the 3rd day of February, 1826, left and bequeathed to the three trustees therein named the lands of Kilkeary and Ballinamurra, and the said lands of Summerhill and Liskeen, and all his interest therein upon trust, first, to pay the head-rents; secondly, to pay petitioner an annuity of £100 a-year out of all the said lands, or out of any, or either, or any part thereof, with power to petitioner and her assigns to enter and distrain said lands in case of the non-payment of any gale of said annuity; and subject thereto upon further trust to pay a life annuity of £40 a-year to petitioner's mother, and after her death to petitioner during her life, with similar powers of distress in case of the non-payment thereof; and subject thereto upon trust, to permit and suffer the testator's nephew, William Thomas Shortt, to receive the rents, issues, and profits of said lands of Summerhill, Kilkeary, and Ballinamurra, during his life, and then to his heirs for ever, first paying the head-rents and said annuities as before mentioned. That petitioner's said husband departed this life in the year 1826, whereupon petitioner became entitled to said annuity of £100, and petitioner's said mother also departed this life many years ago; and thereupon also petitioner became under said will entitled to said annuity of £40. That petitioner's said husband, both at the time of making the said articles of 13th April, 1805, and also at the time of making his said will in 1826, and at his death, was seised of the said one undivided seventh part of said lands; and petitioner now submitted that under the said articles and said will the said two annuities became well charged upon said one-seventh portion of said lands. That subsequent to 1826 and before the year 1849, one John Shortt became seised and possessed of five-sevenths of said lands, including the one-seventh upon which petitioner's said two an-



nunities were charged, and a considerable arrear of said two annuities accrued due; and petitioner accordingly, on the 2nd of January, 1849, exhibited her bill in the Court of Chancery against the said John Shortt and others, and thereby prayed that the said two annuities of £100 and £40 might be declared well charged on said one-seventh of said lands, and that an account of what was due to petitioner might be taken, and said defendants ordered to pay same, and that a receiver might be appointed; and said bill was duly taken as confessed against the said John Shortt. That by an order made in said cause, and bearing date the 20th day of July, 1849, the said John Shortt was ordered to make certain payments to petitioner on account of her said arrears, but which the said John Shortt did not pay. That said John Shortt applied to petitioner to come to some arrangement with him on account of said arrears; and thereupon petitioner agreed to accept the sum of £70 for said arrears. That accordingly by an indenture of the 7th of December, 1849, and made between the said John Shortt of the one part, and petitioner of the other part, it was witnessed, that in consideration of said agreement, and of the forbearance of petitioner, and also to secure to her the payment of the said sum of £147, thereby ascertained as due to her for her costs of said suit and for said arrears, with interest thereupon, and the future annuity of £25 a year to petitioner; the said John Shortt granted to petitioner an annuity of £40 a-year, to be yearly, issuing and payable out of all that and those said five-sevenths of said lands of Summerhill, containing 165 acres, situate in the barony of Ilkerrin, in the county of Tipperary, to hold to petitioner, his executors, administrators, and assigns, from the 1st of November, 1849, for the lives of the said John Shortt and of petitioner, parties to said indenture; and of Maria Shortt, daughter of said John Shortt, to be applied nevertheless by petitioner, first in discharging said sum of £147 so due for costs and arrears of said annuity, with the accruing interest thereupon, and after the payments thereof then in discharge of the arrears of the accruing annuity of £25 per annum, to be computed from the 1st day of November, 1849, and to be payable to petitioner during her life, and after paying said arrears then said annuity of £40 thereby granted to be reduced to £25 a-year. That by said last-mentioned indenture it was, however, also agreed that nothing therein contained shall be construed to abridge the rights of petitioner under the said marriage settlement and said deed of annuity as far as relates to said lands of Liskeen, or as to said lands of Summerhill, if the terms of said deeds were contravened; but that petitioner, at her election, might resort to all her remedies under said former indentures and the proceedings in said cause. That the terms of the said last-mentioned deed were contravened, and no payment whatever has been made to petitioner on account of said last-mentioned annuity of £40, but the said sum of £147, and all subsequent arrears of said annuity, are due and unpaid; and that all the arrears of said two original annuities of £100 and £40 a-year, so granted by petitioner's late husband to petitioner from the date of said last-mentioned deed to the present time, were now also due to petitioner. That on or

about the 15th day of January, 1864, petitioner presented her petition to the Landed Estates Court, Ireland, entitled in this matter, and stating as therein, and praying that one-seventh part of the said lands of Summerhill, or a competent part thereof should be sold for the discharge of the incumbrances affecting the same; and on the 23rd of April, 1864, the usual conditional order for sale of said one-seventh part of said lands was made by said Court, and afterwards the usual absolute order for sale was made on the 15th June, 1864. That said conditional and absolute orders for sale were amended by several others, and finally by orders bearing date the 1st day of March, 1865, and 13th day of July, 1865, said orders for sale were amended by directing a sale of "one undivided moiety of one divided two-sevenths" of said lands. That in a certain other matter depending in the late Incumbered Estates Court, wherein one Hannah Shortt was petitioner, and William Thomas Shortt, owner, such proceedings were had that by an order therein, bearing date the 19th day of March, 1859, a partition of the said lands of Summerhill was ordered to be made, and such partition was made accordingly; and by an order of the 29th day of July, 1863, a certain part of said lands marked A. and B. upon the map to said last-mentioned order annexed, and containing 100 acres statute measure was set apart as representing the two-sevenths of said lands to which the said William Thomas Shortt was entitled, one of such sevenths being the seventh upon which said annuities were charged as aforesaid; and it was in consequence of such partition that Judge Dobbs so amended the said orders for sale, and in said last-mentioned matter three-sevenths marked C, D, E, F, G, H, I, and J on said map, were sold discharged of petitioner's said annuities. That neither petitioner nor the trustees of the said will of petitioner's said husband were parties to said last-mentioned matter or to said petition, or to any of the proceedings connected therewith, or had any notice thereof; and petitioner now submitted that she was not in any way bound thereby. The petition of appeal then stated that such proceedings were had in this matter; that the final notice to the tenants of the said lands, bearing date the 2nd August, 1865, was duly lodged, and therein Martin Murray, Matthew Treacy, and Daniel Treacy were stated to be tenants from year to year, at a rent of £9 2s., of 69 acres, of said lands, but that they claimed to hold under a lease from William Thomas Shortt, for three lives, with covenant for perpetual renewal, and was duly served according to the practice of the said Landed Estates Court upon (amongst others) the said Michael Treacy and Martin Murray; That on or about the 28th day of October, 1865, said Martin Murray and Michael Treacy, both of Summerhill, in the county of Tipperary, filed an objection to the said final notice in this matter, and therein claimed that by a certain indenture of lease, bearing date the 9th day of October, 1839, and made between the said William Thomas Shortt, of Summerhill, of the one part, and the said Michael Treacy, Martin Murray and Daniel Treacy, of the other part; the said William Thomas Shortt demised and granted unto the said Michael Treacy, Martin Murray, and Daniel Treacy, and the survivor of them, all that and those that part of the

lands of Summerhill aforesaid, then and formerly in their possession, containing about 42 acres, Irish plantation measure, situate as therein mentioned, to hold for the lives of three persons therein named, and for the lives of all such persons as should for ever thereafter be added, by virtue of the covenant for perpetual renewal therein contained, subject to the rent of £9 a-year, payable as therein, and in which lease is contained a provision that if any relative of the said William Thomas Shortt should have any claim upon the whole lands of Summerhill, for any quantity of land, and that same might or could be made on the premises thereby demised, in such case the said William Thomas Shortt, his heirs and assigns, were to give the said Michael Treacy, Martin Murray, and Daniel Treacy, their heirs and assigns, as much land out of that part then in their possession, and make such competent recompense as counsel might advise. That the said objection stated that the said Martin Murray had purchased said Daniel Treacy's interest in said lands, and submitted that if petitioner ever had a right to dispute said lease, such right was barred by lapse of time, possession having gone in accordance with said lease since the date thereof, and said objection relied on the Statute of Limitations, the said Martin Murray and Michael Treacy insisting that the said lease gave them a right to the specific lands so set apart for the two-sevenths of the said William Thomas Shortt, and that accordingly the sale in this matter should be made subject to said lease. That the said objection came on to be examined and disposed of on the 12th of January, and again on the 1st of February, 1866, before Judge Dobbs; and he was pleased to order that the claim of the said Martin Murray and Michael Treacy should be allowed, and that they should be allowed their costs out of the fund, in the same priority as the petitioner's costs, and also that they should be allowed the costs of counsel preparing said claim. That at the time of the making of said alleged lease the said William Thomas Shortt was seized only of an undivided share in said lands of Summerhill, and is the sole lessor in said alleged lease. Petitioner then submitted that the said order of the 1st day of February, 1866, was erroneous, so far as it ordered that the claim of the said Martin Murray and Michael Treacy should be allowed, and that they should be allowed their costs out of the fund, and also that they should be allowed the costs of counsel preparing said claim, and that said order ought to be reversed, or ought to be varied by declaring that if the sale in this matter is to be made subject to the said alleged lease of the 9th day of October, 1859, then that petitioner was entitled to a sale of one undivided seventh part of the said lands of Summerhill as prayed for in the original petition in this matter, or of so much of the said lands remaining unsold as will be equivalent to one-seventh of the whole thereof instead of an undivided moiety of the said divided two-sevenths of said lands. The petition then prayed that the said order of Judge Dobbs might be reversed or varied, and that it might be ordered that the said claim of the said Martin Murray and Michael Treacy be disallowed; or that it might be declared that petitioner was entitled to a sale in this matter, of one undivided seventh of the said lands

of Summerhill, or of so much of said lands remaining unsold as will be equivalent to one undivided seventh of the whole of said lands, and that such one undivided seventh, or so much of the unsold lands as will be equivalent thereto, should be ordered to be sold accordingly, and that petitioner may have her costs of this appeal as part of her costs in this matter.

To the above petition of appeal said Michael Treacy, and Martin Murray, who had purchased the interest of Daniel Treacy, under said lease, replied by way of answer; and they, while admitting the facts, submitted that the order of Judge Dobbs was correct, and that the right to dispute the said lease of 9th of October, 1839, was barred by the Statute of Limitations.

*Robert Griffin and George Foley* appeared for the appellants.—The order of Judge Dobbs is erroneous and must be reversed; the effect of that order was to saddle the one-seventh of the said lands with a lease of the 9th of October, 1839, whereby no less an area than 42 acres were leased to the tenants, for lives renewable for ever, at the paltry rent of £9 a-year; the whole of the lands being only 233 acres, and consequently the one-seventh being but 33 acres. We claim under the will of 1826, and by that will John Shortt, appellant's husband, devised to trustees to permit his nephew, William Thomas Shortt, to receive the rents thereof, but subject to the payment of the annuities to his widow, the appellant here, and in making this will the testator merely acted in pursuance of a covenant containing, in his marriage articles of 1805. If this lease is allowed to stand, our annuity falls to the ground, as the lands can not reach any thing at all like what will pay it. The Statute of Limitations, sec. 2, can not run against the appellant here; and on the other side it is pretended that if the petitioner ever had the right to dispute the lease of the 9th of October, 1839, that right is now barred by the Statute of Limitations; we insist that we had the right to dispute a lease that would utterly annihilate our annuity, and further, that that right is not now gone, being barred by the Statute of Limitations; no lease whatever was made by the trustees of the will of 1826, in whom the legal estate was vested, and who alone had the right to make any lease; add also this other fact, that we filed our bill in 1849, for our arrears of annuity; and thus our right to the arrears of annuity is not gone. The legal estate being in the trustees prevents the bar of the Statute, and the *cestui que trust* had no title in him to give the lessees; the *cestui que trust* is in truth merely tenant at will to his trustees—*Gerrard v. Tuck* (8 O. B. 252, 253); when there is an outstanding trust the Statute of Limitations does not operate—*Young v. Lord Waterpark* (6 Jur. 656; s.c., 15 Sim. 204); *Cox v. Dolman* (2 De Gex. M.N. & G. 592) shows that full arrears may be recovered upon part of annuitant when terms is vested in trustees to secure it, and that the arrears were not limited to six years, even after subsequent incumbrance by grantor—*Lewis v. Duncombe* (29 Beav. 175); *Snow v. North* (2 Kay & Johnson, 478); *Massy v. O'Dell* (10 Ir. Chan. 22); *Giles v. Giles* (9 El. Rep. 135); *Sugden, Vend. & Pur.* 14th ed. 478—*Hunt v. Bateman* (10 I. E. R. 360); *Blair v. Nugent* (3 Jon. & Lat. 659); *Scott v. Nixon* (3

Dr. & War. 388); *Kernan v. McNally* (12 Ir. Ch. 89; *Lewis v. Duncan* (29 Beav. 175); *Melling v. Leek* (16 C. B., 652).

*Sherlock, Q.C.* and *John B. Murphy* were heard in support of the decision of the Court below.—It is now late to dispute this lease, the 2nd section of the Statute of Limitations bars any such attempt, and this is not within the proviso of 25th sec. of the Statute of Limitations. The Court will hold here that Shortt has acted as the agent of the trustees, and that therefore his acts were theirs, and the Statute then runs together as against the principal as well as the agent. The decision in *Young v. Lord Waterpark* (6 Jur. 656; s.c. 13 Sim. 204) relied upon on the other side, turned upon the fact that there was a subsisting term of years, and vested in the trustees, under which they were entitled to go into possession, and such is the way it is put by Lord St. Leonards in *Cox v. Dolman* (2 De Gex. & M'N. 592); *Melling v. Leek* (16 C. B. O.S., 652) we are in possession since 1839, and that too for valuable consideration, and this Court is now called on to work an injustice in ousting us out of our lease, of which we are in possession for six and twenty years. It is admitted William Thomas Shortt was in possession and receipt of the rents of the premises and possession has gone with the lease. Daniel Treacy's interest under the lease has been purchased for valuable consideration, by and belongs to Murray.

THE LORD CHANCELLOR.—The Lord Justice of Appeal concurs with me that this order must be reversed, and the case sent back again to the Landed Estates Court.

*Order reversed.*

Solicitors for the appellant—William Neilson and Son, 104 Middle Abbey-street, Dublin.

Solicitors for the respondents—James Barron Kennedy and Son, 61 Mountjoy-square, Dublin.

## Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

STAUNTON v. POWELL.—June 12, 22.

*Rating—Occupation—St. 12 & 13 Vict. c. 91, s. 62.*

*A., the owner of a house in the city of Dublin, furnished it and advertised it to be let or sold. He succeeded in letting it to tenants for portions of the year, but during the other portions the premises were not otherwise occupied than by his furniture. Held—(dissentiente Fitzgerald, J.) that he was only liable to rates on said house and premises for the periods during which same was actually set to and occupied by his under-tenants.*

THIS was an action brought by the plaintiff as Collector-General of Rates in the city of Dublin, to recover the sum of £58 10s. 10d., alleged to be due by defendant for rates and rents of premises No. 99 Stephen's Green, South. After the issuing of the summons and plaint the parties agreed to state a case for the opinion of the Court. The case stated was as follows: The action in this case was brought by the plaintiff as Collector General of Rates in the city of Dublin,

duly appointed under the 12th and 13th Vict. c. 91, intituled, "An Act to provide for the collection of rates in the city of Dublin," for the recovery of the rates and rents due from the defendant as the occupier of the house, offices, and small yard, No. 99 Stephen's Green, South, in the city of Dublin, which rates were duly made, assessed, and declared by the plaintiff as such Collector General under the 48th section of the said 12th and 13th Victoria, c. 91; and notices thereof were duly inserted and published pursuant to the 52nd section of the said statute. Anne M'Donnell was duly rated for said premises as occupier thereof, and defendant having purchased the landlord's interest in said premises in the Bankrupt Court, and after said Anne M'Donnell had left said premises, not being able to let said house and premises, on the 1st June, 1864 the defendant caused the same to be furnished, and advertised to be let as a furnished or unfurnished house, or the interest in the same to be sold. On the 16th day of July, 1864, the defendant succeeded in setting said house and premises as a furnished house to one Wilson Walsh as a weekly tenant, and said Wilson Walsh continued to occupy said house and premises till the 19th day of August, 1864, when he left. The defendant then again advertised said house and premises to be let as a furnished or unfurnished house, or the interest to be sold, and said house and premises were again let as a furnished house by the defendant, on the 8th day of March, 1865, to one Maurice Maude as a monthly tenant, and the said Maurice Maude occupied same as defendant's tenant down to the 8th day of May, 1865, when he left. During the intervals between the aforesaid lettings the said premises were not otherwise occupied than by defendant's furniture. The plaintiff alleges that the defendant is liable for the rates on said house and premises for the periods during which he furnished said house and advertised same to be let as aforesaid. The defendant alleges that he is only liable to rates on said house and premises for the periods during which same were actually set to and occupied by his under-tenants. The question for the opinion of the Court is—whether the defendant's furniture being in said house and premises, No. 99 Stephen's Green, whilst said house and premises were advertised to be so let or sold constitutes such an occupation as renders the defendant in respect of said house and premises liable to city rates. If the Court shall be of opinion in the affirmative then judgment shall be entered up for the plaintiff for £31 7s. 9d., and his costs of suit. If the Court shall be of opinion in the negative, then the defendant shall pay to the plaintiff £6 6s. being the amount of the rates for the periods during which the said house and premises were actually occupied by defendant's under-tenants, and also pay plaintiff's costs in the cause prior to the special case, and then judgment of *non pros*, with costs of, and incident to the special case, shall be entered up for defendant.

*Molloy and Pallez, Q.C.*, appeared for the plaintiff. *J. A. Curran* for the defendant.

The following authorities were referred to—*St. 12 & 13 Vict. c. 91, s. 62; Jones v. The Mersey Docks and Harbour Board* (35 L. J., n.s., Mag. Cas. 1; S. C., 11 Jur. n.s., 746; 12 L. T., n.s., 643); *The Guardians of the North Dublin Union v. Scott*

(1 Ir. C. L. R., 76; *The Guardians of the Limerick Union v. White* (2 Ir. C. L. R., 630); *Staley v. Overseers of Castleton* (5 B & Sm. 505); *Harter v. Overseers of Salford* (34 L. J., N.S., Mag. Cas. 206).  
*Cur. adv. vult.*

June 22.—FITZGERALD, J.—In this case the judgment of the Court will be delivered by my Lord Chief Justice, but as I dissent from that judgment, I will state the grounds of my opinion. This is a case stated by the plaintiff as collector of rates, and the defendant is the occupier of property in this city. The question is as to the liability of the defendant to certain rates. It appears from the statement in the case that the defendant became the owner as well as the occupier in fact of certain premises in Stephen's-green, and it appears that on the 1st June, 1864, prior to the imposing of the rates, he caused the house to be furnished and advertised to be let or sold. It appears that he succeeded in getting it let. He does not contest the rates during the time the house was in the hands of the tenant, but he does during the time while it was not so. The question arises on the meaning of the word "occupier." Some doubt might have been thrown by the decisions on the liability to poor rate, and this Court determined that the owner of a house in Dublin—the house being wholly untenanted and in the hands of a care-taker—was not liable to poor rate. Possibly some doubt might have been thrown on the soundness of those decisions, but those cases have received a legislative sanction by section 62 of the Act for the Collection of Rates in the City of Dublin. It provides that when any property is unoccupied at the time of making the rate the collector-general shall in every case include the property in the rate describing it in the column appropriated to the name of the occupier as being "empty," and if any person afterwards occupy such property, during any part of the period for which such rate was made, the collector-general shall insert in such rate the name of such occupier, and collect from such occupier or from the owner, if he be liable to pay the same, a portion of the said rate proportioned to the time during which such person occupies such property. Well, no doubt that is applying to all the subjects of taxes within the scope of Dublin taxation the principles of other taxes. We were not referred to the Dublin Improvement Act, at. 12 & 13 Vict. c. 97, sec. 118, which exempts from taxation any sufficiently fenced or enclosed lot or lots of ground, being laid out for the purpose of building houses thereon, in front to any street or public passage, and which lot or plot has not any building erected thereon, but is actually waste, and out of use or profit. The short question for us is, whether a house which is subject to be rated, and which would be exempt from the rates for the time being, if actually rated—whether it is equally exempt, when the owner on whom the law throws the occupation has furnished it and advertised it to be let, and has actually during the year, derived profit from it as a furnished house. It appears to me that it is not to be treated as an empty house—that it cannot be said that a house which is furnished and let during parts of the year as a furnished house can be said to be empty and unoccupied. The true meaning of the

word "unoccupied" is, where it is so situated that not only no profit, but no use, is derived from it. On that ground I take it that these premises were subject to the rate for the whole year as being in use, though not having an occupying tenant. I am happy that the case is in that shape that the party may go to the last tribunal.

O'BRIEN, J.—I concur in the last observation made by my brother Fitzgerald, but I abide by the opinion which I formed during the argument, and I think these premises are not liable to be rated. The question turns, in the first instance, on the words of the 62nd section of the Collection of Rates (*Dublin*) Act, 12 & 13 Vict. c. 91, which enacts "that when any property in respect of which any person is liable to be assessed as occupier to any rate under the provisions of this Act is unoccupied at the time of making any such rate, the collector general shall in every such case include such property in the said rate, describing it in the column appropriated to the name of the occupier as being "empty;" and if any person afterwards occupy such property during any part of the period for which such rate was made, the collector general shall insert in such rate the name of such occupier, and collect from such occupier, or from the owner, if he be liable to pay the same, a portion of the rate proportioned to the time during which such person occupies such property, and every such person shall thereupon be deemed to all intents and purposes to be properly rated; and all such rates may be collected and recovered from the person liable to pay the same under the provisions of this Act in the same manner as other rates payable thereunder." Well, now, that manifestly provides for a state of things that does take place as to furnished houses, that they are for a portion of the year occupied, and for a portion unoccupied, and we are to consider whether the words "occupied" and "unoccupied" are to be construed in the way that the defendant contends for, or according to the strict legal meaning of the words. Now, with regard to the case that we were referred to of *Jones v. The Mersey Docks and Harbour Board*, it contains this passage in respect to the word "occupation." Ryles, J. says there—"I am of opinion that the Mersey Docks and Harbour Board are not occupiers within the true meaning of the statute 43 Eliz. No doubt they are occupiers in the strict legal sense of the word, that is to say, they are in possession of the land, and are the proper parties to bring an action of trespass. But the sense in which your Lordships use the word "occupiers" is the sense in which it is used in the earlier leading cases on the subject, and that sense must be borne in mind in order to understand those cases. I conceive that the occupation to be an occupation within the statute must be a beneficial one." Then there are the two cases, that of *The Guardians of the North Dublin Union v. Scott* (1 Ir. C. L. R. 76); and *The Guardians of the Limerick Union v. White* (2 Ir. C. L. R. 630). The latter case was that of a store used for oats. Though the premises were, in the legal sense of the word, in the occupation of the parties rated, still it was held that these parties were not occupiers within the sense of the Poor Law Act, because the occupation contemplated by the Act is an occupation to be attended with some

use and benefit. Now, what is the case before us? We were pressed with the authority of *Staley v. Overseers of Castleton* (5 B. & Sm. 505), and *Harter v. Overseers of Salford* (34 L. J., n. s., Mag. Cas. 206). These were both cases of mills not worked. In the latter case the mill was rated at what it would be supposed to bring, if set to a yearly tenant. It was contended that it was not to be rated at all; but the Court held though it was not rateable at the time at which it had been rated, that it was liable to be rated according to its value as a warehouse for the owner's machinery. In *Staley v. The Overseers of Castleton* the parties agreed that a certain sum should be fixed as the value of the premises considering them merely as a warehouse for storing machinery. That was adopted by the Court; they refused to accede to the argument of the overseers that the rating should be according to the value at which the premises would be let, and adopted the other value. These authorities are of value in this case, as by the Dublin Improvement Act premises are to be rated according to their value as houses, and here these are houses, and it is as houses they are to be rated; so that the decisions in these two cases are applicable to the present, and furnish an argument for holding that as the Court refused to deal with the premises there as if actually used for the purpose for which they were built, so the Court ought also to act here; but it seems to me really that the word "occupation" does not mean actual occupation. A caretaker is the person in occupation in one sense of the word. It appears that these premises were perfectly valueless when bought. The man put furniture into them: the special case finds that the amount was paid for the time during which they were let, and the question is, was he liable for the whole. I think he is not, and that there should be judgment for the defendant.

LEFROY, C. J.—I am of opinion with my brother O'Brien, though I confess that the first impression which I received and retain was suggested to me by the observation of my brother Fitzgerald, namely, that this cannot be considered as an actual profitable enjoyment. The defendant put in the furniture with a view to let the house, and make it a profitable enjoyment; he put it in as a speculation, and from the moment it becomes an actual profitable enjoyment he is taxable, but in the meantime it was a pure speculation, and a man is not taxed for a speculation. On this short ground I concur with my brother O'Brien.

*Judgment for the defendant.*

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

O'NEILL v. BELL.—*June.*

*Sale by sample—Evidence of custom.*

*It is a good custom in trade, and one which may be established by parol evidence, that where there is a sale by sample of a particular article, such being*

*generally sold by sample, the parties may introduce into the contract a condition to that effect. Syers v. Jonas (2 Ex. 111) followed.*

THE first count of the summons and plaint complained that it was agreed by and between the plaintiffs and the defendants that the defendants should sell and deliver to the plaintiffs, and that the plaintiffs should buy and accept from the defendants a lot, to wit, 1,170 barrels of prime Riga flax seed at 46s. per barrel less two months' interest for prompt cash for same, free at railway or steamer, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have such "prime Riga" flax seed delivered as aforesaid, yet the defendants delivered to the plaintiffs as and for the flax seed so agreed to be sold and delivered as aforesaid certain flax seed which was not prime Riga flax seed, but of an inferior quality, whereby the plaintiffs lost the price paid by them to the defendants for the said flax seed, and the profits which they would have derived from the performance of the said agreement by the defendants, and incurred other expenses in and about the same. The second count complained that by an agreement made by and between the plaintiffs and the defendants, the defendants bargained and sold to the plaintiffs, and the plaintiffs bought from the defendants certain flax seed at the price of 46s. per barrel, and by the said agreement the defendants warranted the said flax seed to be "prime Riga flax seed," and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action for the breach herein-after mentioned of the said warranty, yet the said flax seed was not prime Riga flax seed, but of inferior quality, whereby the plaintiffs were unable to sell part of the same, and were obliged to sell the residue thereof for less prices than they otherwise would have done, and incurred expenses in and about the same by reason of its inferior quality. The third count complained that the defendants, by warranting that certain, to wit, 1,170 barrels of flax seed were then equal in quality and description to a sample thereof then shewn by the defendants to the plaintiffs, sold the said 1,170 barrels to the plaintiffs, yet the said 1,170 barrels of flax seed were not then equal in quality and description to the said sample thereof, whereby the plaintiffs lost the price paid by them to the defendants for the same, and the profits which would have otherwise accrued to them, and incurred expense in and about the same; and the plaintiffs averred that they had sustained damages by reason of the premises to the amount of £1,075. The defences pleaded were, to the first count, that it was not agreed between the plaintiffs and the defendants in manner and form as in the said count alleged. To the second count, that the defendants did not make the agreement in the second count mentioned as alleged. To the third count, that the defendants did not make the warranty in the said count mentioned as alleged. The issues were in the terms of the defences.

At the trial before Keogh, J., it was proved for the plaintiffs that a commission agent, Beattie, who resided in Belfast, and who acted for one of the plaintiffs as his agent, had in the latter end of February

called at the office of the defendants, and had seen a sample of flax seed lying in it, in reference to which one of the defendants, Thompson, remarked that it had been marked as picked, but would only be sold as prime; that Thompson gave Beattie a sample, which he sent to Londonderry to O'Neill, one of the plaintiffs, who came to Belfast in the month following, and accompanied Beattie to the defendant's office. That a sample was then shown to O'Neill, and ultimately an offer was made on behalf of O'Neill at 46s. per barrel, less two month's interest; that the offer having been telegraphed to London to the defendant's principals, a telegram was received from London declining the offer; that O'Neill subsequently told Beattie he might renew the offer; that accordingly Beattie having again called, and having examined the seed in three or four open barrels in the defendant's store signed the following letter:—

"13 Donegal-street,  
Belfast, 8rd Month, 6, 1865.

"Richard Bell & Co.,

"Belfast.

"On behalf of John O'Neill and others in Derry I hereby authorize you to offer John Todd, of London 46s. per barrel, less two months' interest for prompt cash for his stock of seed in your hands (under 1200 barrels) free at railway or steamer, to be paid for and removed within a week, or storage charged. If any outcome arises in the re-coopering, you are to give my friends the benefit of same.

"Yours truly,  
"JAMES BEATTIE."

On the same day the acceptance of the offer was forwarded to Beattie's office; it was in the handwriting of Thompson, and was in the following terms—

"13 Donegal-street,  
Belfast, 3rd Month, 7, 1865.

"James, Beattie,

"Belfast.

"On behalf of your principals, O'Neill and others, we accept the offer made us, viz., John Todd, of London, 46s. per barrel, less two months' interest for prompt cash for stock of seed (under 1,200 barrels), free at railway or steamer, to be paid for and removed within a week, storage, &c., charged after 14th inst.

"Yours truly,  
"RICHARD BELL & Co."

Evidence of the inferior quality of the seed was given, and the plaintiff, O'Neill, and other persons in the flax trade deposed to the existence of a custom in the trade that seed is always sold by sample. The defendant's counsel then called for a non-suit or a direction which the judge declined to give. The defendants then went into evidence, their case being that the contract between the parties was contained in the two letters of the 6th and 7th March, and that the sale was not by sample, but a sale of goods, where the buyer had a perfect opportunity of inspection, and one of the witnesses for the defence denied that there was a custom in Belfast underlying such a contract that there should be a sale by sample or warranty. The judge told the jury that if they believed the contract was for prime Riga seed, they would then say

if the seed delivered was of that quality: that they could arrive at the conclusion either as a matter of fact, or if they believed that there was a custom that the seed delivered should be equal to sample shown, then if the sample shown was prime Riga the defendant would be bound to deliver seed of the same quality; that the custom must be universal, and invariable. The defendant's counsel called on the judge to tell the jury that the contract was contained in the written letters, and that on the evidence they should find for the defendant, which the judge declined to do. The jury found for the plaintiffs on all the issues, with damages. The judge respite execution until the 20th of April to give the defendants an opportunity of moving to set aside the verdict. A conditional order for a new trial was accordingly obtained, against which

Dowse, Q.C. (with him James P. Hamilton) for the plaintiff, showed cause. He cited *Syers v. Jonas* (2 Ex. 111) as governing this case. He also cited *Dixon et. al. v. Bouill* (3 Macqueen's H. of L. 1); *Macdonald v. Longbottom* (1 El. & Bl. 977); *Ryder v. Woodley* (10 W. R. 294); *Shore v. Wilson* (9 Cl. & F. 355); *Josling v. Kingsford* (32 L. J., C. P. n. s. 94); *Malpas v. London and South Western Railway* (1 Law Rep. C. P. 336).

*Macdonogh, Q.C., and Henderson, Q.C., contra*, cited *Anderson v. Prütcher et ux.* (2 Bos. & Pal. 168); *Mejer v. Everth* (4 Campb. 22); *Gardiner v. Graig* (4 Campb. 144); *Greaves v. Ashlin* (3 Campb. 426); *Owens v. Dunbar* (12 Ir. L. R. 304); *Harnor v. Groves* (15 C. B. 667); *Behn v. Burness* (3 Best & Smith, 751); *Hall v. Janson* (4 El. & Bl. 500); *Spartali v. Benecke* (10 C. B. 212); *Hodgson v. Davies* (2 Campb. 530) *Roberts v. Barker* (1 Crompton & Mees. 808); *Cunningham v. Fonblanque* (6 C. & P. 47, note); *Malcolmson v. Morton* (11 Ir. Law Rep. 230); *Brown v. Price* (27 L. J. Ex. n. s. 290); *Lewis v. Marshall* (7 M. & G. 729); *Parker v. Ibbetson* (4 C. B. n. s., 346); *Mackenzie v. Dunlop* (3 Macq. H. of L. 22); *Bartlett v. Pentland* (10 B. & C., 760); *Chitty on Contracts*, 57; *Addison on Contracts*, 230. *Syers v. Jonas* is the only case in the books in which this evidence was received. It has been cited with disapprobation. In *Brown v. Byrne* (3 El. & Bl. 703) the counsel says that *Syers v. Jonas* was disapproved of by the profession. *Syers v. Jonas* is not law. Assuming it to be law, it is not applicable to this case. If a specific thing be bought, and there be a written contract, it is impossible that there should be an implied warranty.

James P. Hamilton replied.

The plaintiff's counsel then consented to have a finding entered against them on the question of warranty.

June 12.—MONAHAN, C. J.—This case has been argued at considerable length. The summons and plaint contains three counts. The first says that there was a contract to sell and deliver to the plaintiffs a lot of prime Riga flax seed; the second states that the defendants warranted the seed to be prime Riga flax seed; the third states that there was a contract that the seed sold was according to sample. The defendants allege by their pleading that they did not pretend it was according to sample. Was there

any such term introduced? I think there was, viz., that this was a sale by sample. What is the evidence of that? [His Lordship stated what occurred.] There is a case decided, and one which we have no authority to overrule, which establishes this, that it is a good custom in trade, and one which may be established by parol evidence, that where there is a sale by sample of a particular article, such being generally sold by sample, you may introduce into the written or verbal contract a condition to that effect. Does this case come within the principle of that case? The evidence here is that such a custom exists. If there is a question at all in the case it is, was there such a preponderance of evidence that the verdict is unsatisfactory. We entertain the opinion that it was a proper case to submit to the jury; that there was evidence, without sufficient evidence to contradict it, that the custom existed. The question then is, was this a sale within the custom. That is a question of fact, if the second offer contained this element in it, and I do not doubt but that the jury have found rightly, and that such was the intention of the man, who afterwards thought he might get out of it. The only other question is, was there evidence to sustain the other count? We do not think there was. There being a satisfactory finding on the one issue, we have a right, the plaintiff not objecting to it, to direct a finding to be entered against the plaintiff on the other.

*Rats discharged.*

#### SMYTH v. GALBRAITH.—June.

*Sale of seed—Implied warranty—Costs of immaterial issues.*

*Upon the trial of an action to recover damages for the breach of a warranty of seed sold by the defendant to the plaintiff, the correspondence between the parties put in evidence negatived the existence of a warranty. The judge refused to direct the jury that there was an implied warranty, and left to them the question of the existence of the warranty. Held, that the judge was right. Sheils v. Cannon (10 Ir. Jur. N.S. 274) distinguished.*

*Where the judge, without the consent of the plaintiff, discharged the jury from finding upon certain of the issues as immaterial; Held, that the plaintiff was entitled to the costs properly and necessarily incurred by him in respect to them.*

THE first count of the summons and plaint complained that the defendant, by warranting 38 barrels of extra picked Riga flax seed to be good growing seed, and that the same would give a good crop, sold the said 38 barrels of said seed to the plaintiff, yet the said seed was not then good growing seed, nor did said seed give a good crop, and the plaintiff being then, as defendant well knew, a grower of flax and a seller of flax seed, and having bought the said 38 barrels of said seed in the way of his business, and not know-

ing or having any notice of the said breach of warranty, and believing that the said seed was good growing seed, and that same would give and yield a good crop, duly and properly sowed part of the said seed in plaintiff's lands, which were then suitable, and were properly prepared and cultivated in that behalf, and also re-sold portions of the said seed to the persons herein-after named (that is to say) Daniel McCarthy, Charles Growly, William Deasy, Timothy Sullivan, Patrick McCarthy, Jeremiah Collins, Timothy McCarthy, Cornelius Sullivan, James Nyham, Timothy Collins, William Patterson, Henry Jones, James Leary, and Timothy Kingston, for divers prices, by warranting the said seed to the said persons respectively to be good growing seed, and that the same would give a good crop, and that said persons respectively not having any notice or knowledge that the said seed was not good growing seed, or that same would not give or yield a good crop, sowed same in their respective lands, which were then suitable, and were properly prepared and cultivated in that behalf, and plaintiff saith that said seed so sold by defendant and so sown by plaintiff, and said other persons as aforesaid, was not good growing seed, and did not give a good crop, but yielded and produced a bad and inferior and deficient crop, and thereby plaintiff sustained and incurred loss and damage amounting, to wit, to £2,000 in respect of the portion of the said seed sown by plaintiff as aforesaid, and the said other persons also sustained and incurred damage and loss in respect of the said seed sold to them respectively by plaintiff as aforesaid, amounting in all, to wit, to £1,080 by means and in consequence of the said breaches of warranty so made to them respectively by plaintiff as aforesaid, and by their respectively sowing same seed on the faith of the said warranty to them respectively being true, and plaintiff became liable to compensate and make good to the said persons respectively the loss and damage so sustained and incurred by them respectively as aforesaid, and plaintiff has heretofore been obliged to compensate and make good, and has compensated and made good to certain of the said persons, and is now liable to compensate and make good to the others of the said persons their respective aforesaid loss and damage, to the plaintiff's damage of £3,000. The second count complained that plaintiff, at the time next mentioned, and long before, was a grower of flax and seller of flax seed, and defendant was a merchant, and importer and seller of flax seed, and that in the year 1864 there was a good quantity of flax seed sown in Ireland, which was good growing seed, of good quality, and from which good crops were produced, to wit, in the season of 1864, and plaintiff saith the defendants, in the year 1865, by warranting 38 barrels of flax seed to be as good growing seed as any flax seed of the then last year, to wit, the year 1864, sold the said 38 barrels of said seed to the plaintiff, yet the said seed so sold to the plaintiff as aforesaid was not then as good growing seed as any flax seed of the then last year, but was greatly inferior to other growing flax seed of the then last year, sown by plaintiff and certain other persons. The third count complained that the defendant, in the year 1865, by warranting 38 barrels Mitchell's picked Riga flax seed to be very good, and



that same would give as good a crop as any flax seed, sold the said 38 barrels of said seed to the plaintiff, yet the said seed so sold to the plaintiff as aforesaid was not then very or at all good seed, nor would same give, nor was same capable of giving or yielding as good a crop as certain other flax seed which was sown by plaintiff, and certain other persons produced in the said year 1865. The fourth count complained that the defendant, by warranting 38 barrels of extra picked Riga flax seed to be reasonably fit and proper for the purpose of being sown, and capable of yielding and producing a good crop of flax seed, sold the said 38 barrels of said seed to the plaintiff, yet the said seed was not then reasonably fit and proper for the purpose of being sown, or capable of yielding or producing a good crop of flax. The fifth count complained that before and at the time of the sale of the said seed hereinafter mentioned, the defendant was and still is a seller of flax seed by wholesale, and the plaintiff, as the defendant during all the time aforesaid well knew, was and still is a grower of flax and a seller of flax seed by retail, and that plaintiff bought of the defendant, and the defendant sold and delivered to the plaintiff for the purpose of plaintiff's said trade and business, as grower of flax and retailer of flax seed, a quantity of flax seed for the purpose of being sown during the season of 1865 in Ireland, of which the defendant had due notice, and the price of same was the best price of the day for good, sound, merchantable seed, and all conditions were performed, and all things happened and were done, and all times elapsed necessary to entitle plaintiff to have said seed delivered to the plaintiff of a good, sound, and merchantable quality, and reasonably fit and proper for the plaintiff's aforesaid purposes, of all which the defendant had due notice; yet the said seed was not, at the time of the delivery thereof by the defendant to the plaintiff as aforesaid good, sound, or merchantable, or reasonably fit or proper for the purposes aforesaid. The sixth count complained that before and at the time of the sale of the seed hereinafter mentioned, the defendant was and still is a seller of flax seed by wholesale, and the plaintiff, as the defendant during all the time aforesaid well knew, was and still is a grower of flax and a seller of flax seed by retail, and that for and in consideration that plaintiff would buy of defendant 38 barrels of flax seed at a certain price, defendant promised that same should be of good, sound and merchantable quality, and reasonably fit and proper for the plaintiff's aforesaid purpose, and plaintiff bought from defendant, and defendant sold and delivered, said 38 barrels of seed to plaintiff on the terms and at the price aforesaid, and all conditions were performed, and all things happened and were done, and all times elapsed necessary to entitle plaintiff to have said seed delivered to the plaintiff of a good, sound, and merchantable quality, and reasonably fit and proper for the plaintiff's aforesaid purposes, of all which defendant had due notice; yet the said seed was not, at the time of the delivery thereof by the defendant to the plaintiff as aforesaid, good, sound, and merchantable, or reasonably fit or proper for the purposes aforesaid. The defences pleaded were the following:—To the first count—1. That the defendant did not warrant, as in the said first count alleged.

2. That at the time of the said sale the seed sold by the defendant to the plaintiff was good growing seed, and such as would give a good crop. To the second count—1. A traverse of the warranty. 2. That at the time of the said sale the seed sold by the defendant to the plaintiff as therein stated was as good growing seed as any flax seed of the then last year. To the third count—1. That the defendant did not sell to the plaintiff the flax seed in said third count mentioned, or any part thereof. 2. A traverse of the warranty. 3. That at the time of the said sale the seed sold by the defendant to the plaintiff as therein stated was very good, and such as would give as good a crop as any flax seed. To the 4th count—1. A traverse of the warranty. 2. That at the time of the said sale the seed sold by the defendant to the plaintiff as therein stated was reasonably fit and proper for the purpose of being sown, and capable of yielding and producing a good crop of flax. To the fifth count—1. A traverse of the warranty or undertaking alleged. 2. That at the time of the sale and delivery of the flax seed as therein stated, the said flax seed was of a good, sound and merchantable quality, and reasonably fit and proper for the plaintiff's purposes, as in said fifth count mentioned. To the sixth count—1. A traverse of the promise alleged. 2. That at the time of the sale and delivery of the said flax seed as therein stated, the said flax seed was of good, sound, and merchantable quality, and reasonably fit and proper for the plaintiff's purpose in said count set forth. The issues were in the terms of the defences.

The action was tried before O'Hagan, J., at the Cork Spring Assizes, 1866. The alleged warranties were contained in a written correspondence of considerable length between the plaintiff and defendant, which was put in evidence, and in particular in two letters of March 15th and March 23rd. The plaintiff deposed that he purchased on the faith of the statements in those letters, having confidence in the defendant's skill and probity. On the defences alleging that the seed was sound, several witnesses were examined on the part of the plaintiff to prove the unsoundness and bad condition of the seed. Upon the suggestion of the learned judge the plaintiff's counsel forbore to examine several other witnesses who were in attendance to prove this part of the plaintiff's case. Upon the question of warranty the following letters and portions of letters amongst others were read on both sides. A letter from the plaintiff to the defendant dated 30th Jan. 1865, asking, "What for a lot of Riga extra picked?" A letter from the same to the same, dated 4th February, saying, "Will thank you for samples of Dutch and Riga with lowest price for 50 of each." A letter from the defendant to the plaintiff dated 15th March, saying, "I am in receipt of your favour of the 13th inst., and I now send you sample of the extra picked and picked Riga of what I have this year. It does not look so well as last season, but good growing seed, and will give a good crop, as good a crop as far as seed is concerned." A letter from the plaintiff to the defendant, dated 17th March, saying, "The sample of extra and picked seed to hand is really miserable stuff. Could you get me 20 barrels of Jacobs for my own sowing, and send it

early next week. I will leave the price to yourself, as I want a good article." A letter from the defendant to the plaintiff dated 23rd March, saying, "I am not able to get one barrel of Jacob's extra picked Riga, and those who have picked. I see it is hardly equal to Mitchell's picked, so if you want real extra picked, you will have to take Mitchell's, and which is the best I have seen this season, bad and all as you think it to be, but you will find it as good a growing seed as any of last year. If you want for your own sowing, I would advise you to take it. Mitchell's picked is very good, and give as good a crop as any. If you want a lot of it for Lord Bandon's tenants, I will be able to give you as good seed, and on as reasonable terms as any one in the North, if you have to come North to purchase." A letter from the plaintiff to the defendant dated 25th March, saying—"Send me 20 barrels of the best extra picked Riga you can get on receipt. There is some of Mitchell's shipments warranted extra picked offered to me at 58s. Yours is a little cleaner." A letter from the same to the same dated 10th April, saying, "How is it the Riga seed is so cold and damp-like? I never saw it before; I will want more seed next week." A letter from the same to the same, dated 14th April, saying, "The demand for seed here is very sluggish, and the cold, raw feel of yours has put me to a stand, but find it cleaner than other samples I see here." A letter from the same to the same, dated 18th April, saying, "Send now on receipt 8 barrels extra picked." A letter from the same to the same, dated 26th April, saying—"There is terrible havoc in the seed trade this year, and don't wonder at it from quality of seed, the first I sowed of your seed brairding very thin." A letter from the same to the same, dated 10th May, saying, "I hope you got well rid of your Riga seed, and that you gave no guarantee of it. It is little more than half crop, except where nearly double seed put on, or a bushel more to the statute acre than is usually put on?" A letter from the same to the same, dated 15th July, saying—"It is a miserable crop—never had I as bad, and what seed I gave out I am in a fix about it. I will have to allow something to them for the loss. Several shopkeepers who sold seed are allowing for loss to stop their mouth. I would rather than a good deal I had nothing to do with flax seed this year." The defendant was also examined. At the close of the case on both sides, the counsel for the plaintiff called upon the judge to direct the jury that on the evidence for the defendant and the correspondence, an implied warranty was established on the terms of the last two counts of the summons and plaint, which he declined to do. The plaintiff's counsel then asked him to tell the jury that the intention of the defendant in writing his letters was immaterial to the issue, and that if the plaintiff acted on the representation of the letters there was a warranty irrespective of the intention on either side. The judge declined so to direct the jury, and told them in substance that an affirmation on the occasion of a sale is a warranty if it be so intended, and that a representation without an intention on either side to give or receive a warranty does not constitute a warranty, and he left to them the question whether a warranty had been given. The jury found there was no war-

ranty. The defendant's counsel called on the judge to discharge the jury from finding on any of the issues save those as to the warranty, to which the plaintiff's counsel objected. The judge discharged the jury from finding on the other issues as being immaterial, by reason of their answer that there was no warranty, and they found a verdict for the defendant. In the Easter Term ensuing, the plaintiff's counsel obtained a conditional order to set aside the verdict and for a new trial, on the ground that said verdict was against evidence and the weight of evidence, and on the further ground of misdirection by the learned judge, and also because the learned judge discharged the jury from finding on certain of the issues without the consent and against the will of the plaintiff, against which

*Chatterton*, Q.C. and *Exham*, Q.C., showed cause. *Heron*, Q.C., and *William M. Johnson*, for the plaintiff.

The following authorities were cited—*Powell v. Sonnet* (1 Bligh. N. S. 545); *Tisdall v. Parnell* (14 Ir. C. L. R. 1); *Cassidy v. Kincaid* (10 Ir. Jur. N. S., 176); *Tinkler v. Rowland* (4 A. & E. 868); *Carter v. Crick* (4 H. & N. 412); *Studey v. Baily* (1 H. & C. 405); *Sheils v. Cannon* (10 Ir. Jur. N. S. 247); *Empson v. Fairfax* (8 A. & E. 296); Taylor on Evidence, 998; Addison on Contracts, pp. 230, 234; Chitty on Contracts, 411.

*Cur. adv. vult.*

June 12.—KNOX, J., delivered the judgment of the Court.—The whole question turns on the correspondence. It was contended by the plaintiff's counsel that an implied warranty existed, relying very much on *Sheils v. Cannon*. Judge O'Hagan left the question of warranty to the jury. We do not think the case conflicts with *Sheils v. Cannon*, because the correspondence negatives the existence of any warranty. As to the issues which were withdrawn from the jury, upon these issues we are of opinion that the plaintiff should have the costs properly and necessarily incurred by him.

*Rule discharged.*

## Court of Appeal in Chancery

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

BARRY v. MC CARTHY.

*Solicitor and client—Both living out of the jurisdiction—Substitution of service on Irish solicitor.*

*T. R., living in Rio de Janeiro, instructed his London solicitors, De Jersey and Micklethorp, of London, to appear for him in certain administration suits pending in the Irish Court of Chancery. Said London solicitors employed an Irish solicitor to appear in said suits; and with said London solicitor, and never with said T. R., whose exact address they then as now were ignorant of, did said Irish solicitor entirely correspond in said matters.*

*Another and a different cause petition in relation to certain claims of said T. R. in said suits having been filed by one B., a motion was thereupon made to the late Master of the Rolls to substitute service on said Irish solicitor for said T. R., whereupon his Honor made an order making no rule on said motion. Held, reversing the order of the Master of the Rolls, that the motion ought to have been granted, and service should have been substituted.*

*A. B., who resided in London, appeared as respondent in said administration suits by her Irish solicitor, G. O'B. K., but said A. B. had not instructed her said solicitor to appear in said other suit filed by said B. Held also, that service should be substituted on said G. O'B. K. for said A. B.*

This was an appeal from an order of the Master of the Rolls. The petition of appeal stated that a cause petition was instituted on the 29th of May, 1865, pursuant to liberty given by Master Litton on the 8th of May, 1865, by his rulings made in a certain cause petition matter pending before him, under the 15th section of the Chancery (Ireland) Regulation Act; and being a suit to administer the personal estate of one Anne Kenny, deceased, instituted by Denis Florence M'Carthy for that purpose, in which Bridget Agnes Burke, a residuary legatee, and her Majesty's Attorney-General, were respondents, and by suggestion Agnes Burke, executrix of said Bridget Agnes Burke, deceased, was made respondent. That the object of the suit so instituted by petitioner, pursuant to such permission, was to be relieved from the operation of an order made in that administration suit by Master Litton on the 26th November, 1864, by which, upon the charge of one Thomas Reeves, resident at Rio de Janeiro, in Brazil, out of the jurisdiction, and filed by Joseph Henry Townsend, who acted and appeared for him as his solicitor in said suit, the said Thomas Reeves was declared entitled to a certain bill of exchange drawn by one William Daly on the 1st of June, 1859, and accepted by the said Thomas Reeves, and payable to Messrs. Richard and George L. Cathcart, who subsequently acted as the solicitors for the petitioners in said cause petition proceedings before Master Litton, in discharge of a claim made by him, the said Thomas Reeves, against the assets of said Anne Kenny; but as to one-fourth of which bill the said Messrs. Cathcart were trustees, not for the representative of said Anne Kenny, but for petitioner, although dealt with in said matter as being in its entirety assets of said Anne Kenny. That the order now appealed from by petitioner was an order made by the Master of the Rolls on the 7th day of July, 1865, herein-after more particularly mentioned, whereby he dismissed with costs, payable to said Joseph Henry Townsend, solicitor, an application for an order to have substitution of service of the petition in this matter on the solicitors in the suit, the order wherein it was by the petition sought to be relieved from. That the facts and circumstances material to the purposes of this appeal as showing the nature of the suit as set forth in the petition more fully, and as referred to in the affidavit of Charles L. Perrott, petitioner's solicitor, made for the purposes of said motion and read thereon, and the documents therein

referred to were as follows:—One James Kenny, formerly of Ireland, but who died domiciled at Rio de Janeiro, in Brazil, was the brother of the said Anne Kenny and three other sisters, resident in Ireland, who all survived him; the said Anne Kenny, who lately died, having been the survivor. That Mary Barry, one of said sisters, was the wife of petitioner, of whom he is and was, at the time of the compromise after mentioned, the personal representative. That the said James Kenny so domiciled, and having amassed considerable wealth, made two wills bearing date the 23rd January, 1847, and 29th June, 1856, and died, leaving a son, Robert James Kenny, to whom and his three (testators) sisters he thereby bequeathed all his property, and which Robert James Kenny also subsequently died, having first bequeathed all his property (being that so devised from his father) to his said four aunts, the sisters of said James Kenny. That by the conjoint operation of said wills and otherwise, the said sisters of said James Kenny, that is, Anne Kenny, Catherine Kenny, Ellen Kenny, and petitioner and his said wife, Mary Barry, otherwise Kenny, became entitled in fourths to the assets of said James and Robert James Kenny; and in the year 1859 one William Daly was sent out to Rio de Janeiro to realise the same, and received powers of attorney for the purpose from the said Anne, Catherine, and Ellen Kenny, and from petitioner's said wife. That such proceedings took place that said Mr. Daly effected a compromise of such claims in Rio de Janeiro by a sale by deed executed on the 4th June, 1859, on behalf of the other parties, and one executed by petitioner and his said wife confirmatory on their behalf in the month of July following, by which all the said assets were, according to the law of Brazil, ceded to said Thomas Reeves in consideration of £8,000, secured by bills for £3,000 in London subsequently received, and one for £5,000, bearing date the 1st June, 1859, at one year's date, drawn by said William Daly, accepted by said Thomas Reeves, payable in London to Messrs. Richard and George L. Cathcart, who are the solicitors now for the said Denis Florence M'Carthy. That after the said bills had been received, and the amount of the former paid to Messrs. Cathcart, the trustees thereof, and the same being about to be paid to the other *cestui que trusts* in derogation of the rights of petitioner and his said wife, they, on or about the 22nd December, 1859, instituted a cause petition proceeding against the said Messrs Cathcart and said Anne Kenny and others to enforce their claims to the one-fourth of said bills, which suit was terminated by a written compromise on the 17th March, 1860, whereby it was declared that said Anne Kenny in her own right, and as personal representative and devisee of her sisters, Catherine and Ellen, then deceased, was entitled to three-fourths, and petitioner, as personal representative of his said wife, then deceased, to one-fourth of the amount of the bill of exchange for £5,000, the one-fourth of the amount of the other bills, and the costs of the suit being paid to petitioner. That the said D. F. M'Carthy having, by the said Messrs. Richard and George L. Cathcart, as his solicitors, filed such cause petition under the fifteenth section of the Chancery Regulation Act (the petition wherein did not

disclose the rights of petition as aforesaid, and of the filing of which, and of the subsequent proceedings wherein he was ignorant, being neither party nor privy thereto, nor informed thereof, till long after the pronouncing the order complained of herein-after mentioned), an order was made by Master Litton on the 28th May, 1863, for the petitioner therein to bring into Court to the credit of that matter the said bill for £5,000, dealing with the same as altogether assets of said Anne Kenny. That thereupon the said Thomas Reeves appeared in said matter by the said Joseph Henry Townsend as solicitor, and on the 10th of May, 1864, filed a charge, to which petitioner referred, claiming against the assets of said Anne Kenny, on the ground of certain alleged defect in the title to the said assets on account of a subsequent alleged demand to a portion of the assets of said Robert James Kenny, charged to have been established in Rio de Janeiro against said assets, according to the law of that country, by the reputed mother of the said Robert James Kenny. That such proceedings took place on the hearing of said charge that by the final order made in the said matter on the 26th of November, 1864, it was, among other things, declared that the said Thomas Reeves was entitled in addition to a certain balance of stock and cash, to the said bill of exchange in full discharge of all claims and demands which he might have against the estate and effects of said Anne Kenny and her said sisters, Catherine and Ellen, thus disposing of petitioner's one fourth, which, if handed over, in pursuance of said order, to the said Thomas Reeves in Rio de Janeiro, petitioner would have been without redress. That having for the first time, in April last, learned the above facts, an application was made by petitioner to Master Litton; and the same having been heard on the 8th day of May last, and opposed by counsel, instructed by said Joseph Henry Townsend on behalf of said Thomas Reeves, and by counsel for Agnes Burke (erroneously in said rulings entered as Miss Kenny), instructed by Mr. George O'Brien Kennedy, a ruling was made by the Master that the bill for £5,000 should remain in Court till further order, with liberty to petitioner to file a cause petition in relation to his claims on same if filed by the 29th May, and further as therein. That accordingly petitioner on the said 29th May filed his cause petition against the said Thomas Reeves and the other parties in this matter, stating, among others, the above facts, and seeking to be relieved from, or to have said order of the 26th November, 1864, varied, so far as it affected the rights of petitioner; and that the said Messrs. R. and G. L. Catheart might be declared trustees for petitioner of one fourth of said bill of exchange, and ordered to enforce payment thereof from said Thomas Reeves, and further as therein. The petitioner having thereupon, on the affidavit of his solicitor, Charles L. Perrott, filed the 16th day of June, applied to the Master of the Rolls for substitution of service of said cause petition on the said Joseph H. Townsend for the said Thomas Reeves so resident in Rio de Janeiro, and on George O'Brien Kennedy, the solicitor for said Agnes Burke, resident near London, the Master of the Rolls gave permission to serve notice of such application on said Joseph H. Townsend and George O'Brien Kennedy, whereupon

such notice was served that application would be made that the service of the notice of cause petition filed in this matter already served on Thomas Reeves and Agnes Burke, respondents in this matter, by service of said notice on the solicitors for said respective respondents, who appeared for them in a cause petition matter now pending in this Court, wherein said Denis Florence M'Carthy is petitioner, and her Majesty's Attorney-General, and by suggestion said Agnes Burke, executrix of Bridget Agnes Burke, deceased, (a former respondent) were respondents—that is to say, on the 3rd June then instant, on Joseph Henry Townsend, solicitor for the said Thomas Reeves, and on George O'Brien Kennedy, solicitor for said Agnes Burke, said respondents, residing out of the jurisdiction of this Court, the said Thomas Reeves, who resides in Rio de Janeiro, in the Brazil, being given up to the 31st of October next to answer said petition, and said Agnes Burke being given up to the 1st of August then next to answer, or that said petitioner be at liberty to serve said notice out of the jurisdiction of this Court. That the said Joseph Henry Townsend, on the 1st of July, 1864, filed an affidavit, stating in substance that he acted as the solicitor for Mr. Reeves, having been appointed through Messrs. De Jersey and Micklem, solicitors, of London, and communicated only through them as by such affidavit appears; and he appeared on said motion by two counsel to oppose the application; the said George O'Brien Kennedy did not appear, but wrote a letter, giving the address of Miss Burke in Kirby-street, Hatton Gardens, London, but saying he had not authority to appear for her in the petitioner's suit. That thereupon, the Master of the Rolls, by his order made on the 7th July, 1865, referring to the notice of motion herein-before stated, and set forth in the schedule to his order, and referring to the documents herein-before mentioned, was pleased to make no rule on the motion, and to order that petitioner should pay to Mr. Joseph H. Townsend, his costs of appearing on said motion.

To the above petition of appeal said Joseph Henry Townsend answered, that by the order appealed from, the Court made no rule on the motion therein mentioned, having regard to the affidavit of said Joseph Henry Townsend, filed the 1st July last, and the letter of Mr. George O'Brien Kennedy, dated 24th June last; and it was thereby ordered, that petitioner should pay to said Joseph Henry Townsend his costs of appearing on said motion, when taxed and ascertained. That as to the facts and circumstances alleged in said petition of appeal, the said Joseph Henry Townsend, so far as same are material, referred to such proof as petitioner should make thereof, he only lately having heard of many of the matters therein alleged, and having no other knowledge thereof, save what is derived from hearsay; but he believed and charged that, under the compromise in 10th paragraph mentioned, there was actually paid to the petitioner a sum of £500, or thereabouts, part of the sum of £3,000, the money of the said Thomas Reeves,—the consideration for which had wholly failed, as herein-after mentioned. That he admitted he filed a charge on behalf of said Thomas Reeves, but he submitted that the said charge was not accurately

stated in said petition, for he said that by said charge the said Thomas Reeves alleged that there had been a total failure of the consideration for the sum of £3,000 paid by him, and for the sum of £5,000, the amount of the bill of exchange in petition mentioned, the subject of the present suit; and by said charge said Thomas Reeves alleged that he had never received any sum whatsoever in respect of the inheritance of said Robert James Kenny, purchased by him for said sum of £3,000 and said bill for £5,000, the said Thomas Reeves never having received any money or other consideration whatsoever in respect of said inheritance, and the amount of the costs which he had incurred in defending his right to said inheritance having far exceeded the part thereof which was decreed to him. That such orders were made as in petition of appeal mentioned, and that such notice of motion was served as in said petition also is mentioned. That said notice of motion having been served on said Joseph Henry Townsend, he the said Joseph Henry Townsend was advised that being an officer of this honorable Court, it was his duty to appear on said motion and inform the Court by affidavit, of the true nature of the position which he occupied in reference to the said Thomas Reeves, and he accordingly made and filed the affidavits in said petition mentioned, but which affidavit was not truly stated in said petition. That by said affidavit (the several allegations in which he prayed might be taken as if here repeated) he amongst other things deposed, as the facts were, that he was retained by Messrs. De Jersey and Micklem, solicitors, of London, to file said charge to recover the amount claimed by said Thomas Reeves, to be due to him from the assets of Anne Kenny by reason of the total failure of the consideration for which said Thomas Reeves paid said sum of £3,000, and gave the said bill of exchange for £5,000; and that he the said Joseph Henry Townsend never had any direct communication with the said Thomas Reeves, and did not know him, and did not know his address, save that he believed said Thomas Reeves resided at Rio de Janeiro in Brazil, and that he, said Joseph Henry Townsend, communicated exclusively with said De Jersey and Micklem during the progress of the litigation in reference to said charge, and that he was not the agent of said Thomas Reeves; and that he had no authority whatever to act for or represent him, save the authority of said Messrs. De Jersey and Micklem, to prosecute said claim against the assets of said Anne Kenny. That the said Joseph Henry Townsend was only, in fact, the Dublin agent of said London solicitors for the establishment of the claim of said Thomas Reeves, in said suit of Denis Florence McCarthy against the Attorney-General and others. That the said Joseph Henry Townsend was advised that said order of the 7th of July, 1865, was in accordance with law and with the practice of her Majesty's High Court of Chancery in Ireland, and ought to be confirmed.

George O'Brien Kennedy, one of the respondents, also filed the following answer to the above petition of appeal. That one James Kenny, who died domiciled at Rio de Janeiro, in Brazil, and possessed of considerable property there, by his last will, dated the 29th June, 1856, devised and bequeathed all his

property to his only son Robert James Kenny, subject to the payment of £500, to each of the said testator's four sisters, Anne Kenny, Catherine Kenny, Ellen Kenny, and Mary Barry, the wife of the said petitioner, James Barry. That the said Robert James Kenny departed this life shortly after the death of his said father, James Kenny, having by his last will and testament devised and bequeathed the whole of his property, including the whole property acquired by him from his said father to his four aunts herein-before mentioned, the sisters of the said James Kenny. That the said James Barry and his said wife, Mary Barry, in conjunction with her said three sisters, conveyed by deed of cession the whole of said property so devised and bequeathed to them as aforesaid to one Thomas Reeves, in consideration of £8,000, to be paid for by him by two bills of exchange, one for £3,000 and the other for £5,000, of the tenor and effect stated in the 9th paragraph of the said petition of appeal. That the said bill of exchange for £3,000 was duly paid by said Thomas Reeves at its maturity, and that one-fourth of the net proceeds of said bill of exchange was duly paid over to said James Barry, and that said James Barry makes no claim whatever in respect of the proceeds or amount of said bill of exchange for £3,000. That a woman, alleging herself to be the mother of said Robert James Kenny, subsequently appeared in Brazil, and instituted a suit for the purpose of having the will of said Robert James Kenny annulled; and after considerable litigation the will of said Robert James Kenny was annulled by several tribunals, and by the tribunal of last resort so far as related to two-thirds of the property therein bequeathed, and the said mother of said Robert James Kenny was declared by said tribunals and by the tribunal of last resort entitled to two-thirds of the said property so devised and bequeathed by said Robert James Kenny to his said four aunts as aforesaid. That said Thomas Reeves declined to honour his acceptance for £5,000 on the ground that by the decrees of the proper tribunals and also by the decree of the proper tribunal of last resort, he was deprived of two-thirds of the property so ceded to him as aforesaid, and condemned in costs, and said Thomas Reeves further claimed a return of the said sum of £3,000 so paid by him as aforesaid. That the rights of said James Barry to one-fourth of the said bill of exchange for £5,000 were fully stated in the discharge of the respondent, Bridget Agnes Burke, who was entitled to three-fourths of the amount of said bill of exchange, and said Bridget Agnes Burke, under the circumstances aforesaid, and after full discussion, and after expensive and very complicated litigation on the subject aforesaid, first had under the advice of Master Litton, and of her counsel, consented to forego not only all her right to said bill of exchange for £5,000, but also agreed that after certain payments being first made, the sum of money in Court, which represented the three-fourths of the said bill of exchange for £3,000, should be divided between the said Bridget Agnes Burke, and said Thomas Reeves. That from the expensive and difficult nature of the litigation already had in said cause petition matter, this respondent believes that no sum whatever will be divisible between the said

Thomas Reeves and the said personal representative of the said Bridget Agnes Burke, and that there will be no fund in Court applicable for that purpose. That the said James Barry has no claim whatever against the late Anne Kenny, or against the said Bridget Agnes Burke, or against the said Agnes Burke, said James Barry's claim relating exclusively and being confined to the one-fourth of the said bill of exchange for £5,000, accepted as said Thomas Reeves as aforesaid. That said Thomas Reeves claimed a return of said bill of exchange for £5,000 on the ground of a total failure of the consideration for which his said acceptance had been given, and said Thomas Reeves also claimed a return of so much of the sum of £3,000 so paid by him as aforesaid, as was represented by the fund then being administered in Court, the property of said Anne Kenny, on the ground that the proper tribunals had determined by their several decrees that the appellant, James Barry, and his wife, Mary, and her said three sisters, had no right or title whatever to two-thirds of the property so conveyed by them to said Thomas Reeves as aforesaid, their right and title to which had been warranted by them to said Thomas Reeves by the deed of cession so executed by them as aforesaid. That the case of the said James Barry is for the reasons aforesaid totally destitute of merits, inasmuch as he has already been paid his fourth of said bill of exchange for £3,000, and has not repaid to said Thomas Reeves any of the money so received by him as aforesaid. That the said respondent, George O'Bryan Kennedy, is not the receiver or steward of the said Agnes Burke, nor does the said respondent receive or remit the rents of any lands, tenements, or hereditaments to the said Agnes Burke. That the said Agnes Burke resides in Kirby-street, Hatton-Garden, London, out of the jurisdiction of the Court, and that the said respondent has no authority whatever to appear for her in the suit of the said appellant. The respondent, George O'Bryan Kennedy, humbly submit that the order of the Master of the Rolls of the 7th day of July, 1865, was correct, and that the said petition of appeal of said James Barry should be dismissed with costs.

*Andrews, Q.C. with Leslie, for the appellants.*—The order made by the Master of the Rolls was erroneous, and must be reversed. Jos. H. Townsend had acted as solicitor on behalf of the solicitor of Mr. Reeves, who is resident in Rio de Janeiro, in South America, and he acted in the very identical order against which relief was sought by the cause petition. The whole current of authorities is against the conclusion arrived at by the Master of the Rolls. *Norton v. Hepworth* (1 M'N. & Gord. 54) was where a defendant to a bill of revivor, had appeared to the original bill by his solicitor; but before the filing of the bill of revivor had gone out of the jurisdiction, and the Court therein ordered that the service of the subpoena to appear on the solicitor, should be good service on the defendant. So also in *Hobhouse v. Courtney* (12 Sim. 140), which is a leading case on this doctrine, it was held that if a defendant who is out of the jurisdiction has given special authority to a person within the jurisdiction to act as his agent with respect to property which is the sub-

ject of the suit, the Court will order service of the subpoena to appear and answer on that person to be good service on the defendant. The true principle upon which substitution of service is ordered is, that there is reasonable ground for the Court to suppose that the service will come to the knowledge of the defendants.—*Hope v. Hope* (4 De Gex M'N. & G. 328); *M'Loughlin v. Loughlin* (8 Ir. Eq. 157); *Governors of the Grey-coat Hospital v. Westminster Improvement Commissioners* (4 Jur. N. S. 449); *Weymouth v. Lambert* (3 Beav. 333).

*F. Walsh, Q.C., C. Armstrong, and Devitt,* appeared in support of the order made by the Master of the Rolls.—This is an unheard-of attempt to substitute service upon those attorneys who in truth were not the attorneys at all of Mr. Reeves, but are, or rather were, the Dublin town agents of Messrs. de Jersey and Micklem, the true solicitors of Reeves, and upon those London solicitors should the service be substituted. Between the town agent of a solicitor and the solicitor's client there is no confidential relationship whatever—there is no duty whatever cast upon a town agent to transmit to the suitor any process of the Court or any document whatever.—*Waterton v. Croft* (5 Sim. 502). It was decided that in a case of cause and cross-cause, where the plaintiff in the former is abroad and cannot be found, the proper course is to stay the proceedings in that suit until the plaintiff has answered the cross-bill, and not to order the cross-bill to be served on his clerk in the Court in the original cause. That case is much stronger than the case now before the Court. We distinctly swear that we know nothing whatever of Mr. Reeves; and as to service on Mr. Townsend, he has not been employed at all by Agnes Burke in this suit, and he is not her agent.

THE LORD CHANCELLOR.—A great number of cases have been cited in the argument of this case now before the Court. It does, however, appear to me that the question we have to consider is an extremely narrow one, and it is really this. Have we grounds to believe that the service will come to the knowledge of Mr. Reeves in Rio de Janeiro? Had the service been made on the English solicitor, there can be no doubt but that in the course of the post that service would come to the knowledge of Reeves. Now, the Irish solicitors were employed by these English solicitors, and the question comes round to this—and it is a question entirely within the discretion of the Court—can we be satisfied that Mr. Reeves will be communicated with? There is no question certainly that the instructions of the agent are not derived from the client himself; these Dublin solicitors are not in any way the agents of this gentleman, who resides in South America. To use the expression of Lord Cranworth in *Hope v. Hope* (4 De Gex M'N. & G. 242)—“The object of all service is of course to give notice only to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him, and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, the conscience of the Court will be satisfied.” I am clearly of opinion here that service on the Irish agents will, through

the English solicitors who have employed them in this case, reach the party in Rio de Janeiro. I feel no doubt whatever on my mind that this service will, in the course of post, reach Mr. Reeves. I am of opinion, upon those grounds, that the order of the Master of the Rolls ought to be reversed.

**THE LORD JUSTICE OF APPEAL.**—I am also of opinion that the order of the Master of the Rolls ought to be reversed. I think in all cases of application for the substitution of service, the question is, has the Court reasonable grounds for belief that the notice will be communicated to the parties? Upon these grounds I concur with the Lord Chancellor that the order of the Court below must be reversed. On the same principle the Court also allows service to be substituted.

*Order reversed—no costs.*

#### JONES'S ESTATE.—June 6.

**GUSTAVUS R. JONES, OWNER; ALEXANDER J. MONTGOMERY AND WIFE, PETITIONERS.**

**MICHAEL REILLY AND JAMES REILLY, APPELLANTS; ALEXANDER J. MONTGOMERY AND WIFE, RESPONDENTS.**

*Deed—Interpolation in—Presumption of law as to when same was made.*

*An absolute order, dated 21st November, 1863, being made in the Landed Estates Court for the sale of certain lands in the County Longford, M. R. and J. R. (lessors of a portion of said lands) claimed to hold under a lease of 1st of January, 1802, for lives "renewable every thirty-one years after demise of said lives at three grains of pepper-corn." A notice of motion having been served on said M. R. and J. R., that it was intended to impeach in said Landed Estates Court said leases, which motion was grounded, among others, on the affidavits of two experts, who gave it as their opinions that said above-mentioned clause of "renewable every thirty-one years," &c. had been interpolated after the execution of said lease; and said motion having been brought on before Judge Hargreave, his Lordship, while declining to grant an issue to try the question, declared that the said lease did not at the time of the execution thereof contain said clause, which now appears therein in a nonsensical and ungrammatical form, and that the presumption of law was therefore against the genuineness thereof. Held, reversing the order of Judge Hargreave, that the presumption of law was (unless the contrary were proved to the satisfaction of the jury) that the said clause existed in said lease at the time of the execution thereof, and that an issue should therefore have been granted to try the question.*

THIS case came before the Court on an appeal taken by Michael Reilly and James Reilly from an order of Judge Hargreave, dated 28th of February, 1866. The petition of appeal stated that on the 17th

of October, 1863, Alexander John Montgomery and wife filed their petition in the Landed Estates Court in Ireland, praying that the lands of Annadonnell and Quinnering, situate in the barony of Granard and County of Longford, together with certain houses and premises in Mountgrange, in the County of Westmeath, might be sold to discharge certain incumbrances thereon. That said petition was filed for the purpose of recovering the sum of £621, due on foot of a charge of £1,000 created by a codicil to the will of Gustavus Jones, the father of the owner, Gustavus Robert Jones, on the said lands of Annadonnell and Quinnering, which said will bears date the 4th of October, 1855. That on the 21st of November, 1863, an absolute order was made for the sale of said lands. That on the 22nd of April, 1864, the solicitor having the carriage of the proceedings in this matter obtained an order directing the tenants of said lands to produce the leases or agreements under which they held said lands. That in obedience to said order petitioners furnished copies of their said leases to the solicitor having carriage of the proceedings, and subsequently, on 24th June, 1864, pursuant to appointment made for that purpose, petitioners attended at the office of one John E. O'Ferrall, the town agent of petitioners' solicitor, with their leases, for the purpose of comparing same, and accordingly, on said 24th of June, 1864, the solicitor having the carriage of the proceedings on behalf of the said Alexander J. Montgomery and wife, and Thomas W. Bond, solicitor on behalf of the owners, attended at the office of said John E. O'Ferrall, when the said lease, together with the other leases of said Annadonnell and Quinnering, were carefully compared and examined by the said parties, and that no question was then raised touching the validity of petitioner's said lease, or any of the leases then produced for examination by the respective owners thereof. That by indenture of lease bearing date the 1st of January, 1802, made between Francis Fetherston, Esq., Lieutenant of his then Majesty's Foot, of the one part, Bryan Reilly, of Annadonnell, in the County of Longford, farmer, of the other part, the said Francis Fetherston demised to the said Bryan Reilly all that and those the town and lands of Annadonnell aforesaid, containing 102 acres, plantation measure, together with that part of Cunnareen, containing by estimation 28 acres statute measure, situate in the parish of Columbkil, barony of Granard and County of Longford, to hold the said demised premises, with the rights, members and appurtenances thereunto belonging, or in anywise appertaining to the said Bryan Reilly, his heirs, administrators, and assigns, from the 29th of September last past, for and during the natural lives of John Reilly, second son of Owen Reilly, of Cunnareen aforesaid, aged 14 years, and Bryan Reilly, third son of Owen Reilly, aged 12 years, and Patrick Martin, of Longford, aged 12 years, whichever should longest continue, and also renewable every thirty-one years after the demise, at three grains of pepper-corn, at the yearly rent of £27 2s., payable half-yearly, as therein is mentioned. That said Bryan Reilly died in 1830, and was succeeded by his brother, Thomas Reilly, the father of petitioners, who remained in the possession of said lands under said



lease, and paid the rent reserved thereby, and performed the covenants therein down to his death, which took place in the year 1852. That upon the death of said Thomas Reilly, petitioners became possessed of the interest in said lease, and have since remained in possession of said lands under said lease, and paid their rents regularly to the present owner down to the present time. That pursuant to the practice of the Landed Estates Court, the final notice to tenants and to adjoining owners and occupiers was served upon petitioners, together with the other tenants on said lands; and in the schedule to said final notice to tenants petitioners were thus set out "as tenants under a lease dated the 1st January, 1802, from Francis Fetherston to Bryan Reilly, of 110 acres of late Irish plantation measure (equal to 178a. 0r. 28p. statute), of the lands of Annadonnell, and 28 acres, Irish plantation measure (equal to 45a. 1r. 16p. statute), of the lands of Cunhereen, for the term of thirty-one years and three lives, renewable every thirty-one years after demise of said lives, at three grains of pepper-corn, at the yearly rent of £27 3s. 2d., with duty work or 15s. 2d. in lieu thereof, being together equal to £25 15s. 5d. present currency." "The sum in the rent column (£28 16s. 6d.) is the full amount which has been received for all the lands in the present tenants' hands. Lease reserves to lessor all game, royalties, mines, minerals, and quarries, woods, &c., with liberty of hunting, &c. on demised lands" as by said notice will appear. That said final notice further stated in said schedule that petitioners held another portion of said lands, 22a. 1r. 6p. "as tenants from year to year; tenancy determinable 29th September in each year." That petitioners (the appellants) on the 4th day of October, 1864, filed an objection to said final notice so far as same stated them as holding 22a. 1r. 6p. "as tenants from year to year;" that the entire of the lands then in their possession they held under and by virtue of the said lease of 1st January, 1802, and submitted to the Court that said final notice was inaccurate in that respect; and petitioners also filed an affidavit in support of said objection. That on the 16th day of November, 1864, said objection came on to be argued by counsel on behalf of petitioners, Alexander J. Montgomery and wife, and counsel on behalf of petitioners, together with certain other objections filed on behalf of other tenants on said lands, and after reading said objections and affidavit, it was "ordered, that the solicitor having the carriage of the proceedings was authorised to attend on the lands personally, or by some competent persons on his behalf, to ascertain the circumstances as to the possession of the bog and turbary referred to in the objections, and to give evidence in reference thereto; and, if necessary, is hereby directed to serve notice on the solicitor for the tenants, setting forth the extent of the turbary or bog to which it was alleged the tenants were not entitled, and also setting forth the extent to which it was intended to impeach the lease put forward and relied on by the tenants, and directed the said leases to be impounded." That no steps were taken or any further notice given of impeaching said leases, or as to a survey of said lands, until the time and in the manner herein-after mentioned. That petitioners, after the pronouncing

of said order of the 16th day of November, 1864, paid their rent reserved under the said lease to the owner, Gustavus R. Jones, and got a receipt for the same, in the usual way. That a notice bearing date the 13th day of January, 1866, was served on petitioners' solicitor, stating that it was intended to impeach the clause in each and every of the leases put forward by Michael and James Reilly (petitioners), John and Patrick Murtagh, Thomas Michael, and Patt. Murtagh, and Bernard and John Reilly, whereby the said several leases were made to be renewable and expressed in three former of said leases, as follows:—"and also renewable every thirty-one years after the demise of said lives, at three grains of pepper-corn," which clause or words were intended to be impeached as having been written in each and all of said leases after they were executed, and that it would be contended that same being a material alteration, invalidated the whole of said leases, and that on Monday, the 22nd instant, counsel would apply to have said objections overruled, and to set aside each and all of said leases, and that it be stated in the rental for sale as being held from year to year, at the yearly rent to be afterwards agreed upon. That three affidavits were filed in support of said motion, viz., the affidavit of Charles Chabbot, filed the 14th December, 1866, and the affidavits of G. E. Seawright and John Swanzy, filed the 12th day of January, 1866. That the case made by the affidavits of said Charles Chabbot and G. E. Seawright, who described themselves as experts, was, that in their opinion and for the reasons therein particularly stated, the said clause of renewal had been written after the execution of the said lease. That petitioners, on the 25th day of Jan. 1865, filed their joint affidavit in support of their said lease, and in denial of the allegations, to the effect that said words "and also renewable every thirty-one years after the demise of said lives, at three grains of pepper-corn," were not inserted in said lease at the time of the execution thereof, in which affidavit they stated, amongst other things, that on the death of Bryan Reilly, the original lessor in said lease, the said lease and lands became the property of Thomas Reilly, the brother of said Bryan Reilly, and the father of petitioners; that the said Thomas Reilly remained in the possession of said lands, and paid rent for same reserved in said lease, and performed the covenants therein down to the day of his death, which took place some time in the year 1851 or 1852, and that the said Bryan Reilly and Thomas Reilly always kept the possession of said lease; that they saw said lease frequently while in their father's possession, and read same, and they positively said that the said lease then contained the words alleged to have been added, viz.:—"Renewable every thirty-one years after the demise of said lives, at three grains of pepper-corn;" and stated that they had neither directly or indirectly written, altered, erased, or in any manner changed or added, or inserted the words, "and also renewable every thirty one years after the demise of said lives, at three grains of pepper corn," to the manuscript part of said lease, or procured same to be done; and that no persons in any respect or way, or at any time whatsoever, in the lifetime of their uncle or their father, or by their authority, or to their know-

ledge or belief, had added or inserted said words or any of them; and the said lease was in the same state and condition, making allowance for the effect of time, as when same was in their father's possession. That on the 28th day of February, 1866, said motion came on to be argued before Judge Hargreave, and petitioners submitted, amongst other things, that they were entitled to an issue to a jury directed to try the question. That Judge Hargreave made his order on the 28th February, 1866, whereby he declared that the lease to Bryan Reilly, dated 1st January, 1802, did not, at the time of the execution, contain the clauses of renewal which now appear therein. And petitioners submitted that the said order was erroneous; and that the said motion of the petitioners, Alexander Montgomery and wife, should and ought to have been refused so far as it sought to make said lease null and void, and that an issue should have been directed to try whether the words—"and also renewable every thirty-one years after the demise of said lives at three grains of pepper-corn," were inserted in said lease after the execution thereof by the respective parties, or whether said words were written therein after the execution of said deed.

To this petition of appeal the respondents filed an answer in support of Judge Hargreave's order, now appealed from. The views taken by that learned Judge are contained in his Lordship's judgment, which was delivered in the Court below, and which is as follows:—

**JUDGE HARGREAVE.**—This case comes before me for an adjudication as to the validity of an alleged clause of perpetual renewal, contained in four leases, to different tenants, all dated the 1st day of January, 1802, made by Francis Fetherston, the owner of this property, from the present owner's ancestors, purchased in 1805. Of these leases three are produced in a mutilated condition, viz. one to Francis Murtagh, one to Patrick Murtagh, and one to Bryan Reilly. The fourth, which was apparently made to Owen O'Reilly, is lost, and the only secondary evidence of it is a document of the 26th day of May, 1836, purporting to be a demise from Owen O'Reilly to Peter O'Reilly. This deed is not evidence against Mr. Jones: but the Court is not satisfied, and it is not seriously disputed, that there was a fourth lease of the 1st day of January, 1802, to O'Reilly, for the same time as the other lease, and that the deed of 1836 was meant to be an assignment of it. The three leases produced are on the same printed form. They are filled up so as to operate at law for thirty-one years from 29th September then last, or for three specific lives, the lives not being the same in the three leases. The spaces between the printed words are as usual only partially occupied by the writing; and no particular pains were taken to prevent possible interpolation, though in some places there appears to have been a sort of scroll or flourish put in. Such is the condition and legal effects of the three leases produced; and in all of them there is a clause in the *habendum* in the same language, purporting to make the lease renewable every thirty-one years after demise of said lives, on payment of three grains of pepper corn. There is no further covenant or clause on the subject and all the provisions of the lease are the usual ones in a termin-

able lease. I attach no importance to this latter point, because it is quite possible it should be so in any view of the case. It is clear from an inspection of the three lives that they were originally for the term and lives only by the insertion in writing of the proper words for that purpose, though in reference to one of the leases (Patrick Murtagh's) if it was considered by itself this fact would not be very apparent except from a comparison of handwriting. In that lease the words in question stand in a perfectly intelligible form coming in at the end of the *habendum*, and before the words "yielding and paying." It must be admitted, however, that there is a difference of handwriting, but whether of itself sufficient to attract attention or cause suspicion I will not undertake to say. In the two other leases produced, after the last word in the *habendum*, the word "continue," the words "he the said lessee, his executors, administrators, and assigns, are inserted, and but for the interpolation these words are antecedent to the *reddendum* "yielding and paying." In these two leases, therefore, the fact of an interpolation after the leases had been prepared is obvious, for the words in question come in an unintelligible and ungrammatical place, with the middle of the *reddendum* separating the person who is to pay the rent from words obliging him to do so. Now it is said—and with perfect truth—that this is consistent with the notion that the words were, by agreement of the landlord and tenant, put in before execution; and it is contended that in the absence of evidence the Court ought so to presume in order not to affix the charge of fraud upon anyone on mere suspicion. It is also contended that each deed must fall or stand by itself, and that the suspicion of subsequent interpolation in reference to one lease should not be increased by a consideration of suspicious circumstances connected with the others. I concur in these views in the main, and my opinion (to which I adhere) that the leases cannot be considered together unless the owner is able to establish a *prima facie* case of complicity between the owners of these leases to effect a fraud by inserting these words after the execution of these leases; and this brings me to what I consider to be the real cause for suspecting the genuineness of the clause in question. I have stated that there was a fourth lease of the same date to Owen O'Reilly for the same term and number of lives, and in all material respects similar to the others. The interest in this lease is claimed by the present tenant, who derives title in some way from the lessee; and as the lease is lost he relies upon what is called an assignment of it made in 1836 as evidence of its existence, and also as evidence that it contained the same clause of renewal. On inspection of that assignment, which was made thirty-six years after the leases, the same words are found in it, and they are a manifest and palpable interpolation, still using the term without reference to the date of interpolation. The whole of this deed is rather closely written, but at two of the legal divisions of a deed, that is, at the *habendum* and *reddendum*, a new line has been commenced with a capital letter, leaving a portion of the preceding line blank. A space of about two inches and a half was thus left at the end of a line before the word "yielding," which commences

the *reddendum* in the next line. That space was insufficient to put in the whole of the clause now in question; and it has been put in an abbreviated form by continuing the line in a crooked direction downwards and writing the words "at three pepper-corn grains" on the end of the line. This document is put in as evidence, first, to prove the existence of a lease to the grantor in the assignment; and secondly, to show that the lease conferred a renewable interest in perpetuity; in other words, to prove the existence and contents of the lease. The *habendum* of this assignment is relied on as being in effect a copy of the *habendum* in the original lease, made by some person who either took it directly from the lease or from the instructions of the lease as to its contents. On either view of the case it is difficult to avoid the inference that the words in question were not, at the time when the assignment was written, in the original lease to O'Reilly; for if they were, how is it possible that they could have been omitted even temporarily from the assignment? It is suggested that the assignment was drawn from memory only of the contents of the original lease, and that the clause was forgotten and put in afterwards when they remembered it. It is impossible, however, to read this assignment without becoming aware that it was copied from the printed form of lease used on this estate, and filled up in a manner similar to the other three leases. The assignment is entirely written by the hand, and under ordinary circumstances we should not expect to find it punctuated at all. In point of fact it is punctuated, and, I believe, punctuated exactly as in the printed form. If anyone will take the trouble to compare them he will find that in the written assignment there is a comma between nearly all the tautologous words as there is in the printed form. In the printed form there is the "do" with a blank sufficient to put "th" to it when there is only one grantor. In the assignment the words are exactly the same, but the "doth" has not the "th," because, no doubt, the writing of them had become obliterated in the lease, just as they are now in the lease to Patrick Murtagh. I find also that the reservation of royalties is identically in the same language, which shows that it must have been copied from one of the leases on the estate, as they are not printed; but part of the written filling-up in the original leases. In fact, the identity of the document, except in names and other necessary variations, is almost absolute. The original lease from Mr. Fetherston, who was the owner of an estate there, contains a covenant on the part of the tenant to furnish two cars with horses, leaders, and proper tacklings, and two labourers for duty-work, or to pay 7s. 7d. in lieu of it. This is all copied *verbatim* into the assignment. The *habendum* in the assignment, so far from being put in from memory, is in the following precise terms: "from the 25th day of May inst., for and during and unto the full end and term of thirty-one years from thence next ensuing, and fully to be completed and ended, or for and during the natural life of Neil alias John Quinn, of Mat, eldest son of Owen Quinn, now deceased, farmer." Those circumstances leave no room to doubt that the assignment was prepared from Owen Reilly's lease; and the inference is inevitable

that the words in dispute were not then in that lease, and that they have been imported into this assignment subsequently. I have now the facts of this case so far as they are apparent or can with certainty be inferred from the documents; but I have not yet referred to the evidence of the experts. In reference to the last lease, I think it clearly proved beyond all doubt that when it was executed it did not contain any clause of renewal, and that it did not contain it at the time of the assignment of 1836. This lease therefore can only be allowed for the life if it is subsisting. In reference to the two leases which contain the clauses in the wrong place, Francis Murtagh's and Bryan Reilly's, I am of opinion that in the absence of all other evidence the presumption at law is adverse to the genuineness of the leases. I quite agree that an interpolation which reads sensibly and grammatically will, in the total absence of evidence, be presumed to have been made before execution unless there be other clauses in the deed which render it *prima facie* impossible that the interpolation was made before the execution. For example, in this case if there were any clauses exclusively applicable to a terminable lease; but when the interpolation makes nonsense, when it turns a sentence which was originally correct into something which cannot be grammatically construed, then I think the *presumption of law must be against its genuineness*, for I think the Court is not to presume that the parties, especially the landlord, would sign a document containing so important a clause in an absurd connexion when the thing could have been done correctly by simply filling up another printed form. I therefore rule against the clause in Francis Murtagh's and Bryan Reilly's leases. I do this upon mere presumption at law, and therefore I do not send an issue, as no further evidence could be given in favour of the clause, though there is some slight evidence against it on the face of the deeds and the opinion of the experts. In reference to Patrick Murtagh's lease, there are two points to be considered: first, whether any evidence against it can be given arising from the probable tampering which has been committed on the other documents. These documents are not admissible except upon *prima facie* proof of a common fraud, and there is no such proof except by production of the document. I therefore think they are inadmissible. Secondly, whether it is not sufficiently obvious on the face of the deed that the words were written after the surface of the paper had become uneven and full of creases. I will not rule on the case on this point alone as it is rather matter for a jury, and I will therefore direct an issue to try the question if the petitioners or owner desire it. The other documents may be sent to the Court in which the issue is, so that they may be given in evidence if the judge should decide that they are admissible.

*Flanagan Q.C. (with Richardson)* for appellants.—The order made by Judge Hargreave on Feb. 28, 1866, ought to be reversed. By that order the learned judge took upon himself to decide a question which ought to have been sent to a jury to decide upon the evidence which should be left before them. And further, the comparison and inspection of other leases contemporaneous with the said lease of petitioners

was not admissible as evidence, and should not have been read or referred to by counsel as evidence, or been admitted by that learned judge in reference to petitioner's lease; and also the order was erroneous in allowing the assignment produced and read upon the original objection of Bernard Reilly and John Reilly, tenants to different lands, and to which assignment petitioners were neither privy or parties, and which was not therefore evidence. Now, as to the presumption of law, no such presumption arises as that alleged by Judge Hargreave. Where a bill of exchange produced on a trial appears to have been altered, the jury cannot on inspection of such a bill without other proof decide whether it was altered at the time of making or at a subsequent period.—*Knight v. Clements* (8 Ad. & Ell. 215). There "a bill of exchange was drawn upon a two months' stamp, and had begun with 'three months after date,' but the word 'three' had been defaced (as if blotted while the ink was wet), and 'two' months upon it and 'two' written again underneath. And the plaintiff who put in the bill at Nisi Prius offered no evidence to account for these alterations. Held that the document by itself was no evidence to go to the jury of alterations." In fact, when an alteration is made, in no case does such a presumption arise as that put by Judge Hargreave. So early as 13 Car. II. it was laid down in *Trowel v. Castle* (Keble's Reports, 22) that "an interlineation (without anything appearing against it) will be presumed to be at the time of the making of the deed and not after." And so on in Co. Lit. 225-6—"Of ancient time if the deed appeared to be rased or interlined in places material, the judge adjudged upon their view to be void. But of later times the judge has left that to the jurors to try whether the rasing or interlining were before the delivery." And in a note upon the passage in Hargreave and Butler's edition of Coke upon Littleton, it is laid down "'Tis to be presumed that an interlining, if the contrary was not proved, was at the time of the making of the deed.—*Tatum v. Catamore* (16 Ad. & El. n. s. 745). So, if the case had been tried by a jury they could not have been directed to raise the presumption which Judge Hargreave without the aid of a jury has raised.

*Butt, Q.C.*, with *R. H. Mills*, were heard in support of Judge Hargreave's decision.—There is a legal presumption arising from the position in the lease in which the clause of renewal occurs, that the same must have been interpolated at some time subsequent to the execution of said lease; and from the facts and evidence in the case, that the interpolation of the clause of renewal in petitioner's lease must have been inserted subsequent to the execution thereof.—*Buller's N. P. 255; Lord Trimleston v. Kemmis* (9 Cl. & Fin. 775). A number of cases were referred to which are collected in *Broom's Legal Maxims*, 4th ed. 155, note c.

**THE LORD CHANCELLOR.**—I am of opinion that the order made by the Court below in this case cannot be sustained. I interfere with great reluctance with the decision of so eminent a judge as the late Judge Hargreave. His decisions always evinced great learning and patient investigation. His loss is a matter of public regret; and I confess that I with reluctance

pronounce a judgment which differs from his. The whole question in the present case is—whether this particular interlineation was made at or before the time of the execution of the lease or subsequently; and we are not here concerned with its interpretation. Are there then grounds for supporting the order made in the Landed Estates Court? It is stated in the judgment below that admitting the general law to be that an interlineation is to be presumed to have been made before the execution of the instrument in which it occurs, still that presumption is in the present case to fall to the ground, because the interlineation in question was not in that careful and grammatical form which the Court would consider desirable. That is a dangerous doctrine. We know that error often exists in deeds prepared in the most careful manner. The custom now is to notice at the foot of a deed any interlineation which happens to occur in the body of the instrument; but that custom is by no means universal, and certainly was not so fifty-four years ago. What is the evidence in the present case which should have the effect of taking it out of the operation of the rule of law? No counterpart is produced, nor anyone who ever saw a counterpart of his lease. No rental is produced, nor any other document, and we are asked to deal with this case upon the mere inspection of the lease itself. Now the evidence as to the interlineation being in a different handwriting from that in the body of the lease is founded on mere matter of opinion; and as to the colour of the ink in which the interlineations are written, although I don't mean to set up my own personal powers of vision in opposition to those of the gentlemen examined in this case, still I confess I do not entirely concur in their evidence upon that point. It does appear to us that the question here is one entirely for a jury; it is a question of fact. I do not concur in the view of the late Judge Hargreave that there is such a presumption of law. The current of modern decisions from Lord Coke to the present time are directly the other way; and after all that has been said in the case it comes round to this narrow question, "Is there such a presumption of law?" As I just said, the current of decisions is the other way, and I know of no single decision to the contrary. We must then reverse the order made by Judge Hargreave.

**THE LORD JUSTICE OF APPEAL** entirely concurred with the view the Lord Chancellor had taken of the case. No doubt, the presumption of law was, that the clause in question existed at the time of the execution of the deed, and in order to displace this presumption, evidence should be laid before a jury to that effect. Reverse the order.

Solicitor for the appellants—C. Reynolds, 48 Mountjoy-street, Dublin.

Solicitor for the respondent—John Swanzy, 5 Bachelor's-walk.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

COSTELLO v. MOORE.—May 24; June 4, 22.

*Garnishee order—Equitable assignment.*

*A. being indebted to B., and C. being indebted to A., A. gave B. an order on C., directing him to pay to B. what he owed to him, A. At the time when the order was given, C. had in his hands goods belonging to A. of considerable value. Notice of the order was at once given to C. Held, that the order operated as an equitable assignment of the value of the goods to B., and took priority over garnishee orders subsequently obtained by other creditors of A.*

THIS was a motion to show cause against a garnishee order obtained by the plaintiff in the cause on the 8th May, attaching a sum of £91 16s. 6d. due by the Commissioners for Improving the Port and Harbour of Waterford to the defendant, Patrick Moore. The present application was made by a Mr. Power, who claimed priority over the plaintiff as an equitable assignee of Moore, the defendant, who had been a contractor in the service of the Waterford Harbour Commissioners, and it was grounded upon an affidavit of Mr. Power, stating that Patrick Moore, the defendant in this cause, being indebted to the deponent for work and labour, and on bills of exchange in the sum of £243 13s. sterling, the deponent, on or about the 6th day of March, 1866, caused a writ of summons and plaint entered and appropriated to the Court of Exchequer in Ireland for the recovery of £99 15s. 10d. portion of the said sum, to be issued against the said Patrick Moore, and which said writ of summons and plaint was, on or about the 7th day of March, 1866, served on the said Patrick Moore, who, on or about the 4th day of April, 1866, for the purpose of arranging the said action, and in part payment of the said debt gave to deponent an order, which ran thus:—"At the request of W. Power, I hereby give the following orders on the Commissioners of Waterford Harbour Works for the following amounts, as stated at foot." It then stated the items, amounting to £235 3s. 10d., and continued—"To John Farrell, Esq., Secretary, Waterford Harbour Commissioners—Sir,—Please pay the above amounts, and charge to my account, and oblige yours truly—P. Moore;" that the sum of £91 16s. 6d. sought to be charged by the garnishee order in this cause having been due by the said commissioners to the said Patrick Moore at the time of the giving of the said order as aforesaid, the said order operated and was an equitable assignment of the said last-mentioned debt by the said Patrick Moore to deponent, and deponent submitted that the said commissioners having admitted said sum to be in their hands, they should hold same for the use and benefit, and as the proper monies of this deponent; that since the giving of the said order by the said Patrick Moore to deponent as aforesaid (and in consequence thereof) deponent had not taken any step in the said action so commenced by deponent against said Patrick Moore as aforesaid, and that no payment having been made either by the said Patrick Moore

(save by the giving of the said order as aforesaid), or by the said commissioners, or otherwise, to deponent on foot of the said sum of £243 13s., the same and every part thereof was still due to this deponent. Notice of the order was at once given to the Commissioners.

The case stood over for the purpose of obtaining information as to what was the property of Moore in the hands of the commissioners, and from an affidavit of Mr. John Farrell, their secretary, it appeared that when Moore became contractor, he got from them a dredge-boat, with certain mooring chains attached to it; that while it was in his possession he added other mooring chains, his own property, and that on the 19th of March the commissioners took possession of the dredge-boat with his mooring chains, and an anvil and some other small matters which were in it, the property of Moore, and that the value of these chains, and other articles of Moore's separated from those which were the property of the commissioners, was £91 16s. 6d.

There were several other garnishee orders at the suit of the creditors, but all were subsequent to the order of the 4th April.

*Curtis*, for Power, referred to the cases cited in the note to *Ryall v. Rose* (2 Wh. & Tud. 615).

*James Greer* contra, for the execution creditor, argued that the order of the 4th April, 1866, could not operate as an equitable assignment as it did not ear-mark any specific fund.—*Rodick v. Gandell* (4 De G. M. & G. 763); *Watson v. The Duke of Wellington* (1 R. & M. 602); *Burn v. Carvalho* (4 M. & Cr. 690).

*Curtis*, in reply, referred to *Cooke v. Black* (4 Hare, 390).

*Cur. adv. vult.*

June 22.—LEFROY, C. J.—In this case the question was whether the order given on the commissioners amounted to an equitable assignment of the demand which the party had against the commissioners. We are of opinion that it did amount to an equitable assignment, and therefore that the party is entitled to the benefit of it.

O'BRIEN, J.—This case stood over to get some specific information on a matter of some importance—namely, whether at the time the order was given, the Harbour Commissioners had in their possession property on which the order could attach. Under the terms of their contract Mr. Moore did not perform it, but there was a provision in it enabling the seizure by the commissioners of all their plant. Along with this of their own, they took some plant that belonged to Mr. Moore, and the case stood over to see if that was done at the date of the order, and when it was delivered. Now, there is an affidavit of Mr. Farrell which sets the matter beyond all doubt. It states that the commissioners took possession of their dredge vessel, &c. on the 19th March. Well, that took place on the 19th March. Then the question comes that even in equity it does not avail until notice is given to the debtor. Here it appears that the order was delivered to the commissioners in the first half of April, and on one of the first days of that month. Now, the earliest of these attaching orders was after that period, and if this was an equitable assignment,

we have a fund in the hands of the Harbour Commissioners, and further we have the assignment completed by notice to the commissioners, and therefore the question is, is that, on the face of it, an equitable assignment? Now, I think the result of the authorities is, that where an instrument purports to be a direction to one party to pay another out of the funds he owes the party giving the direction, it is a good equitable assignment. Does that apply to the case before us? We are at liberty to construe the agreement by reference to the state of facts existing between the parties at the time. Here we have the Harbour Commissioners having these goods; we have this fund in their hands, and the order. Now, construing that with reference to the facts as they stood at that time, can it be said that it is not an order to pay him out of the money in their hands? The rule, therefore, will be to discharge that part of the garnishee order. It is a very proper question to bring forward, and therefore, as against the judgment creditors, I do not think there should be any costs.

FITZGERALD, J., concurred.

LENNON v. BINKS.—May 26.

*New trial—Misdirection—Deed—Property—Interpleader.*

*A bill of sale recited an agreement to sell certain goods; in the operative part it omitted to name the articles, but they were set out in a schedule. There was a delivery of the goods. Upon an interpleader issue between the claimant under the deed, and an execution creditor of the grantor, the judge withdrew the question as to the property in the goods from the jury, and directed a verdict for the creditor. Held, that this was a misdirection, and that there should be a new trial.*

Hemphill, Q.C. for the defendant, shewed cause against a conditional order for a new trial obtained by the plaintiff on the ground of misdirection. The case was an interpleader issue, the claimant being plaintiff, and the execution creditor defendant. The plaintiff claimed under a bill of sale dated the 3rd of February, 1866. The deed recited an agreement on the part of the debtor to sell certain goods to the plaintiff. The operative part of the deed omitted the articles, but they were named in a schedule. There had been a delivery of them. The judge at the trial withdrew the question as to the property in the goods from the jury, and directed a verdict for the defendant in the issue, the creditor in the execution.

THE COURT held the question too plain for argument. The articles had passed by delivery. The deed recited an agreement to sell them. The question should have been left to the jury, and therefore there must be a

*Rule absolute for a new trial.*

MACKEN v. ALEXANDER.—June 11.

*Contract—Provision for arbitration—Stat. 19 & 20 Vict. c. 13, s. 14.*

*A contract contained a stipulation for referring dis-*

*putes arising under it to the arbitration of parties residing in England. Upon an action being brought upon the contract in this country, a motion to refer the matter to the arbitrators named was refused, there being no provision in the stipulation for compelling the attendance of witnesses belonging to this country before the arbitrators, and the question likely to arise being one as to facts existing in this country.*

Dowse, Q.C. on behalf of the defendant, moved to have the matters in dispute referred to arbitration pursuant to the terms of the contract between the parties. The action, which was for not delivering a cargo of corn in this country, was brought on a corn-contract, which contained a provision that if any dispute concerning it should arise, it should be referred to the arbitration of two gentlemen named, both of whom resided in England. Counsel referred to section 14 of the Common Law Procedure Act of 1856; *Hattersley v. Hatton* (3 F. & F. 116); *Mason v. Hatton* (6 C. B. N. s. 626); *Blythe v. Lafontaine* (1 Ell. & Ell. 491); *Roper v. Lendon* (5 Jur. N. S. 491). [Fitzgerald, J.—There is nothing in the provision in this contract to compel the attendance of witnesses before these English arbitrators, and that being so, and the question likely to arise being as to the condition of the corn when it arrived here, we ought not to grant this motion.]

Palles, Q.C., contra, referred to *O'Flanagan v. O'Geoghegan* (16 C. B. N. s. 636).

*Motion refused with costs.*

THE QUEEN v. NOLAN.—June 22.

*Criminal law—Bail—Harbouring—Treason-felony.*

*Application to admit to bail a prisoner charged with harbouring a party connected with the Fenian conspiracy, refused, though it was sworn that the prisoner's health was suffering from confinement, that his affairs were going to ruin, and that he had no sympathy with the conspiracy, and though he offered bail to the amount of £1,000 (O'Brien, J. dissenting).*

THIS was a motion to admit a prisoner to bail. Nolan had been arrested on a charge of harbouring one Morris, who had subsequently been found guilty of treason-felony as being connected with the Fenian conspiracy as head-centre for Carlow. From the affidavits it appeared that Nolan had been arrested in March of the present year, that he was over seventy years of age, that his health was failing in consequence of his imprisonment, and that the affairs of his farm were going to ruin. A memorial for his discharge, signed by the clergymen and gentry of his neighbourhood, had been forwarded to the Lord Lieutenant. No answer had been received to that memorial till three days ago. The prisoner's affidavit denied all connection with the Fenian movement.

Byrne in support of the application.—We have made a case for having our application granted.—*Baronet's case* (5 Dearsley, C. C. R. 51); *Aylesbury's*

case (1 Salk. 103). The prisoner can give bail up to £1,000, and it cannot be pretended that there is any possibility of any danger that he will not appear to take his trial.

*Heron, Q.C.* for the Crown, contra.—Apart from all other objections, the prisoner has allowed an unreasonable time to elapse before making his application.

*Byrne* in reply.—The delay arose from waiting for an answer to the memorial forwarded to the Executive. [*Fitzgerald, J.*—The age and failing health of the prisoner are matters more for the consideration of the Executive than of this Court. The Court must also consider that this party, if discharged, might be at once re-arrested under the Habeas Corpus Suspension Act.] The punishment of an accessory after the fact in treason-felony, would be only two years' imprisonment. There is a probability amounting almost to certainty under all the circumstances of the case, that the prisoner will attend to take his trial at the assizes. The suspension of the Habeas Corpus Act gives the Crown an additional protection, and therefore there is the less reason to depart from settled principles in this case.

*LEFROY, C. J.*—If there was any reason to believe that this party's life would be in danger by being confined in gaol between this and the time at which he is to be brought to trial, I should be disposed to discharge him on bail; but the trial must now take place in a few weeks, and therefore, with respect to the hardship, I think it does not exist. We must consider the nature of the offence of which this man stands accused, an offence which affects not merely an individual, but the whole public, an offence, the nature of which—treasonable conspiracy—has been so often before us, that we cannot fail to take notice of it, and of the consequences involved in it. We must also consider that our refusing to discharge him, does not deprive him of an application to the Lord Lieutenant, who will then have the opportunity of obtaining information which we cannot obtain as to the actual state of his health. I do not say that that ground alone would be sufficient, but I think we must consider it. Under these circumstances, considering the nature of the offence, and the closeness of the time at which the prisoner will be brought to trial, I think we should not be acting advisedly in allowing him to be discharged.

*O'BRIEN, J.*—In this case the prisoner stands charged with harbouring a person implicated to a very serious extent in the Fenian conspiracy. The punishment for his offence is two years' imprisonment. The offence is certainly one to be greatly reprobated, but all that we have to consider is, whether, considering the punishment and the amount of bail offered, there can be any reasonable doubt of his appearing to take his trial. His age, I think, may also be taken into consideration in this way, that considering it, and his position in life, and the punishment for his offence, I can only say that I do not entertain any reasonable doubt that he will make his appearance. My own opinion, therefore, I must say, is that he ought to be admitted to bail.

*FITZGERALD, J.*—I regret that I feel myself obliged to concur with my Lord Chief Justice. I cannot see

my way to discharging this prisoner. It is true that he is committed for harbouring one charged with treason-felony, this person being his nephew. We cannot shut our eyes to this, that treason-felony and high-treason are the same thing. The words in the Treason-Felony Act are a repetition of the law of Edward III. John Morris may be tried for high treason, and so may the prisoner here, though that is improbable, and if he was charged in form with being guilty of high treason, we could not interfere. We cannot, also, help seeing besides that the charge is connected with this conspiracy. In all the cases which have been considered on the question of bail, that has been one element, and very recently we refused an application on the subject, where a crime was committed which in itself was not very great, and where there was no difficulty as to obtaining bail. It may be one of the objects of the treasonable conspiracy to secure those who have harboured parties connected with it, and if such is their object, no amount of bail will stand in the way. We are dealing with a crime of a peculiar nature in an exceptional period, and we are bound to do nothing which will paralyse the hands of the executive. The offence is a most serious one. The crime is of the gravest magnitude, and when it is brought into connection with a treasonable conspiracy, there is no certainty that the offender will be brought to trial. Under the circumstances I am of opinion that the motion must be refused.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

*FARRINGTON v. DONOHUE*.—May 1, 2; June 12.

*Statute of Frauds—Agreement not to be performed within a year.*

*An agreement with the mother of an illegitimate child, in consideration that she would maintain it, to allow her £20 a year until the child should be able to maintain itself, is an agreement within the Statute of Frauds, and requires to be in writing.*

*Murphy v. O'Sullivan* (11 Ir. Jur. N. S. 111) distinguished.

THIS was an action brought to recover £55 for the support and maintenance by the mother of a female child, and was tried before Monahan, C. J. at the Hilary after-sittings. The defendant was the brother and executor of the father of the child. The summons and plaint contained three counts, viz., for the board and maintenance of the child, for work and labour, and on an account stated, and the defence consisted of traverses of those counts. At the trial the plaintiff stated that the child in question was the survivor of three children whom she had borne to the brother of the defendant, who died June 22, 1859, and who, during his life, had allowed her £44 per annum; that on the 21st July in that year she met the defendant by appointment at his resi-



dence, No. 35 Upper Fitzwilliam-street, in the city of Dublin, and that the defendant then and there, in consideration of her continuing to support and maintain the child, promised to allow her £20 a year until the child should be of an age able to support itself; that the child was then eleven years of age, and that plaintiff had received the £20 a year up to April 1, 1862, when she received a sum of £10 from an officer of the Hibernian Bank (which was the last payment received by her), and that she had never received any letter from the defendant (who was and had been British Consul at Buffalo and New Orleans, in the United States of America), intimating that the £10 was a final payment. The case made for the defendant was, that the only arrangement he had ever entered into was, to pay the plaintiff £20 a year so long as he thought proper, and that he gave her notice of discontinuing the allowance by letter, dated Mar. 1, 1862, from Buffalo, in the United States, and presumed by him to have been handed to the plaintiff in the Hibernian Bank. The answers given by the defendant in writing to interrogatories and cross-interrogatories submitted to him pursuant to an order of the Court dated Nov. 24, 1865, were read in evidence, and a number of letters which passed between the plaintiff and defendant. The learned judge left to the jury the four following questions, to which the jury gave the following answers:—1. Was any agreement entered into by defendant to pay for the support of his brother's child? Answer—Yes. 2. If so, was it to last so long as Mr. Donohoe pleased, or till the child was able to maintain itself? Answer—Until the child was able to maintain itself. 3. Had the plaintiff notice in April, 1862, that Mr. Donohoe put an end to this contract, and liability? Answer—No. 4. Had plaintiff that notice previous to writing the letters of 27th Jan. 1863, and 29th November, 1863? Answer—No. The defendant's counsel objected to these questions being left to the jury, and asked for a direction in the defendant's favour, and also asked the learned judge to rule that previous to January, 1863, or November, 1863, the plaintiff had notice that the defendant had stopped the annuity, which he refused to do. The jury having answered the four questions as above, the defendant's counsel asked for a direction on the ground that there was no consideration for the defendant's promise, and because the contract established by the verdict of the jury was a contract that could not be performed within a year, and was not in writing. The learned judge refused to do this, but directed a verdict for the plaintiff for the sum of £55, reserving liberty for the defendant to move to have a verdict entered for him if the Court should be of opinion that he should have held that there was no consideration for the defendant's promise found by the jury, or that same was a promise not to be performed within a year, and therefore should have been in writing, and also that the Court should be at liberty to reduce the verdict to such sum as should have been directed for.

A conditional order was accordingly obtained in these terms, and also for a new trial, on the ground of the verdict being against evidence and the weight of evidence, and for misdirection by the learned judge, against which

*Palles, Q.C. (with him Cleary) for the plaintiff* showed cause.—1. There was a consideration for the defendant's promise. The plaintiff incurred an additional liability, because she could have been sued by defendant for not supporting the child. If the guardians of the poor could have sued Donohoe, and if there was any liability imposed on him, then there was a consideration for his promise. The mother's executor would be bound by this contract, because it would not determine with the death of the mother; and therefore there is a liability on her greater than the one imposed on her by the Poor Law Act. The contract embraced the education as well as the maintenance of the child, as appears from some of the evidence. 2. The promise was not one not to be performed within a year within the Statute of Frauds. It is impossible, on the face of the agreement, to say that the defendant was liable beyond a year, because that depended on the life of the child. 3. Even if the contract be within the Statute of Frauds, the consideration has been partly executed, and so much of it as has been executed must be paid for.

*Heron, Q.C. and Curtis, in support of the order.*—1. The defendant was under no obligation to make the promise. He received no benefit from the contract. The mother would have been bound to maintain the child for four years more. 2. The case is within the Statute of Frauds. It is true that in *Murphy v. O'Sullivan* (11 Ir. Jur. N. S. 111) the Court of Exchequer Chamber held that a contract for an annuity for life is not within the statute. A contract to support a child for life is not within the statute; but a contract to support a child for six years is within the statute. A contract for an annuity for years determinable by death is within the statute. 3. The verdict is against evidence, because the jury ought to have found that the defendant had given notice of withdrawal.

*Cleary in reply.*—1. The obligation upon the mother arising from the contract was greater than that imposed by common or statute law. But even if not, the specific contract was itself a sufficient consideration. No case has been cited to show that the mother of an illegitimate child is bound to support it except while in her custody. 2. A contract to support for life is capable of being performed within a year. The present case is not distinguishable from *Murphy v. O'Sullivan*. The analogy of defeasible estates may be referred to. The contract may mean till the child does or till she can do for herself, and if the contract embraces two periods of time, one of which may expire within the year, the case is not within the statute. It might happen that the child might get a legacy. 3. The consideration here has been executed. 4. If the jury were wrong in finding such a contract as they did, the question arises if they should not have found the other contract, and then the question of notice arises. The party who comes to prove an affirmative such as the sending of notice in this instance, should come prepared with the best evidence of it.

The following authorities were cited:—*Crowhurst v. Laverack* (8 Ex. 208); *Murphy v. O'Sullivan* (11 Ir. Jur. N. S. 111); *Peter v. Compton* (1 Smith's L. C. 283); *Anonymous case* (1 Salkeld, 280); *Fenton v. Embley* (3 Burrow, 1279); *Gilbert v. Sykes* (16

East. 150); *Wells v. Horton* (4 Bingham, 40); *Souch v. Strawbridge* (2 C. B. 808); *Sweet v. Lea* (3 M. & G. 452); *Giraud v. Richmond* (2 C. B. 835); *Dobson v. Collis* (1 H. & N. 81); *Teal v. Auty* (2 B. & B. 99); *Collis v. Botthamley* (7 W. R. 87); *Cameron v. Baker* (1 C. & P. 268); 1 & 2 Vict. c. 56, s. 53; *Ruttinger v. Temple* (4 B. & S. 491); *Hicks v. Gregory* (8 C. B. 378); *Shelton v. Springett* (11 C. B. 452); *Smith v. Roche* (6 C. B. n. s. 223); *Santos v. Brice* (8 H. & N. 290); *Tierney v. Marshall* (7 Ir. C. L. R. 308); *Harris v. Watson*, cited in *Stilk v. Myrick* (2 Campbell, 318); *Harris v. Carter* (3 El. & Bl. 559); *Lexington v. Clarke* (2 Ventr. 223); *Chater v. Beckett* (7 T. R. 201); *Thomas v. Williams* (10 B. & C. 664); *Hesketh v. Gowing* (5 Espinasse, 131); *Power v. St. George* (11 Ir. L. R. 79); *Bracegirdle v. Heald* (1 B. & Ald. 722); *Jennings v. Brown* (9 M. & W. 496); *Fearne on Contingent Remainders*; *R. v. Inhab. Herstonceaux* (7 B. & C. 551); *Lavery v. Turly* (6 B. & N. 239); *Mechelen v. Wallace* (7 A. & E. 49); *Mellin v. Taylor* (3 Bingham, N. C. 111).

*Cur. adv. vult.*

June 12.—*MONAHAN, C. J.*—In this case which was tried before me, a conditional order for a new trial was obtained on various grounds—for misdirection, and because the verdict was against evidence. There was also a reservation to enter the verdict for defendant, it being for the plaintiff, or to reduce it. The circumstances are these:—The action was in the common form, an *indebitatus assumpsit*. The brother of the defendant was the father of this child. He had allowed £44 a year for its maintenance, which was paid up to his death. Upon his death in June or July, 1859, the sum of £5 was paid, which was alleged to be due, voluntarily or not, and this woman called on Mr. Donohoe at his request. She represents that on that occasion Donohoe promised to allow her £20 a year for the support of this child till it could provide for itself. It was then five years old, and is now ten or eleven years old. The plaintiff's case was, that this was paid up to April, 1862; that then, instead of £5, she received £10 through an officer of the Hibernian Bank, and since that nothing. It was admitted that she had received several letters, and had written several letters, and she stated that one in particular, stated to have been sent, she had not received. Donohoe has been examined on interrogatories, and the substance of his evidence is, that he said he would allow the plaintiff gratuitously, as long as he pleased, £20 a year for the support of this unfortunate child. There were other letters, particularly one in November, 1863, in which the plaintiff charges the defendant with stopping her allowance, and she demands from him, as executor, a large arrear of the £44 a year, which she says she was entitled to. On that state of things, I thought it right to submit several questions to the jury. Mr. Heron, for the defendant, insisted that, assuming the contract was as stated by this woman, and that she, for consideration, undertook to support this child, the contract was not to be performed within a year, and therefore, being within the Statute of Frauds, was incapable of being enforced.

He also insisted that there was no consideration—there was no moral obligation on the defendant: he was not the father. I left to the jury the question, first, was there an agreement? also what was it—was it to pay the allowance till the child could maintain itself, or was it such as Mr. Donohoe described? The jury would not listen to the case at all, but said that they had quite made up their minds to find for the plaintiff; but Mr. Curtis thought he was bound to submit to the jury his client's case. I knew anything I said would have no effect whatever, but still I thought it right to put to them the questions, and I also thought the agreement, as represented by this woman did not require to be in writing under the Statute of Frauds. I asked the jury if the plaintiff had notice that the defendant put an end to this contract. The jury made short work of it. They said there was an agreement, and it was such an agreement as this woman relied on. The first question is, if I was right in point of law. That depends on this, whether a promise to maintain this child (which was five years old), until it was able to maintain itself—whether that was an agreement contemplated by the parties to be performed within a year. It is unnecessary to go through the cases bearing on that. They were considered in a case in the Court of Queen's Bench, and in the Court of Error—*O'Sullivan v. Murphy*. The majority of the Court held (in which we all concur) that the agreement there was not necessary to be performed within a year, because it contemplated the death of the party. In this case, however, we are of opinion that this case does come within the statute. We are of opinion, from the nature of the thing, the child being five years old, that what was contemplated was a thing not to be performed within a year, though it is quite true that it was capable of being collaterally determined by the death of the child within the year, and therefore we hold that I fell into a mistake at the trial. The next question is rather peculiar—whether this verdict is against the weight of evidence. On the written evidence in the case, that preponderates very much in favour of Mr. Donohoe's statement. Assuming there might have been an agreement, we think the evidence preponderates very much to show that it was for so long as Donohoe wished, but that involved that he might determine it when he wished, but, till then, assuming there was a consideration, he was liable to pay the allowance. Having regard to what happened at the trial, we see that the feelings of the jury got the better of their judgment, and the Court must set aside the verdict as being against the weight of evidence. But there is another question. We do not decide the abstract question of the defendant's liability, even though the agreement was for so long as the defendant pleased, this woman having on her own evidence shown that she was to be allowed a certain sum. We will not forestal the opinion we may have, if the parties go again to trial. A serious question will then arise, whether there was a consideration, this woman being the mother of the child. We think the best rule is this—to set aside the verdict for misdirection, and also as being against the weight of evidence.

*Rule absolute.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE FITZGERALD, HUGHES, AND DEASY, BB.]

MALONE v. KIRKPATRICK.\*—May 26; Nov. 8.

*New trial motion—Right of a magistrate to get notice previous to action brought—Can there be a bona fide belief of a person's guilt, if that belief is not at the same time reasonable?*

*Plaintiff was summoned before a J.P. for an alleged trespass on another person. Defendant, on the evidence submitted to him, committed plaintiff to prison, whereupon plaintiff brought an action for false imprisonment against defendant (the Queen's Bench having quashed the conviction), but did not give the proper notice of action under 12 Vict. c. 16, s. 9. At the trial the judge told the jury the question for them was, "Did defendant really, on the evidence before him, believe in the existence of a state of facts from which, exercising reasonable care and discretion, a lawful authority to do the act might have been inferred by him," and that if he did, he was within the protection of the statute. A conditional order for a new trial having been obtained on the ground of misdirection, Held, that the judge at the trial was right, and that the bona fide belief must have a foundation in reason.*

This was an action for assault and false imprisonment. The defences were—1. A traverse of the trespass. 2. That the act was done in execution of defendant's office as Justice of the Peace, and that the action was not commenced within six months after the act complained of. 3. On the same ground want of notice of action under 12 Vict. c. 16, s. 9. The case was tried before Fitzgerald, B. at the sittings after last Michaelmas Term.

Plaintiff examined.—Holds a small portion of land at the Strawberry Beds, near Dublin; was tenant of this land to a Mr. Hawkins for 30 years; that land adjoins Scriber's (who was the complainant on the occasion in question), who had been there for 10 or 11 years. He admitted having clipped the hedge between his land and Scriber's in October, 1864, and that he had received a notice from Scriber cautioning him against so doing; that he had received a summons on Saturday, October 15, 1864, at 3:30, p.m., to attend before defendant and his brother Justices of the Peace on the following Monday; that there were on the bench at the hearing of the case, the defendant (who presided), Alderman Mackey, Mr. Thomson and Mr. Flanagan; that he asked to have the case postponed, in order to see his landlord or agent; that the Bench would not listen to him; that he said he claimed the hedge, and offered to leave it to any two men to decide on whose ground the hedge was. That he said he had cut his own; that one Cowan and Scriber were examined; that he had been fined in 1859 for throwing rubbish in the gripe between his

land and Scriber's; that he brought an action against Scriber for malicious prosecution, and got a verdict for £22 10s.; that he was sent to gaol for a fortnight for clipping the hedge.

At this stage of the case plaintiff's counsel desired to prove the conviction, and called John Higginbotham, petty sessions clerk of Blanchardstown, who produced the petty sessions book containing a conviction dated October 17, 1864, of plaintiff at the complaint of Scriber, for unlawfully and maliciously cutting a fence of Scriber's, having been previously convicted on March 28, 1859, for a trespass on lands of Scriber, by putting rubbish thereon, and pulling up trees—fined 1s. and 3s. costs for the first offence; 14 days' imprisonment for the second. Plaintiff's counsel then produced a certified copy of an order of the Queen's Bench, dated May 30, 1865, quashing the conviction of October, 1864, for want of jurisdiction in the magistrates, on account of there being a *bona fide* question of title to realty.

Plaintiff's examination continued.—The conviction in March, 1859, was on account of some husks or clearings of strawberries thrown by the women of my family over the hedge on to Scriber's land. I threw none of them.

Daniel O'Callaghan examined.—Was Malone's attorney, in the proceedings taken by him in the Queen's Bench, to quash the conviction of October, 1864. Between £20 and £30 had been given to him to carry on the proceedings then. At the close of plaintiff's case, defendant's counsel called on his Lordship to nonsuit plaintiff, or to direct a verdict for defendant. He alleged that the single question in the case was whether the act complained of was done by defendant in the execution of his office. He distinguished between an act done in execution of duty, and an act done in the execution of his office, and referred to *Kirby v. Simpson* (10 Exch. 358). That in the present case there was no doubt that defendant was a magistrate, and was acting as such when the conviction was made in Court, and with other magistrates. That the only possible remaining question—whether defendant had reasonable ground for his belief that he was acting in the execution of his office—was not a question for the jury, but for the Court. He called on his Lordship to decide it, and he further urged that even if the question were whether defendant believed that he was acting in execution of his duty, the question would still be for the Court, and relied on *Arnold v. Hamel* (9 Exch. 406). His Lordship declined to take the case out of the hands of the jury. Defendant's counsel then stated his case, admitting that the conviction was intended to have been under 24 & 25 Vict. c. 97, s. 25.

Defendant examined.—Have been a magistrate of the County Dublin for 42 years; attended the Blanchardstown Petty Sessions in October, 1865: issued a summons for the plaintiff at the complaint of Scriber. Plaintiff asked for a postponement; I asked him what was the object of a postponement; he said to get the agent. I asked him could the agent do him any good if he was there, or give any evidence in his favour. I am not sure what Malone said; I, after hearing the case, conferred with my brother magistrates; we were unanimous in convicting Ma-

\* See a former motion between the same parties, reported in the *IRISH JURIST*, ante, p. 15.

tone; I believed that Malone was guilty of an offence under 24 & 25 Vict. c. 97, s. 25; I acted on my own recollection of a previous conviction; I have no acquaintance with Scriber at all.

Cross-examined.—The sessions book was not before us at all—it was locked up in a press; but I remembered the old conviction perfectly.

To his Lordship.—My impression is, that I thought Malone wanted the postponement for the purpose of showing that the hedge was his; but I was satisfied that the hedge was not his on the previous inquiry.

Thomas Thomson examined.—I was one of the magistrates present at the hearing of the case at petty sessions. Scriber swore that Malone cut his hedge after being warned by him not to do so. I believed it was Scriber's hedge, and I believed that he had given notice to Malone not to cut it; I am not an intimate acquaintance of Scriber's; I believe it was my duty as a magistrate to do what I did. We looked at the Act of Parliament before convicting.

Cross-examined.—I believe that Malone came there claiming the fence as his. I heard M'Kay, the agent examined in 1859; I think he swore that the hedge and gripe were Malone's; Bentley, the schoolmaster, swore the contrary; I believe we have no jurisdiction in questions of a disputed title. We thought we had jurisdiction in 1859; I believe what Scriber wanted the agent for was to show that the fence was his; I thought that question was disposed of in 1859.

Maurice Flanagan, another of the magistrates, gave substantially the same evidence, and added—After the evidence was given we called on Malone for his defence; he gave no evidence; he said—"I have no answer." In convicting him I *bona fide* believe I was acting as a magistrate. The two senior magistrates remembered the former conviction, but Alderman Mackey and I examined the entry in the petty sessions book of the former conviction; we then referred to the Act of Parliament, and came to the conclusion that the case was one of a second conviction.

Cross-examined.—I remember having told Scriber that I thought the hedge and gripe were Malone's; I told Scriber that according to the custom of the Co. Dublin the fence would appear to be Malone's; but about ten days before the hearing in October, 1864, Malone himself told me that he had been convicted for cutting the hedge, on the ground that the hedge was Scriber's. About ten days before the trial I heard Malone acknowledge that the hedge was Scriber's in Scriber's presence; I still think that the hedge belongs to Scriber; I said nothing to the magistrates about Malone's admission; I did not think he wanted the agent to prove his right to the fence.

Baron Fitzgerald, in his charge, told the jury that the single question in the case was whether in directing plaintiff's imprisonment, defendant was acting in the execution of his office; that if he was, he was within the protection of 12 Vic. c. 16; that it was not necessary for that protection that he was acting pursuant to lawful authority in what he did; but that he must have *bona fide* believed that he was acting pursuant to lawful authority, and that substantially the question for them would be—Did defendant *bona fide*

believe that he was acting pursuant to lawful authority in what he did. He told them that it was not sufficient that defendant should have believed that he was acting pursuant to lawful authority; that a man might believe that which the commonest attention to the facts before him, if he paid it, would have prevented him from believing, and that therefore the question resolved itself into this—Did he really, on the evidence before him, believe in the existence of a state of facts, from which, exercising reasonable care and discretion, a lawful authority to do the act might have been inferred by him. His Lordship pointed out to the jury what the facts were which would have made the conviction lawful, and he called their attention to what, upon the evidence, were the facts before the magistrates, and so left the question to them. On the question of damages his Lordship told them that if they thought money was actually paid by plaintiff, and expended in quashing the conviction, they might consider such sum; but he told them to mention to him distinctly anything they should give on that ground.

Defendant's counsel objected to the charge, and contended that a *bona fide* honest belief does not necessarily mean a reasonable one, and that the only question that ought to have been left to the jury was as to defendant's honest belief; he also repeated the requisitions made by him at the close of plaintiff's case.

The jury found for plaintiff £75 damages, £25 being for the costs of the certiorari proceedings.

His Lordship reserved leave to defendant to move to have a non-suit, or a verdict for defendant entered in case the Court should think the learned Baron ought to have so directed—also leave to have the verdict reduced to £50, in case the Court should be of opinion that no damages ought to have been given in respect of the costs of quashing the conviction.

Serjeant Armstrong, for defendant, having obtained a rule nisi accordingly,

Morris, Q.C. (with him M'Kenna) for plaintiff, showed cause against the conditional order.—24 & 25 Vict. c. 97, s. 25, under which Malone was imprisoned; 12 Vict. c. 16, ss. 8, 9, Magistrates' Protection Act; *Hermann v. Seneschal* (13 C. B. n. s. 393); *Heath v. Brewer* (15 C. B. n. s. 804); *Roberts v. Orchard* (2 H. & C. 769); *Bayley v. Aldred* (10 Law Times, n. s. Q. B. 523.) We give up the point as to the reduction of the verdict to £50.

Serjeant Armstrong (with him Pulles, Q.C. and Napier) contra, in support of the order.—12 Vict. c. 16, s. 1; *Kirby v. Simpson* (10 Exch. 358) decided that a magistrate in a case like the present is entitled to notice. This is an attempt to put a judge on his trial for exercising a judgment which happens not to be the same as some other persons have. In every case where a magistrate is sitting *colori officii*, he is entitled to notice.—*Wheller v. Toke* (9 East. 364). The subject-matter here, as in that case, was within the jurisdiction of the magistrate though subsequently he overstepped his jurisdiction. He was not a wrong doer from the beginning. If a magistrate is acting according to the best of his opinion, that opinion is not to be tried by anyone else. No matter how unreasonably he has acted, if he has acted *bona*

*fide*.—*Haseldine v. Grows* (3 Q. B. 997); *Wedge v. Berkeley* (6 A. & E. 663). There may be *bona fides* without reason.—*Booth v. Clive* (10 Q. B. 827); *Gosden v. Elphick* (4 Exch. 445); *Horn v. Thornborough* (3 Exch. 846); *Beechy v. Sides* (9 B. & C. 806); *O'Bailey v. Lawton* (3 Ir. L. R. 290). When the magistrate became a wrong-doer he should have had notice as a means of repairing his wrong, especially when the law would not allow him to pay money into Court.

*Palles*, Q.C. on same side.—We were entitled to a non-suit, and the learned Baron left the question wrongly to the jury.—*Bird v. Gunston* (4 Dougl. 275); *Briggs v. Evelyn* (2 H. Bl. 114); *Greenway v. Hurd* (4 Term. R. 555); *Daniel v. Wilson* (5 Term. R. 1); *Wheller v. Tols* (9 East. 365); *Queen v. Bokon* (1 Q. B. 66); *Lawrenson v. Hill* (10 Ir. C. L. R. 177); *Parton v. Williams* (3 B. & Al. 330); *Prestidge v. Woodman* (1 B. & C. 12); *Morgan v. Palmer* (2 B. & C. 729); *Beechy v. Sides* (9 B. & C. 806); *Ballinger v. Ferris* (1 M. & W. 628); *Wedge v. Berkeley* (6 A. & E. 663); *Cox v. Reid* (13 Q. B. 558); *Arnold v. Hamel* (9 Exch. 404); *Pease v. Chaytor* (1 B. & Sm. 658; a. c. 9 Eng. Jur. N. S. 664). The defendant was bound by his oath to exercise his own reason, and not to decide according to the reason of others. The question is whether a judicial officer who has acted according to the best of his belief though he may be a fool, is not entitled to notice of action. I say he is; it is the fault of the Crown to appoint him if he is not a reasoning man, and competent for his office, but he is not to suffer for it, and a jury is not to decide whether a person appointed by the Crown has reason or not. I admit he is bound to exercise the reason he has. The only question that ought to have been left to the jury was as to defendant's honest belief, and it should have been left thus if he did believe honestly, though unreasonably, he was still entitled to notice.

*M'Kenna* in reply.—The cases cited on the other side have each an element not existing in the present, and therefore are not authorities. They are nearly all old cases, and in them the question of *bona fides* was not raised; therefore, we may suppose the verdicts were right, but they throw no light on this case for either side. The question in this case is, what is "*bona fides*," and how is it to be construed.—*Rudd v. Scott* (2 Scott N. R. 631); *Read v. Coker* (13 C. B. 850); *Cann v. Clipperton* (10 A. & E. 582).

*Cur. adv. vult.*

Nov. 8.—The unanimous decision of the Court was now given by

*DEAST*, B.—[His Lordship stated the facts of the case and the judge's charge at length, as they have been given above, and proceeded]—We are all of opinion that the judge at the trial was right in the direction he gave the jury. At the argument great reliance was placed on the case of *Kirby v. Simpson* (10 Exch. 358), and if that case was applicable here it would have great weight with us, but we think it was distinct from the present case. It was essential that the question of the *bona fide* belief of defendant should have been left to the jury. But on the part of

defendant it was contended that in the case of a magistrate it was sufficient to entitle him to the protection of the statute that he should have honestly, though not with reason, believed he was acting within his authority, even if he was not. But no authority was cited for this proposition, and the cases go to prove that the *bona fide* belief must be a reasonable one also. There is nothing in *Hermann v. Seneschal* to support defendant's argument. [His Lordship then referred to most of the cases cited in the argument, and concluded]—We are, therefore, of opinion that the conditional order must be discharged.

*FITZGERALD*, B.—I concur with this judgment, but I think it right to state that I would probably have done better if I had used these words, "*ordinary care and discretion*," instead of "*reasonable care and discretion*," but it is evident I was not misunderstood.

*Rule discharged with costs.*

[BEFORE THE FULL COURT.]

*WALSH v. WALSH*.—Nov. 3, 7.

*Practice*—*Right to full costs*—*Payment into Court*.

*In an action for assault and battery, with a second count for disturbance of a right of way, defendant paid £5 into Court (which was accepted by plaintiff) on the second count, and traversed the first, upon which count plaintiff obtained a verdict with £1 damages, the judge not certifying. The Master gave plaintiff his full costs. Held, on motion to send back the case to the Master to review his taxation, that the Master was wrong, and that the taxation must be reviewed.*

THERE were two counts to the summons and plaint—one for assault and battery, the other for a disturbance to a right of way. Defendant traversed the first count, and paid £5 into Court on the second. This sum plaintiff accepted in full satisfaction of his right of action on that count, and joined issue on the first plea, upon which he obtained a verdict with £1 damages, the judge not certifying, and the taxing master gave full costs to the plaintiff.

*DAMES*, now for defendant, applied to the Court that the case should be sent back to the taxing master in order that he might review his taxation. The only question in the case is, whether plaintiff is entitled to full costs down to the verdict. [*Fitzgerald*, B.—If there were only the first count in the summons and plaint, plaintiff could not have his full costs as having recovered less than £2, and if there were only the second count, he would be entitled to costs only down to the drawing of the money out of Court.] Precisely. The sections of the Common Law Procedure Act applicable to this case are ss 5, 54, 75, 76, 77, 126. That part of an action for which money is paid into Court and accepted, must be considered as struck out of the plaint.—*Blackmore v. Higgs* (15 C. B. N. S. 790). [See the dictum of Erle, C.J.] *Devine v. London and North-Western Railway Co.* (10 Ir. Jur. N. S. 26); *Sumner v. Vane* (29 Law

Jour. n. s. Q. B. 162). Plaintiff would not have been able to pay money into Court on the count for assault and battery.—*Goodle v. Goldsmith* (2 M. & W. 202).

*Ryan* contra, for plaintiff in support of the ruling of the taxing master referred to. *Hughes v. Guinness* (4 Ir. C. L. R. 314; s. c. 7 Ir. Jur. 298); C. L. P. Act, s. 243.

*Jur. adv. vult.*

Nov. 7.—The unanimous judgment of the Court was now given by

PIGOT, C.B.—There has been some fluctuation in courts of law as to the meaning of the word “recovered” in the statute, both here and in England. In England it was held, in the case of *Boulding v. Tyler* (3 B. & S. 473), that where defendant pays into Court a sum less than £20 which is accepted by plaintiff, plaintiff must be held not to have “recovered” that sum. In this country, in the case of *Hughes v. Guinness* (4 Ir. C. L. R. 314) it was held that where plaintiff accepted a sum less than £20 which was paid into Court, and afterwards recovered a further sum also less than £20, which, however, being added to the former sum, exceeded £20, he was to be treated as entitled to full costs. That decision was in accordance with the case of *Fenster v. Boggett* (9 M. & W. 20), and also *Crosse v. Seaman* (11 C. B. 424) referred to in 4 Ir. C. L. R. 317. If plaintiff had disputed the sufficiency of the sum paid into Court in this case, and had then obtained a sum however small in excess of that payment on the second count, say one shilling over and above the £5, and nineteen shillings on the first count, we would then consider that plaintiff had recovered £5 + 1 shilling + 19 shillings, that is, £6 in all, and was therefore entitled to his full costs. But the case is otherwise; there are two counts, each separate and distinct from the other. On one, defendant paid £5 into Court under s. 75, which plaintiff accepted, and by that acceptance he put an end to that cause of action. There remained then only the count for the assault and battery, and if so, the case is directly within s. 126, and the jury found for plaintiff with £1 damages, no certificate being given by the judge. We are, therefore, of opinion that this motion must be granted, and the taxation must be reviewed.

*Motion granted with costs.*

KENNEDY v. KELLY.—Nov. 10.

*Motion to set aside plea for embarrassment—Goods sold and delivered.*

In an action for goods sold and delivered, a plea “that no money was payable by defendant to plaintiff for goods sold and delivered by plaintiff to defendant as alleged,” will be set aside as embarrassing and too large.

THE summons and plaint was—“Defendant is indebted to plaintiff in the sum of £44 on account of money

payable by defendant to plaintiff for goods sold and delivered by plaintiff to defendant.” The defence was—“Defendant says no money was payable by defendant to plaintiff for goods sold and delivered by plaintiff to defendant as alleged.”

LITTON, for plaintiff, applied to the Court to set aside the plea as embarrassing. The plea is too large and clearly ambiguous.

M’MAHON, contra, for defendant, in support of the plea.—The plea was drawn by defendant in person, who is a member of the bar, not practising now; but it is a good plea, for it raises a good issue. The past tense, “no money was payable,” means “never was payable.” The debt never was incurred.—*Martin v. M’Hugh* (6 Ir. Jur. 279).

LITTON in reply.—In *Cock v. Mahony* (3 Ir. C. L. R. 240), Lefroy, C. J. said *Martin v. M’Hugh* was not correctly reported.

PIGOT, C.B.—In *Lord Dunsandle v. Finney* (10 Ir. C. L. R. 171), I made an observation which I mean to repeat here, viz.—“It is of great importance that parties and their advisers shall not be exposed to delay, inconvenience, and expense in dealing with defences of this nature. This is the second time that a motion has been rendered necessary in consequence of the same kind of inconvenience imposed upon a plaintiff by the same fault in a defendant’s pleading.” We have held that pleas tantamount to the present one are too large, and give a larger proof to defendant than the statute intended him to have. Here the plea is open to the charge of ambiguity as to whether it means that defendant never was indebted to plaintiff at any time, or that defendant was not indebted to plaintiff at the time of action brought; and this latter signification is consistent with the assumption that he had been originally indebted, but that the debt had been discharged. If it means that defendant never was indebted, it is too large. Defendant does not traverse the consideration. Nothing is easier than the usual form, and when there is a departure from this, the circumstance becomes suspicious, and likely to embarrass plaintiff, who cannot tell what defence he has to meet. I have made those observations in order to point out to the Bar that we will accurately scrutinize these departures from the usual forms, which will not be suffered to stand.

*Defence set aside with costs.*

## Court of Probate.

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law.

LAWLER v. METCALF.—Nov. 6, 7.

LAWLER v. MILEY.

*Administration—Nominee of next of kin—78th sect. of Probate Act—Lunatic.*

Where M. L. a sole next of kin of A. and B., her deceased brother and sister, had been of weak mind and of advanced age, and a commission in

*Chancery had been granted to inquire into her state of mind, but same had been directed not to issue until further order, and had never been acted on, and by the order in Chancery she was expressly authorized to manage and receive the income of the property belonging to her said deceased brother and sister, the Court of Probate refused to give letters of administration to the goods of the said brother and sister to a nominee of M. L., the sole next of kin, limited to the income thereof only, and during her life, under the 78th section of the Probate Act of 1855—one of the persons who would be next of kin of M. L., such sole next of kin, if dead, opposing the motion, but directed an application to be made to the Court of Chancery to appoint a person to be named to apply for administration.*

Dr. Townsend, Q.C. moved, on behalf of Mary Lawler, to set aside the caveats and appearances entered by the defendants in said respective causes, as having no interest in the assets of the brother and sister of said Mary Lawler. Rose Lawler died, on the 5th December, 1865, intestate and unmarried, and not leaving any parent or grandparent, or brother, and leaving said Mary Lawler, her only sister and sole next of kin, and not leaving any grandchild, the issue of a deceased child, surviving. A brother had died previously to Rose, leaving Rose and Mary Lawler, and two other sisters, his only next of kin. Rose and another sister had obtained administration to his assets, but all of them were now dead except Mary Lawler. The assets of Rose and John Henry Lawler were considerable, and were under the control of the Court of Chancery. A petition in Chancery had, in July, 1866, been filed by a first cousin of Mary Lawler, and prayed a commission *de lunatico inquirendo* to be issued as to Mary Lawler, whose age was about 85. She had been for several years an inmate of Swift's Hospital, but had not been under restraint for upwards of twenty years past, during which period she had been regarded as sane. The commission had been granted, but it was at the same time ordered by the Chancellor, that it should not be acted on until further order, and that Mary Lawler should be allowed to continue in the possession of the income of the property. The Bank of Ireland, in which most of the assets were secured, would not, of course, pay the dividends until administration had been taken to Rose, and administration *de bonis non* to John Henry Lawler. From the great age of Mary Lawler, and from the fact of a commission having issued from Chancery, counsel submitted that perhaps the case was one in which the Court would consider it to be a fit case to act under the 78th section of the Probate Act, and to follow the authority of the case in *The Goods of Roberts* (1 S. & Tr. 64), and give the grant to a nominee of the next of kin, who was perfectly competent to attend to her own affairs, and to name a substitute. James Metcalf would be a proper administrator, as it was sworn in the Chancery matter that he had for several years been acting as the agent of Rose Lawler in her life, and of Mary Lawler.

Robert O'Hara for Thomas Ryves Metcalf, a first cousin of the applicant, opposed the motion. He

would be, if Mary Lawler were dead, her next of kin, and therefore had, if she were declared a lunatic, a possible interest in the assets entitling him to ask for administration.—*Close v. Monkhouse* (17 Jur. 536). He will undertake to speed the commission, and apply to the Court of Chancery.

J. B. Murphy in reply.—We are content if James Metcalf, who for eleven years managed the property for Rose and Mary Lawler as their agent, be appointed administrator.

KEATINGE, J.—I cannot in this case give a grant, as the order in Chancery in terms only allows Mary Lawler to deal with the income of the assets; but an application must be made to the Court of Chancery to name a proper person to take a grant, as a difficulty would arise as to the corpus of the estate, if I gave a limited grant.

*Order accordingly.*

M'CRACKEN v. M'CRACKEN.—Nov. 10.

*Lost will—Probate of contents.*

*A will prepared by a solicitor from instructions of the testator, and the contents deposed to by him, allowed to be proved, though the original was lost, and supposed to have been thrown out by the widow of the testator in a bed in which she had concealed it. The Court, however, required evidence of the provisions made by settlement for next of kin not substantially provided for by said will, to show that the will was, in fact, an equitable one.*

John Frazer, for John M'Cracken, Hugh M'Cracken, and Eliza M'Cracken, the executors named in the last will and testament of William M'Cracken, moved, on notice, for probate of the will of the said William M'Cracken, dated the 30th day of March, 1865, as contained in the affidavit of Thomas Murphy, solicitor, limited until the original will, which was lost, should be brought into, and left in the registry of the Court, and for the costs of the application as part of the executor's testamentary expenses.

It appeared from the affidavit of Thomas Murphy, solicitor, that he had been acquainted with William M'Cracken for five years before he died, which occurred on the 6th May, 1865; that on the 27th March, 1865, Francis Wrey, a son-in-law of said deceased, called on Mr. Murphy to appoint a time for Mr. Murphy to attend at the residence of the deceased to prepare his will. The following Thursday, the 30th of March, was then agreed on, and on that day, at 3 o'clock, p.m., Mr. Murphy proceeded to the house of deceased, and met on his way, his eldest son, John M'Cracken, and a man of the name of John Ratcliff, when the former told the latter the object of Mr. Murphy's visit, and requested Ratcliff to attend to be a witness to the will. The affidavit detailed minutely the taking of the instructions from the deceased, and his capacity, the engrossment and reading over and approval of the will, and that the draft was, by said deceased's desire, destroyed in his presence by burning. The due execution was then deposed to, viz., by the deceased signing in the presence of Mr. Mur-



phy, and of Ratcliff, present at the same time, and who attested in the presence of the testator and of each other. The will was sealed up, and, by the direction of the testator, taken possession of by Mr. Murphy, who deposited it in his office for safe custody. The will remained in Mr. Murphy's hands until some time in August following, when John M'Cracken and Hugh M'Cracken, two sons of the deceased, and two of his executors, who took said will away with them, and same was then unopened and sealed. John M'Cracken, on the 29th October following, told Mr. Murphy that he had given the will to Eliza M'Cracken, his mother, to keep, who had deposited it under her bed, and that it had been lost, and could not be found. The contents of the will were set out in *hæc verba* by Mr. Murphy, from his recollection, and it gave legacies to the several members of his family in a fair proportion, and appointed the executors already mentioned. Mr. Murphy was corroborated by Mr. Ratcliff as to the preparation, instructions for, and execution of the will, and of its custody by Mr. Murphy. The widow, Eliza M'Cracken, also corroborated the case made by Mr. Murphy, and added several recognitions by said testator of his said will, and accounted for its loss by the fact of the bed in which it was concealed having been, in September, 1865, carried out by her to the yard to be aired and renewed, and that portions of it were removed and thrown on the manure heap, and that in that manner the original will may have been lost. The several next of kin who had any interest in opposing the motion had been served with notice, and an affidavit had been filed showing that they had got a fair provision on their marriages.

Counsel cited *Goods of Gardner* (1 S. & Tr. 104); *Miller's Pr.* Pr. 82.

No one appeared to resist the motion.

KEATINGE, J.—Cases of this kind require the clearest evidence, but I think that you have satisfactorily made out the facts to entitle you to carry your motion, and I shall, therefore, allow you to apply for and obtain, in the registry probate of the will of the deceased as contained in Mr. Murphy's affidavit, and allow the executors the costs of the proceedings as part of their testamentary expenses.

## Court of Appeal in Chancery

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

[BEFORE BLACKBURNE, C., AND BREWSTER L.J.A.]

MICHAEL MURPHY AND OTHERS, ASSIGNEES OF PATRICK MURPHY, OWNER AND PETITIONER.

MOORE v. GUINNESS, MAHON, & Co.—Nov. 20, 1866.

*Voluntary deed—Settlement on children of a former marriage—10 Car. I. ch. 3, sec. 2 (Ir.)*

*P. M. a widower, being seised of certain lands in the county Dublin, and being about to marry a second*

*wife, and being desirous of making not alone a provision for her and any children he might thereafter have by her, but also for the children of his former marriage, executed on the 15th November, 1855, immediately prior to his second marriage, two contemporaneous deeds, by the one providing for his future marriage, and by the other granting to a trustee for a term of years an annuity of £75 issuing out of said lands for the benefit of the said children of P. M.'s said first marriage. To this last mentioned deed his then intended second wife was no party whatever. After his said second marriage, viz., on 2nd November, 1865, P. M. made an equitable mortgage to G. and M. to secure a sum of £——. Held, affirming an order of the Landed Estates Court, that the deed creating said annuity was a voluntary deed within the meaning of 10 Car. I. chap. 3, s. 2 (Ir.) and that therefore said equitable mortgage to G. and M. for £——, though subsequent in date, should take priority over same.*

THIS was a petition of appeal by Murtagh Moore from an order of Judge Dobbs, dated the 7th May, 1866; the facts of the case are as follow:—In the year 1855, and prior to the execution of the indenture of settlement hereinafter stated, Mr. Patrick Moore was seised of certain lands in the county of Dublin, which had been sold in this matter. Patrick Moore was then a member of the extensive firm of Moore, Brothers, railway contractors, and had realized and was possessed of very large property over and above all his just debts and engagements. Said Patrick Moore had in the year 1849 effected two policies of insurance upon his own life, in the respective sums of £1000 each, with the directors of the Great Britain Mutual Life Insurance Company, numbered 1,073 and 1,074 in the books of said company, and subject to the respective annual premium of £37 10s. each, payable on the 31st of December in every year. Patrick Moore was then a widower, and had several children by his then deceased wife—viz. James, Alice, Bridget, Elizabeth, and John Moore, as a provision for whom he had effected the said two insurances upon his life. In the year 1855, Patrick Moore being about to marry a second wife, was desirous of making a provision by way of settlement both for his then intended wife and her children, and also for the children of his former marriage. This object was effected by two contemporaneous deeds, both dated the 15th day of November, 1855, the one made between the said Patrick Moore of the one part, and the Rev. Peter M'Ardle and John Gartlan, medical doctor, of the other part; and the other made between the said Patrick Moore of the one part and the petitioner of the other part. By the former of these deeds Patrick Moore made for his intended wife certain provisions which were immaterial to the matter of this petition. By the second of these deeds Patrick Moore assigned to the petitioner the two several policies of insurance hereinbefore mentioned upon the trusts hereinafter stated, and further granted to the petitioner, his executors, administrators, and assigns, for 100 years, if the said Patrick Moore should so long live, an annuity of £75 1s. 8d. issuing out of the lands aforesaid, which were sold in this matter, and were in the

said deed fully described, to hold the same upon the trusts hereinafter stated; and the trusts of the said deed were thereby declared to be—that the petitioner should apply the said annuity of £75 1s. 8d. in discharge of the annual premiums payable in respect of the said two policies of insurance as they should fall due, and should receive the monies payable on account of said policies of insurance and stand possessed thereof in trust for the children of the said Patrick Moore by his deceased wife in such shares and proportions as the said Patrick Moore should from time to time appoint, and in default of appointment in trust for the said James, Alice, Bridget, Elizabeth, and John Moore, share and share alike. The petitioner expressly agreed with the said Patrick Moore to execute said deed and to act as the trustee of the said indenture upon the understanding and in consideration that thereby a good and effectual provision was made for the children of the said first marriage; and the intention of the said Patrick Moore to make such provision for his children of his former marriage was communicated to and acquiesced in by his then intended wife and her family. The said indenture providing for the children of his former marriage was actually executed by Patrick Moore prior to his second marriage. The second indenture of the 15th of November, 1855, was executed by the said Patrick Moore in contemplation of and as part of the arrangement of his property effected in connexion with his said second marriage, and for the purpose upon that occasion of providing for the children of his former marriage. The then intended marriage was subsequently solemnised. The indenture secondly hereinbefore stated was, under the circumstances aforesaid, executed by petitioner, and for his protection duly registered in the Office for the Registration of Deeds in Ireland on the 5th of December, 1856. On the 2nd of November, 1862, Patrick Moore deposited with Richard Guinness, John Ross Mahon, Henry Guinness, Thomas Rawdon Hardy, and Charles Uniacke Thompson, the then members of the firm of Guinness, Mahon, & Co., the title-deeds of the property hereinbefore mentioned (which was sold in this matter), together with a certain letter of equitable deposit dated the 1st day of November, 1862, addressed to the said Messrs. Guinness, Mahon, & Co., whereby in consideration of the advances then made by the said firm of Guinness, Mahon, & Co. to the firm of Moore, Brothers, and of such further advances as they might make, he declared that the said title-deeds were deposited as a collateral security, and he thereby granted them an equitable mortgage thereon to the extent of such advances as were then made or might thereafter be made. In the year 1862 the firm of Moore, Brothers, having become embarrassed, Patrick Moore, in conjunction with his partners, on the 20th December, 1862, presented a petition to the Court of Bankruptcy in Ireland, and subsequently passed through that court under the arrangement clauses. The property of Patrick Moore hereinbefore mentioned was subsequently vested in the owners and petitioners in this matter as trustees on behalf of the creditors of the firm of Moore, Brothers, by whom the petition in this matter was presented. By an order made in this matter, dated the 29th of May, 1865, it was ordered that the aforesaid

lands should be sold, discharged of the said annuity vested in the petitioner under the said indenture of the 15th of November, 1855, and that the petitioner should be placed on the schedule in the proper order of his priority. The amount due by the Messrs. Moore, Brothers, to the Messrs. Guinness, Mahon, & Co. was ascertained to amount to the sum of £4,553 11s. 11d. In the settlement of the final schedule the amount due to the firm of Messrs. Guinness, Mahon, & Co. on foot of said equitable mortgage was placed in priority to the said annuity of £75 1s. 8d., created by the said deed of the 15th November, 1855, and vested in the petitioner as aforesaid. After the payment of the incumbrances upon the final schedule prior to the demand of the Messrs. Guinness, Mahon, & Co., there remained in the court the sum of £3,548 0s. 4d. Previous to the payment of the Messrs. Guinness, Mahon, & Co., the petitioner applied to the Honorable Judge Dobbs to stay such payment as the question of priority between their claim and that of the petitioner was not adjudicated upon in consequence of a miscarriage in respect to the settling of said final schedule. This application of the petitioner was refused by the judge, who stated that the petitioner might apply to have the money brought back into court by the Messrs. Guinness, Mahon, & Co. On the 3rd of March the said sum of £3,548 0s. 4d. being the balance then remaining in court, was paid to the Messrs. Guinness, Mahon, & Co. on the understanding that they would abide any order the Court might subsequently make in respect thereof. On the 7th of May, 1866, counsel on behalf of the petitioner moved the Honorable Judge Dobbs for an order declaring that the claim of the petitioner under the said indenture of the 15th day of November, 1855, was a charge prior in point of time and in point of law to that of Messrs. Guinness, Mahon, & Co.; and that in the event of such order being pronounced that the Messrs. Guinness, Mahon, & Co. might be directed to bring in and lodge in court the money paid to them in this matter on the 3rd of March, 1866, or a portion thereof sufficient to satisfy the demands of the petitioner as trustee of the said indenture of the 15th of November, 1855. On the 7th of May, 1866, and upon the occasion of such motion, the Court refused the order, being of opinion that the deed under which petitioner claimed was a voluntary deed; but in order to enable petitioner to appeal from said order, the Court gave petitioner liberty within one fortnight to file an objection *nunc pro tunc* to the final schedule. On the 22nd of May the petitioner, pursuant to the leave reserved by the said order, filed an objection to the final schedule in this matter, and thereby objected to the said schedule, for that the petitioner's said demand was prior in point in point of date and of law to the claim of Messrs. Guinness, Mahon, & Co. aforesaid. Petitioner was advised that the said order of the 7th of May, 1866, was erroneous, and therefore prayed that the said order might be set aside, and that it might be declared that the claim of the petitioner, under the indenture of the 15th of November, 1855, was a charge prior in point of date and in point of law to the claim of Richard Seymour Guinness, John Ross Mahon, and Henry Guinness, the present partners of the firm of

Guinness, Mahon, & Co.; and that in the event of such order being pronounced, the said R. S. Guinness, J. R. Mahon, and H. Guinness, might be ordered to bring in and lodge in court the money paid to them in this matter on the 3rd of March, 1866, or a sufficient part thereof to meet the demand of the petitioner as trustee under the said indenture of the 15th November, 1855.

It was admitted by respondents that Patrick Moore on the 1st of November, 1862, deposited with Richard Seymour Guinness, John Ross Mahon, and Henry Guinness, Thomas Rawdon Hardy, and Charles Uniacke Townsend, the then members of the firm of Guinness, Mahon, and Company, the title deeds of the premises sold in this matter, except the conveyance of the lands of Edenmore, and at same time deposited the letter of equitable deposit in petition mentioned; and afterwards, on the 3rd day of November, 1862, in pursuance of said letter, deposited with the same persons the conveyance of Edenmore as aforesaid, which deeds had, ever since they were so deposited, remained in the possession of the said firm until same were lodged in the Landed Estates Court in pursuance of a notice served on the said firm for that purpose. And respondents insisted that they were now the persons entitled to all the interest and benefit of the said firm in the said equitable mortgage, and that at the time of the payment to respondents of the balance in court, as stated in the 23rd paragraph of the petition, there was due to respondents, on foot of said equitable mortgage for principal, the sum of £4,142 11s. 6d., and for interest up to the 3rd day of March last the sum of £411 0s. 5d., making together the sum of £4,563 11s. 11d.

*F. Walsh, Q.C. (with Richey)*, appeared in support of the appeal.—The Court below was wrong in making the order of the 7th of May, 1866. The children of a former marriage were provided for on the second marriage by deed; and contrary to the current of decisions, it is sought to set that deed aside. The leading case on this branch of the law is *Clark v. Wright* (6 Hurl. & Nor. 849). The marginal note in that case is as follows:—"D., a widow, being possessed of certain real property, by settlement in contemplation of her marriage, dated 17th of May, 1830, reciting that upon the treaty for the marriage it was agreed that her property should be appointed, released, and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder as to part to her husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a person claiming title under the mortgage it was proved that in October, 1830, the husband and wife let the property to T., and received the rents of it for some years. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), first, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void as against the mortgage by the 27 Eliz. ch. 4; *dissentiente*—Williams, J." Two questions present themselves for solution—first, are provisions made, in contemplation of a second marriage, on existing children binding and not fraudulent

within the 10 Car. I. (Ir.) ch. 3, s. 2; second, are they of such a character as to lead to the conclusion that they were discussed and made part of the marriage contract—of the reciprocal considerations between husband and wife—for if so they are not voluntary. Previous to considering those two questions let us put a question in the language of Cockburn, C.J. in *Clark v. Wright* above recited. "Suppose two persons about to marry, one of whom has children by a former marriage, and that they agree by articles to make provision for those children, would not that be valid?" That is the identical case we are now dealing with. Now upon the first question we are considering, the above-cited case of *Clark v. Wright* is directly in point. The lady there, who was actually getting married, provided for her own bastard child, and the settlement was held good; apply this case to the present. [*The Lord Justice of Appeal* did not think that *Clark v. Wright* was as much in point as was relied upon by Mr. Walsh, Q.C. That case was where the property was kept by settlement from the husband and settled upon the lady's illegitimate child. Is not that widely different from the husband interfering with property coming from himself?] In both cases the agreement forms part of the marriage contract. In *Newstead v. Searles* (1 Atk. 264), "a widow had two children by a former husband and no provision made for them, and being in possession, in her own right, of freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and she, by his consent, conveys the whole to trustees, that they should divide the freehold, copyhold, and leasehold, if no issue of the marriage, in moieties; one to the plaintiff, her grandson, his heirs; and assigns, the other to her granddaughter, in fee; provided that if there be any child or children of the marriage, that child or children to have an equal share of the estates with the grandson and granddaughter. The husband and wife afterwards mortgaged the settled estates to persons who had notice of the settlement. Held, that the settlement was no voluntary agreement but a binding one; and in no instance has such a limitation been held fraudulent and void against subsequent purchasers or creditors, for if it should no widow on her second marriage would be able to make any certain provision for the issue of a former." [*The Lord Justice of Appeal*.—Your argument is that this is a mutual agreement between the husband and wife, and that the husband and wife agreed by the deed to provide for the children of the former marriage. There is not a particle of evidence to show that the wife here insisted upon such a provision being made. Show me that she held and refused to marry her husband until he provided for the children of the former marriage. It is contrary to all experience that any woman would so insist upon this being made one of the stipulations of her marriage that the children of a former marriage should be provided for.] Those deeds were executed immediately before the marriage, and the marriage will be implied as one of valuable consideration. In *Clayton v. Lord Wilton* (3 Mad. 302, note), it was held that limitations in a marriage settlement in favor of the issue of a second marriage by the settlor was held good against a purchaser for valuable consideration.

*Flanagan, Q.C. (with Owen).*—The order of the Court below is correct. The deed under which the petitioner claims is a voluntary conveyance within the operation of the statute of 10 Charles I., ch. 3, sec. 2 (Ir.) The argument on the other side goes a great length, that the issue of a former marriage were as much within the consideration of the second marriage as the children of that second marriage. There is not a particle of evidence here that this lady was aware of this provision for the children of the first marriage. *Johnson v. Legard* (3 Mad. 283) decides that limitations in a marriage settlement to the brothers of the settlor are not good against a subsequent purchaser for valuable consideration. Lord St. Leonards in the 14th edition of his book of Vendors and Purchasers, 717, 718, explains the case of *Clayton v. Lord Wilton*, and distinguishes that case. There were limitations interposed between the limitations to the sons of the first marriage and the daughters of such; but here, in truth, it was not a marriage settlement at all. The woman who was getting married was made no party whatever to the transaction. —*In Re Cullen's Estate* (14 Ir. Ch. 507). The marginal note in *Re Brown's Estate* (13 Ir. Ch. 283) is as follows:—"In an ordinary marriage settlement, where the lands settled are the property of the husband, the latter cannot be considered as a purchaser for valuable consideration of the life estate in those lands limited to him by the settlement. Therefore where A., by a settlement executed in contemplation of his marriage, settled lands of which he was owner in fee to himself for life, remainder to provide a jointure for his widow, remainder to the children of the marriage, it was held that a judgment which was previously to the execution of the settlement a charge on the lands was still a subsisting charge on the husband's life estate, notwithstanding that the said judgment had not been registered pursuant to the 7 and 6 Vic. c. 90, within the time (viz. five years) required by the 13 & 14 Vic. c. 29, s. 3, for keeping it in force against purchasers under the settlement."

*Richey* replied.—*Newstead v. Searles* (1 Atk. 265) is an authority to show that a provision made on a second marriage for the children of a former is a good provision. [*The Lord Justice of Appeal.*—But there is not a single authority for a settlement by the intended husband. A settlement by a widow is different from one by a widower].

THE LORD CHANCELLOR.—The appellant in this case is a Mr. Murtagh Moore, a trustee in the deed which was executed upon the 15th of November, 1855. That deed was made between Patrick Moore (who was then getting married to his second wife) of the one part, and Murtagh Moore, who, as I just observed, was a trustee of that deed, of the other. It is contended by the appellant that the children of the first marriage were purchasers for valuable consideration. Judge Dobbs held that that deed was a mere voluntary deed, and I think that learned judge was right. There is nothing to warrant us in saying that the second wife made the slightest stipulation, or that she was in any way aware that the children of the first marriage should be provided for, as clearly they were, by the deed in question. There were two deeds made on the same day, and in both deeds Patrick Moore

was party thereto of the first part; but in both deeds the other parties were altogether different. In fact, the two deeds were perfectly independent and unconnected; and it is in my opinion to refer the act of the husband to any contract or treaty connected with the marriage, or to put it otherwise than carrying out his own intention to provide for his three children. It appears to me then that this deed providing for the children of a former marriage of Mr. Moore, such provision not being insisted on by his then intended wife, not being a portion of the second marriage contract is a voluntary deed within the meaning of 10 Char. I., ch. 3, s. 2 (Ir.)

THE LORD JUSTICE OF APPEAL CONCURRED.

Order affirmed.

## Court of Chancery.

Reported by Oliver J. Burke, Esq. Barrister-at-Law.

DUNLOP v. DUNLOP.\*—April 26—June 22, 1866.

*Practice*—Amendment of cause petition after decree.

Where petitioner filed his cause petition praying that a sum of money secured by the two promissory notes of a married woman should be paid out of her separate estate, and where the Court made a decree for said petitioner on the 26th of April, but where after the making of said decree, viz., on the 22nd June, it was discovered that the petition was defective for want of parties in this, that the trustee of said settlement was omitted as a party respondent, Held, that the petitioner should at that late stage of the case have liberty to amend.

THIS suit was by Thomas Dunlop against Martha Dunlop and her husband, Robert Dunlop, for the purpose of having two sums secured by two promissory notes of the respondent, Martha Dunlop, raised out of certain freehold landed property which was assigned to a trustee for her separate use by settlement, dated the 6th August, 1862, and which was entered into on the intermarriage of the respondents. The petition prayed for a receiver over certain landed estates in Ireland, portion of the separate estate, and if requisite for a sale thereof. The petition stated that by the settlement the property was conveyed to the trustee, one Rowe, described as of New York, in America, upon trust, as above stated. That he never executed the articles, but that he managed for the benefit of Mrs. Dunlop, certain portions of the property which were in America; but that he never managed or interfered with the Irish property. That at and ever since the making of the settlement he resided and continues as a permanent resident in America; and that the respondent, Robert Dunlop, is a discharged insolvent debtor.

*Brewster, Q.C. (with whom was James Wilson),* for the petitioners, cited *Bulpin v. Clarke* (17 Ves. 365); *Gaston v. Frankum* ((2 De G. & Sm. 561);

\* *En relatione.*

*Murray v. Barlie* (3 Myl. & K. 209); *Aylett v. Ashton* (1 Myl. & Cr. 105); *Vaughan v. Vanderstegen* (2 Drew, 165).

*Macdonagh, Q.C.* (with whom was *Adair*) for the respondent, *Martha Dunlop*, who under order of the Court was permitted to defend separately. After contest and doubt on the part of the Court whether—under the circumstances detailed and sworn to—the promissory notes which were executed by *Mrs. Dunlop* specifically charged her Irish freehold so as to have the debt, which was her husband's, raised thereout as sought. [Counsel cited *Johnson v. Gallagher* (7 Jur. n.s. 275), and the judgment of Lord Justice Turner, as to the effect of the statute of *Frauds*.]

The LORD CHANCELLOR declared that there would be a decree for the petitioner with costs, expressing doubts as to how it could be carried out.

June 22.—Petitioners applied by motion on notice that the decretal order to be made should be that the cause stand over till the first day of the next Michaelmas Term, with liberty to the petitioner to amend the cause petition by inserting therein the name of the trustee *Rowe* as a respondent, and for liberty to apply at the Rolls, or, if necessary, to the Lord Chancellor; meantime to substitute service on said *Rowe* in such manner as petitioner might be advised.

Counsel for the respondent, *Martha Dunlop*, resisted the order now sought, on the ground of its being a contravention of the general orders and practice of the Court to make such an order; and relied on the absence of a precedent for such an order having ever been made after lapse of such a time since the making the decree, which was on the day of hearing.

THE LORD CHANCELLOR granted the order sought, saying it had been in some measure suggested by himself on finding difficulty in making up his decretal order.

## Court of Exchequer Chamber.

### REGISTRY APPEALS.

Reported by William Woodcock, Esq., Barrister-at-Law.

[BEFORE O'BRIEN, J., FITZGERALD, HUGHES, AND DEASY, BB. AND GEORGE, J.]

SULLIVAN, APPELLANT; LEE, RESPONDENT.

November 28.

*Statute 13 & 14 Vic. c. 69, s. 5*—*Rated occupiers in boroughs—Occupation for twelve months.*

*The law does not recognize any fraction of a day.*

*A. claiming as a rated occupier had entered into possession of the rated premises between the hours of twelve o'clock, at noon, and two o'clock, in the afternoon, of the 20th July, 1865. B. claiming in the same way had entered between eleven o'clock, in the forenoon, and twelve o'clock, noon, on the 20th July, 1865. Both had continued to occupy up to and after the 20th July, 1866. Held, that both had occupied "for the space of twelve calen-*

*dar months next before the 20th July," 1866, and were therefore (all other conditions having been fulfilled) entitled to be registered.*

THIS was a case stated by the Chairman of the West Riding of the County of Cork. The case stated was as follows:—At the Court of Revision held by me at Bandon for the borough of Bandon Bridge, on the 17th day of October, 1866, the name of Philip M'Mahon appeared on the list (No. 7) of persons claiming to have their names on the register of voters for the borough of Bandon Bridge, as Philip M'Mahon, rated occupier of glue works and land at Kilbrogan, rated at £10 10s.; and service of notice of objection having been duly proved, said appellant duly proved that he entered into possession of the rated premises, as tenant thereof, between the hours of twelve o'clock at noon and two o'clock in the afternoon, on the 20th day of July, 1865, and continued to occupy same up to and since the 20th day of July, 1866, as tenant. The premises were sufficiently rated, and all the rates have been duly paid. I held that the said occupation was not for the space of twelve calendar months next before the 20th day of July, within the meaning of the 13th and 14th Victoria, chapter 69, section 5. I accordingly allowed the objection, and expunged the name of the said Philip M'Mahon from the said list of voters. If I was wrong in so doing his name is to be replaced thereon. And at the same Court then and there held by me the name of Jeremiah Sullivan appeared on the list (No. 11) of persons claiming to have their names on the said register of voters, as Jeremiah Sullivan, rated occupier of house and yard, rated at £2; also of house and yard rated at £4 10s., and also of offices, stable, and shed rated at £1 10s., together making £8; and service of notice of objection having been duly proved, said appellant duly proved that he entered into possession of the portion of the rated premises valued at £1 10s. as tenant thereof between the hours of eleven o'clock in the forenoon and twelve o'clock, noon, on the 20th day of July, 1865, and that he was for several years previously in possession of the remainder of the rated premises as tenant or owner thereof, and so continued to occupy same as tenant up to and since the 20th day of July, 1866. The premises were sufficiently rated, and all rates had been duly paid. I held that the said occupation was not for the space of twelve calendar months next before the 20th day of July, within the meaning of the 13th and 14th Victoria, chapter 69, section 5. I accordingly allowed the objection and expunged the name of the said Jeremiah Sullivan from the said list of voters. If I was wrong in so doing his name is to be replaced thereon. And it appearing to me that the validity of the objection to said claim of Jeremiah Sullivan, of Clantool, depends and has been decided by me upon the same point of law as that on which the case of Philip M'Mahon depends. I declare that the appeals against my decision in both these cases ought to be consolidated, and with their respective consent I name the said Jeremiah Sullivan to be the appellant, and Matthew Lee to be the respondent, in such consolidated appeal, and respectively to prosecute and answer the same according to law.

*Sullivan, Q.C.* (with him *Waters*), for the appellant.—The decision of the Chairman was clearly erroneous. The law recognizes no such thing as a fraction of a day; and an entry at or after twelve o'clock is an entry from the first moment of the day. *The Queen v. The Inhabitants of St. Mary's, Warwick* (1 Ell. & Bl. 816), which turned on the construction of the English Settlement Act, is a direct authority on the point. [*Fitzgerald, B.*—Has it not always been held that a man is of age at the earliest moment of the day preceding his birth-day?] Yes. That was held in *Anonymous* (1 Salk. 44).

*Kaye contra.*—The case depends on the construction to be put on section 5 of Statute 13 & 14 Vic. c. 69, the words of which are peculiar. That provides that a rated occupier in a borough shall not be registered in any year "unless he shall have been such occupier for the space of twelve calendar months . . . next before the twentieth day of July in such year." The party must have occupied for a whole year next before the 20th July. A case on the Settlement Act has been referred to on the other side, but *The King v. Astley*, cited in 4 Burns' Justice of the Peace, seems to conflict with that case. [*Fitzgerald, B.*—There was a day short in the case which you refer to.] There are decisions upon the notices to be given on appeals from magistrates under Statutes 44 G. 3, c. 143, in which it has been held that the notices must be exclusive of the first day. [*Fitzgerald, B.*—That is upon an entirely different class of question—namely, as to the mode in which the calculation is to be made.] Under section 77 of the Statute 13 & 14 Vic. c. 69, it has been always held that the six days' notice of appeal there mentioned must be exclusive of the day of service. [*Fitzgerald, B.*—That is also a different point. It was held that the days must be clear days.]

*Waters* (with *Sullivan, Q.C.*) was not called on.

*O'BRIEN, J.*—The decision below must be reversed in both these cases.

*Sullivan, Q.C.*, asked for costs, saying that the old rule of not giving costs where the decision below was reversed had been abandoned in England.

*O'BRIEN, J.*—It has always been the practice of this Court not to give costs where the decision below was reversed. We can give no costs.

IRVINE, APPELLANT; GREGG, RESPONDENT.—Nov. 28.

Statute 13 & 14 Vict. c. 69, s. 36—Schedule B., Forms 14, 15—Notices of objection—Date—Signing.

The date required to be at foot of a notice of objection under s. 36 of Statute 13 & 14 Vic. c. 69, schedule B. Forms 14 and 15, must be the true date of signing the notice. Where, therefore, the notice was not signed until after the date on which it bore date it was held bad—(*George, J. dissente*).

*Parkinson, appellant; Brophy, respondent* (15 I. C. L. R. 346; s. c. 10 Ir. Jur. N. S. 158) followed

*Jones, appellant; Jones, respondent* (1 Eng. L. Rep. C. P. 140) not followed.

APPEAL from the decision of the Chairman of Derry. The case stated by the Chairman was as follows:—The names of the several persons in the schedule hereunto annexed appeared in the list (No. 7) of claimants for revision for the borough of Londonderry. It appears that the said persons were duly served with notice of objection. It also appeared that in the notice of objection given to the town clerk in each case the date was written and stated thus, "Dated this 18th day of August, 1866;" and in the notice of objection served upon claimant the date is stated as "this 18th day of August, 1866." The list (No. 7) of persons entitled to vote for the said city of Londonderry was duly published on or before the 22nd day of July, 1866. It appeared before me, by the evidence of the objector, that he signed the notice of objection in each case on the 20th day of August, 1866, and not on the 18th day of August, 1866, but did so sign same before the notice was served on claimant; and it also appeared before me that the notice was filled previous to the signing thereof. The notice was served on claimant by being sent by post, in the manner directed by the 113th section, 13 & 14 Vic. c. 69. It was contended that the notice was insufficient, inasmuch as it was not signed on the day on which it bore date. Being referred to the decision of the Honourable Court in the cause, *Parkinson, appellant, Brophy, respondent*, decided in Michaelmas Term, 1864, vide 15 I. C. L. 346, I ruled and decided that inasmuch as the notice was proved to have been signed not on the day it bears date, but subsequent thereto, said notice was insufficient; and I retained the names of the several persons in the schedule hereunto annexed on the list. If I was right in the decision so made by me their names are to remain on the list as now; if, on the contrary, I was in error in my decision, their names are to be expunged from the said list. For the appellants the case of *Jones appellant, Jones, respondent*, was cited (1 Law Rep. 140, C. P.) I hereby declare that all the said cases in the schedule hereto ought to be consolidated, as they are all similar in point of law; and I have consolidated them in this one appeal, and they are to be governed by the same decision. And I hereby name David Irvine on the list of voters for said city of Londonderry, as appellant, and James William Gregg, town clerk of the city of Londonderry, respondent, for and on behalf of the said respondents in the consolidated appeal."

*J. P. Hamilton* (with him *Harrison, Q.C.*) for the appellant.—The Court has already decided this question against the appellant in *Parkinson, appellant, Brophy, respondent*; but the Court has always held that its decisions are binding on it only in the particular case, and that it will, if necessary, in subsequent cases, reconsider its former decision. The present question depends very much on whether the latter part of s. 36 of the Statute 13 & 14 Vic. c. 69 is mandatory or directory. We say it is directory only, and on this point *M'Keown v. Bradford* (7 Ir. Jur. N. S. 159) is very important. The Court there held that the requirements in s. 58 of the statute as to

the indorsement to be made by the revising barrister upon the case stated by way of appeal were directory only. [*O'Brien, J.*—The distinction was drawn in that case that the acts there directed were to be done by the barrister and not by the party.] In *Carroll v. Beggs* (15 Ir. C. L. R. 370) the Court held that notwithstanding section 22 and schedule A, form 9, the Christian name of a claimant need not be inserted in full in the signature to the notice of claim. So, *Murphy v. Connor* (3 Ir. C. L. R. 203). Will it be argued that the form 15 in schedule B is so binding that a notice of objection will be had if the word "dated," or "this," is omitted? *Parkinson v. Brophy* was wrongly decided. [*Hughes, B.*—Suppose the date of the notice was altogether outside of the period for giving it?] That might be cured by amendment. Section 115 shows how strongly the Legislature leans against technical objections of this kind. In *Jones v. Jones* (1 Eng. Law Rep., C. P., 140) the Court of Common Pleas in England refused to follow the decision of this Court in *Parkinson v. Brophy*. *Jones v. Jones* has recently been followed in *Dadson v. The Overseers of Chatham* (Weekly Notes, Nov. 24, p. 354). The non-compliance with the strict words of the Act involves no injury to anyone, and insisting upon a strict compliance with them may work grave inconvenience.

*Lawson, Q.C.*, and *McLaughlin, contra.*—The decision in *Parkinson v. Brophy* is good law. The previous authorities had decided that a date was essential; that it was also essential that a place of abode should be stated, and that that place of abode should be the true one at the time of signing the notice; and also that the omission from the notice of the year was fatal. If that had not been the state of the law it might perhaps be said that a date was not necessary; but as it is necessary, it ought to be the true date. As to the question of convenience the Court cannot make itself judge of the convenience or inconvenience of any party; if the law directs a thing to be done it must be done regardless of convenience or inconvenience. *Beenlen v. Hockin* (4 C. B. N.S. 19), which is cited in *Parkinson v. Brophy*, if it stood by itself, would decide the question. The construction contended for on the other side is pregnant with the evil of putting on one part of a statute a popular construction, and on the other a technical one.—*Dwarris on Statutes*, p. 575. If one part of the date must be true, as it has been held in *Beenlen v. Hockin*, so must the other. The introduction of one date for another is not such an error as might be cured under the Act. In the case immediately before *Jones v. Jones*—namely, *Smith v. James* (1 Eng. Law Rep. C.P. 139), it is held in fact that when a party's name appears on the registry, that is a vested right in him which can only be got rid of by a properly framed notice. *Parkinson v. Brophy* is the decision of an Irish Court on an Irish Statute; and it lies on the other side to show that that decision is wrong. This Court is not bound by *Jones v. Jones*. There is this difference between the English and Irish Acts, that the schedules are not made part of the English Act as they are of the Irish one.

*Hamilton in reply.*—The argument on the other side rests on the fallacy of assuming that the true

date was not given in this notice. The true date was given. The day given is the day the date was affixed. The question is—whether the notice must be signed on that day. In *Beenlen v. Hockin* there was no date at all.

*GEORGE, J.*—In this case I am very reluctant to differ from the judgment of the majority of the judges in *Parkinson v. Brophy*, which, I believe I may take it, will be the judgment of the majority in the present case; but as I take it, and as it has been put in argument, that the Court of Common Pleas in England and this Court in Ireland have a right to express their opinions in these registry cases, each without reference to the other; and as I understand also that the decision of this Court binds only in the particular case, I think myself bound to express my opinion, which concurs with the observations made by *Hayes, J.* in *Parkinson v. Brophy*. Now, I assume in this case, as I do not find that any objection is stated to have been made on that score, that the notice of objection was actually served upon the parties objected to within the time required, and served in a proper manner by being sent by post. Then I think the question remains—what are the substantial provisions of this Act of Parliament? What does it require to be done by the party objecting to the voter? That is pointed out in the case of counties by s. 26; and in the case of cities, towns, and boroughs, by s. 36. That section enacts, "that every person whose name shall have been inserted in any list of voters for any such city, town, or borough, may object to any other person as not having been entitled on the 20th day of July next preceding to have his name inserted in any list of voters or list of claimants for the same city, town, or borough; and every person so objecting shall . . . on or before the twentieth day of August give or cause to be given a notice according to the form (numbered 14) in the said schedule (B), or to the like effect, to the town clerk of such city, town, or borough; and every person so objecting shall also, on or before the 20th day of August, . . . give or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice according to the form (numbered 15) in the said schedule (B)." I take it that the words "according to the form . . . or to the like effect," must be applicable to the two forms in the schedule, whether the notice is served on the town clerk or on the party himself; and then it states, without pointing out any time for it, that "every notice of objection shall be signed by the party objecting." It seems to me that what the Legislature required is—that between two dates a notice of objection should be given, and that that notice should be signed by the party. Both of these things were done in the present case, and are so stated to have been done, upon the certificate of the barrister. Both the notices are to be taken as *de facto* dated on the 18th, and signed on the 20th, August; so that the notices contained every requisite required by the statute; they contained a date, and a true date; and further, the signature of the party objecting. Under these circumstances it would appear to me that the notice was a substantial compliance with the provisions of the Act. I know that it was argued in *Parkinson v. Brophy*—as it has been in the present case—that



one object of the date is that the place of abode should be that of the party at the time the notice was given; and I do not know how it might be if between the time of affixing the date and the time of signing there had been a change of residence. In such a case I think the barrister would have held the notice to be invalid; but I think that it is not to be presumed against a document otherwise formal that such a change did take place. Under these circumstances it appears to me that the notice was a substantial compliance with the provisions of the Act and the schedule, which give a form that is to be observed not in its terms but "to the like effect." It is plain that no injury was done to the party; he had a notice dated between the 20th July and the 20th August; he had it signed *bona fide* and *de facto* by the party objecting, and that notice was served on or before the 20th of August.

DEASY, B.—I adhere to the opinion which I expressed in *Parkinson v. Brophy*, and I adopt the reasons upon which I grounded my judgment in that case. I have since read the decision of the Court of Common Pleas in England, but—with all deference to that tribunal—its judgment has not produced upon me the effect of making me think my decision erroneous; neither has anything that I have heard from Mr. Hamilton or from my brother George. I am of opinion that the notice is bad. I may say this: that the decision in *Parkinson v. Brophy* was very fully considered at the time. The case in the Common Pleas does not seem to have been much considered, and they scarcely seem to have read the judgment of this Court in *Parkinson v. Brophy*. As to the difficulty which it is said would be imposed in the way of objectors, I confess I do not see them at all; and it would be quite as easy for parties to put a true date to their notices as a false one. The Act manifestly requires some date, and I cannot avoid coming to the conclusion that when it does so it requires a true one.

HUGHES, B.—I abide by the decision in *Parkinson v. Brophy*; and I will only add that I wish this Court would adopt the course followed in the second case in England—*Dadson v. The Overseers of Chatham*,—and refuse to review its decisions.

FITZGERALD, B.—I hold myself bound by the decision in *Parkinson v. Brophy* without re-considering it.

O'BRIEN, J.—I abide by the decision of my brother Deasy. The arguments which I have heard to day and the case of *Jones v. Jones* have alike failed to make me think our decision in *Parkinson v. Brophy* wrong. As to the question about the propriety of our reviewing our decisions, I can only say that that matter was fully considered in *M'Keown v. Bradford*, and the reasons for doing so are there fully stated—namely, that if the Court afterwards see that its own previous decision was wrong it may review it. That is all that was contended for; and in *M'Keown v. Bradford* there were brought before the Court the decisions of other judges which caused doubt. In this case we have heard the question re-argued. If I had seen reason to change the opinion which I entertained at the hearing of *Parkinson v. Brophy*, I for one would have had no difficulty in acting on that change.

## Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

[BEFORE O'BRIEN AND FITZGERALD, JJ.]

KENNEDY v. BLACKBURN.—Nov. 1865; May 12, 1866.

*Irish Bankrupt and Insolvent Act, 1857—Arrangement clauses—Effect of arrangement as bar to action.*

*An arrangement under the arrangement clauses of the Irish Bankrupt and Insolvent Act, 1857, is no statutory bar to an action until the certificate mentioned in s. 352 of the statute has been obtained.*

DEMURRER:—The summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £208 3s. 6d., for that the defendant, on the 12th November, 1864, by his promissory note overdue, promised to pay to James Higgins, or order, the sum of £200 two months after the date thereof, and that the said James Higgins indorsed the said note to the plaintiff, but the defendant did not pay the same. To this the defendant pleaded on equitable grounds, that the plaintiff ought not further to maintain this action, because the defendant was a trader within the meaning of a certain statute called "The Irish Bankrupt and Insolvent Act, 1857," and was indebted to divers persons in divers sums of money, and amongst others to one James Higgins, on foot of the promissory note in the plaint mentioned, and was unable to meet his engagements with them; and thereupon, and whilst the defendant was such trader, and whilst he was so indebted, and after the passing of the promissory note in the plaint mentioned, and after the passing of the said statute, the defendant became and was unable to meet his engagements with his creditors, and thereupon, being so indebted, and so unable to meet his said engagements, after the passing of the said statute duly made an arrangement with his creditors under the superintendence and control of the Court of Bankruptcy in pursuance of the said statute, and filed such petition, and did all such matters and things as were required by the 343rd to the 347th sections of said statute, both inclusive, and that such sittings were appointed and held as required by the said statute in that behalf, and such orders made and such notices given, and all such matters and things done that three fifths in value and number of the creditors of the defendant who had proved their debts to the amount of £10 and upwards, did at the second sitting agree to the proposal made by the defendant at the first sitting, such sittings being duly held in pursuance of the statute; and from the filing of said petition to the said second sitting, said James Higgins was the only creditor in respect of said note, and was entitled to prove his debt in respect thereof; and said James Higgins was duly served with the notices of said sittings pursuant to the statute, and duly appeared at said sittings, and opposed said arrangement; that said proposal was to the following effect, to wit, a composition of 5s. in the pound in cash within one fortnight after the confirmation of said proposal, said

cash being payable to said creditors through the office of the official assignees according to the practice of said Court; that such proposal was then reduced into writing, and signed by said creditors, and afterwards the said Court of Bankruptcy, after hearing such parties as were in and by the said statute mentioned in that behalf, did approve and confirm the same, and caused it to be filed and entered of record in pursuance of the said statute; and the defendant averred that all things had been done and happened, and all notices given to render the said agreement valid and effectual, obligatory and binding upon the said James Higgins in the plaint mentioned, upon whom were duly served all the notices of said sittings in the said statute mentioned, pursuant to the said statute, and the same was so made and became so valid, effectual, obligatory and binding long before the commencement of this suit; and the defendant averred that he duly, pursuant to the practice of the Court, immediately after said proposal of composition being confirmed, paid into the proper office of said Court of Bankruptcy the entire amount of said composition, for the purpose of same being paid to said creditors by the official assignees appointed to the matter, upon the debts of the several creditors being ascertained in amounts by the chief registrar of said Court of Bankruptcy, according to the law and practice of said Court; and the defendant averred that a warrant for the purpose of authorising said James Higgins to receive said composition of 5s. in the pound upon the promissory note, the subject-matter of this suit, was duly made out in the proper office of said Court of Bankruptcy, and was duly sent by post, according to the practice of said Court, to the said James Higgins, and was duly received by him on the 11th day of April, 1865; and afterwards, to wit, on the 12th day of April, 1865, said James Higgins brought back said warrant to the office of said official assignee at Ormond-quay, in the city of Dublin, and repudiated said dividend and composition, and refused to accept same, and said money, £50 sterling, still remained in the office of said official assignee, ready to be paid to said James Higgins; and the defendant averred that the plaintiff sued in this action only as trustee for, and on behalf of said James Higgins. To this the defendant replied, thirdly, that the said Court of Bankruptcy and Insolvency had not given to the said defendant any certificate under the seal of the Court in the form contained in the Schedule U. to the Irish Bankrupt and Insolvent Act, 1857, annexed, or to the like effect, and that he, the defendant, had not obtained any certificate from said Court, as required and provided by s. 352 of the said Act. To this replication the defendant demurred, on the grounds that the agreement and arrangement in the defence mentioned was valid and effectual, obligatory and binding upon the plaintiff and the said James Higgins, without the said Court of Bankruptcy and Insolvency having granted to the defendant any certificate under the seal of the Court in the form contained in the Schedule U. to the Irish Bankrupt and Insolvent Act, 1857, annexed, or to the like effect; and that no such certificate as was mentioned in the said third replication was required to be obtained by the defendant, or at all, in order to render the agreement and arrangement

in said defence mentioned valid and effectual, obligatory and binding upon the said plaintiff and said James Higgins; and that said third replication offered no answer to the defence, and said third replication was bad in law.

*Molloy and Heron, Q.C.*, were for the defendant in support of the demurrer.

*Coates and Sidney, Q.C.*, for the plaintiff.

The following authorities were cited in addition to the cases and sections of statutes mentioned in the judgment.—*Forsythe on Composition*, 33; *Norman v. Thompson* (4 Exch. 755); *Bradley v. Gregory* (2 Campb. 383); *Boothby v. Sowden* (3 Campb. 175); *Good v. Cheesman* (2 B. & Ad. 328).

*Cur. adv. vult.*

*May 12. O'BRIEN, J.*—This case comes on on demurrer taken by the defendant to the third replication. There is only one plea in the case to which the replication demurred to has been put in. The case was heard last Michaelmas Term. Now, the action was brought by Mr. Kennedy, the indorsee of a promissory note for £200, dated the 12th November, 1864, at two months, in favour of James Higgins. It was due on the 15th January, 1865, and was indorsed by Higgins to Kennedy. To that a defence has been put in that the defendant was a trader, and that he made an arrangement. [His Lordship here stated the substance of the defence.] This is filed as an equitable plea, and the last statement in it was essential to the maintenance of the plea. The replication to that defence was this. [His Lordship stated the substance of it.] There has been a demurrer to that replication, and the question for us to decide is whether it is essential to constitute a defence to an action, where an arrangement of this sort has been entered into, and an action brought for a debt due at the time of the arrangement, whether it is essential to make that a defence that the party should have obtained a certificate under the 352nd section of the Irish Bankrupt and Insolvent Act. We were referred to a great many cases which deal with the question before us, as if the case was to be treated as if it were a case of contract between the debtor and some of the creditors, independent of the Court of Bankruptcy. There were two cases in Campbell, one in 2 B. & Ad., and one in 4 Exch. All these have relation to agreements entered into between a debtor and his creditors in person, and all go to establish this, that if the agreement here made between Blackburne and the three-fifths of his creditors had been made between him and the party who sues, or for whose benefit the suit is instituted, and if it appeared that the money was tendered afterwards and refused, all these cases appear to shew that that would be a good answer to the action. But this is not so. Higgins is stated, on the face of the defence, not merely not to have assented to the proposal, but to have opposed it, and therefore this arrangement has bound him so far only as that is the necessary conclusion to be drawn from the sections of the Act of Parliament. The section which we first have to consider is the 347th. That says, "At such second sitting, or at any adjournment thereof, the creditors may also prove their debts; and if three-fifths in number and value of

those who have proved debts to the amount of ten pounds shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement, subject to such confirmation as herein-after mentioned, shall thenceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings, and the Court, after hearing such creditors by themselves, their counsel or attorneys, as may desire to be heard, either for or against such resolutions or agreement, may approve and confirm the same, and cause it to be filed and entered of record, and grant to the petitioner a certificate thereof, and may from time to time endorse upon such certificate a protection from arrest, and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid, and any officer arresting such petitioner, at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankrupts in the like case." It is argued here for the defendant that by reason of that provision, the contract entered into by the three fifths of the creditors and the defendant, was as binding on Higgins by virtue of the provision as it would have been if, independent of the statute, he had entered into the contract. There is a difference between the case where a man does himself enter into an agreement, and where the agreement is forced on him by the provisions of an Act of Parliament. In the first case the authorities would show that Higgins was bound, but in the latter case we must have regard to the entire of the provisions of the Act, and see if it is binding on him so far as to make it unnecessary to adopt the other provisions of the Act. Now, what the plaintiff here contends for is, that true it is that under this 347th section this agreement was entered into, and that it was approved of, and true it is that the money was tendered and refused, but that notwithstanding all that, the arrangement was not a bar to any future action, unless under section 352 the party had procured a certificate in the form contained in the Schedule U. to the Act; and to that opinion we incline. The 352nd section says—"So soon as the said resolution or agreement shall have been carried into effect, and the creditors of said petitioning trader shall have been satisfied according to the tenor thereof, the Court shall give to such petitioner a certificate under seal of the Court, in the form contained in the Schedule U. to this Act annexed, or to the like effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy;" and there is no doubt that, looking back to section 145, which speaks of the certificate of conformity under a bankruptcy, we find that that section says—"The certificate of conformity shall, subject to the provisions herein contained, discharge the bankrupt from all debts due by him at the date of the filing of the petition of bankruptcy, and from all claims and demands provable under the bankruptcy;" so that the effect of the cer-

tificate here, which is given by the 352nd section, would be to discharge Blackburne from all demands. That certificate not having been obtained, the plaintiff says, and we are of that opinion, that the defendant is not released or discharged. Now, it is material to refer to the language of these sections, because when the Legislature intended to protect a party from actions for any given time, the words used by it are different from those in section 347. That section says that the petitioner "shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid." It protects him there expressly from arrest, and from arrest only—that is to say, that first certificate which is given on the confirmation of the proposal, and before it is ascertained whether the creditors will be satisfied according to the proposal. Then s. 349 says that "from and after the date of the approval and confirmation of such resolution or agreement, all the estate and effects of such petitioning trader shall vest in the official assignee (if such shall be required by virtue of such resolution, and either alone or jointly with any person or persons as may be expressed in such resolution) as fully as if such assignees and other persons were assignees under any bankruptcy,"—so that the debtor gets under these sections a protection from arrest from the time of the confirmation of the resolution, and the property that he has at the time is vested in the assignees of the Court. He may acquire property afterwards, and the question, therefore, is, whether there is anything in the Act to prevent an action being brought against him. As long as the protection continued, he could not be arrested; but is there anything in the Act to prevent the creditors from bringing an action, and making after-acquired property of the debtor available? Now, when it is considered advisable to prevent an action being brought, the Legislature uses very different language, because in s. 343 it says that the trader desiring to make an arrangement "may present a petition to the Court.....praying that his person and property *may be protected from process* until further order, and the Court on such petition shall have power to grant such protection"—that is, they may protect his person and also say that the property which he then has shall not be taken from him by any creditor; but it will be observed that in s. 347 the Legislature says nothing about his property, though it protects his person, and by s. 349 his property vests in the assignees. That being the case on the Act of Parliament, let us see how the authorities deal with it. These provisions very nearly correspond with the provisions in sections 211 to 220 of the English Bankrupt and Insolvent Act of 1849. Of course, looking at the cases which have been cited, they do not absolutely decide the present case, but there are observations in them which bear upon it. The first is *Allcard v. Wesson*, which is twice reported, in 7th and in 8th Exch. The question there was whether the plea of an arrangement was not good, because it did not aver that the agreement was carried into effect, and the Court of Exchequer held that it was bad on that ground, and the Court of Exchequer Chamber also held it bad, but for a different reason, namely, that it did not appear that the

indorsee of the bill in that case was served with notice. *Naylor v. Mortimore* (10 C. B. n. s. 566) does bear on the present case. There there was a proposal for an arrangement, confirmed by the Court, and the usual protection from arrest had been given. The plaintiff had not agreed to it, and then he was tendered the amount of the composition, and he refused to receive it. He brought an action, and the Court refused to stay the proceedings in it. They said that even if it was a doubtful matter they would not take upon themselves to stay the action on a motion from which there would be no appeal; and Erle, C.J. said, "It is clear that the Bankrupt Act, by giving the petitioner protection from process against his person and property, and being silent as to the continuing of any action against him, intended to reserve to the plaintiff the right which every subject has to sue his debtor and obtain judgment. I do not find that any section of the statute has taken away that right." Byles, J., says, "I think the certificate should be pleaded. If the order of the commissioner is nothing more than a protection of the petitioner's person and property from execution, the present application is premature. If the matter be doubtful, then it is open to the objection that we are asked on motion to decide a doubtful question, which ought to be left to the ordinary course of proceeding, when our decision, if erroneous, might be set right. Well, that did come on in an action in the 17th C. B., but on looking at the special case which was agreed to, and at the facts found in it, it will be seen that in the interval the certificate, which I may call the final certificate, had been obtained, and the struggle then was to show that notwithstanding that the plaintiff should be allowed to show that the proceedings were defective. This was overruled. On that ground the case is not applicable here; the only principle which it establishes is, that the validity of the certificate is liable to be impeached, on the ground that the conditions on which it was given were not performed. I have found a case of *Blackford v. Hill* (15 Q. B. 116). That was an action for goods sold and delivered, and the defendant pleaded an arrangement under stat. 7 & 8 Vict. c. 70. I have looked through that statute with some care, and I have compared its provisions with those of the Irish Act, and I do not find any substantial difference between them. Those of the Irish Act appear to have been taken from the then Bankruptcy Act in England. The 5th section of that Act provides that if, at the second meeting of creditors, "three-fifths in number and value of all the creditors present, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, shall agree to accept such arrangement or composition as was assented to at the said first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to such confirmation as is herein-after enacted) shall thenceforth be binding and of full force as well against the said petitioning debtor as against all persons who were creditors of the said petitioning debtor at the date of his said petition, and who had notice of the said several meetings of creditors." Section 6 provides in terms similar to the latter part of s. 347 of the Irish Act. The plea in the case to which I am re-

ferred stated the terms of the arrangement. One was to vest the defendant's property in a trustee—a trustee was appointed, and all vested in him, and the commissioners had extended the protection from arrest to the 2nd July, 1849, which was a period that had not expired at the date of the action. Section 7 of the Act provides "that it shall be lawful for such commissioner as aforesaid, upon the examination of such petition as aforesaid, to grant to such petitioning debtor a temporary and limited protection from arrest, and such petitioning debtor shall be accordingly free from arrest for such time, and within such limits and conditions, as shall be specified in the said protection, with the like penalties on any officer arresting him as aforesaid; and it shall be lawful for such commissioner to require such petitioning debtor to give bail for his appearance at the said several meetings of his creditors; and every petitioning debtor shall have such protection from arrest when going to, remaining in, and returning from his necessary attendance on the said commissioner, or the said meetings of creditors as is enjoyed by any party or witness attending any Court of Record." This will be found nearly similar to the provision in s. 343 of the Irish Act. Now, the next section is s. 8, which is similar to the section here making the property to vest in the assignee. Then we come to sections 12 and 13. Section 13 is the important one, for it provides "that at such last-mentioned meeting the said commissioners shall give to the said petitioning debtor a certificate, under the hand and seal of the said commissioner, of the filing of the said petition, and of the resolution or agreement of the creditors of the said petitioning debtor, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under the statutes relating to bankrupts, excepting only that no debt herein excepted from the operation of this Act shall be barred by the said certificate." Now, on that state of facts there was a demurrer put in, the ground of which was that the confirmation under s. 6, and the protection under s. 7, did not bar the action, which was not barred until the final certificate under s. 13 was granted. The defendant's counsel argued that the action was barred, but Lord Campbell, stopping the plaintiff's counsel in reply, says, "It is quite clear that the certificate under s. 6 is merely a protection from arrest. There is no bar till the case is brought within section 12." Well, now, that appears to me to be a decisive authority in the plaintiff's favour, on an act corresponding with the statute now before us. My brother Fitzgerald has referred me to *Davis v. Percy* (1 L. Rep. C. P. 256), which also arose under the same Act. The marginal note there is—"A certificate, under the 6th section of the 7 & 8 Vict. c. 70, of the filing of the resolution of the creditors agreeing to a composition, with the commissioner's protection indorsed thereon, does not operate to protect the debtor's goods from seizure under a *fi. fa.* upon a judgment obtained before the date of the petition." The application there was made to set aside the writ of *fi. fa.* mentioned in that note, and it was refused. The judge before whom the matter came at Chambers, ordered

the defendant to pay money into Court, and upon the case coming on before the full Court, Erla, C. J., say: "If there had been no authority upon the subject, I should have had no hesitation in holding the construction of the statute to be adverse to this application. The Legislature has provided by s. 6, that when certain steps have been taken by the debtor, he shall be entitled to a certificate protecting his person from arrest; and that when certain other steps have been taken, he shall have a certificate which will enure as a certificate in bankruptcy. Until these latter steps have been taken, the protection is confined to the person of the debtor." I may also refer to the case of *Spencer v. Demmett* (1 L. Rep. Exch. 123). There, to an action for goods sold and delivered, the defendant pleaded equitably, that after the plaintiff's claim accrued, and before writ, she had been adjudicated bankrupt, and that after writ, and before declaration, the plaintiff, Hewett, had been duly appointed assignee, and had proved the debt now sued for, whereby the defendant was discharged, and that the said proof was still in force. On demurrer, that plea was held bad. That was a very strong case. I think that those cases, in dealing with the Act, are full authorities to warrant us in holding that the demurrer here must be overruled.

FITZGERALD, J.—I concur; and the exact proposition that we decide is, that an arrangement under these clauses is no statutable bar to an action until a certificate has been obtained under s. 352. That leaves untouched the question what effect our decision may have on the relative rights of the parties, whether, if the defendant either has obtained or can obtain the certificate under the section, that will not intercept the effect of our judgment. The only matter of surprise to us in the case is that the certificate has not been obtained. There is another point, whether, if the plaintiff received that statutable composition, the defence might not be good, not by the statute, but by virtue of his having received the composition. All that I decide now is, that there is no statutable bar till the certificate is obtained, and it is in reference to that that the last case cited by my brother O'Brien is important, for it is a well-established proposition that a person who comes in and proves, is bound by all the proceedings in bankruptcy, because he has the benefit of the distribution of the effects by the assignee. Where a party stood in that position, the Court held the party was not bound by the proceedings, if he had not accepted the composition, till the certificate is obtained. The expression of opinion of Lord Campbell, C. J., in *Blackford v. Hill*, strictly applies to the present case. It plainly shows his Lordship's opinion that there is no bar till the certificate is obtained. We therefore decide that the demurrer should be overruled.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MURPHY AND OTHERS v. BOWER.—Jan. 23; June 2.

### Demurrer—Privity of Contract.

*The first count of the summons and plaint stated that under an assignment in bankruptcy, the plaintiffs were the assignees of the estate and effects of E. M., J. M., and P. M. railway contractors; that the defendant was the engineer of the F. V. railway company; that before the arrangement in bankruptcy, and whilst the defendant was acting as such engineer, by an indenture between E. M., J. M., and P. M. and the company, it was agreed that E. M., J. M. and P. M. should make the said railway; that during the progress of the works, not later than fourteen days after the termination of each calendar month, when the engineer for the time being should have certified that any part of the works had been executed to his satisfaction, the company should pay nine-tenths of the value of such works, such value being also certified by the engineer; that E. M., &c., and the plaintiffs as their assignees had fulfilled all the terms of the contract; that the defendant having been appointed engineer, accepted the appointment and did act as engineer, but that he had not given certificates of the amount or value of the works, and had wrongfully, improperly, and without any just cause, refused and neglected to estimate the value of said works, and to certify, &c., by means of which plaintiffs had been unable to obtain payment, &c. The second count complained that the defendant had, with intent to injure the plaintiffs, wrongfully and fraudulently refused to certify, &c. The third count complained that the defendant had wrongfully and injuriously, and without just cause, and in collusion with the railway company, refused, &c. Held, upon general demurrer, that the action against the defendant was not maintainable.*

The writ of summons and plaint case contained three counts. There was a several demurrer to each count. The first count set forth that the plaintiffs, Michael Murphy, William Robert Stephens, and Thomas Shannon Martin, were the assignees of the estate and effects of Edward Moore, John Moore, and Patrick Moore, railway contractors, under an assignment executed in consequence of the bankruptcy of the latter, upon an arrangement with their creditors, and by the consent of three-fifths in number and value of the creditors, &c., which assignment was confirmed by the Court of Bankruptcy on April 22, 1863, and that all the estate, effects, and rights of action of the said bankrupts vested in the plaintiffs as fully as if they had been assignees in bankruptcy; that at the time of the commission of the grievances thereafter mentioned the defendant was the engineer of the Finn Valley Railway Co. for the purpose of planning and superintending the making of a railway from Strauorlar, Co. Donegal, to the Londonderry and Enniskillen Railway Company, near Strabane, Co. Tyrone. And that before the arrangement in bank-

ruptcy, and whilst the defendant was acting as such engineer, by an indenture bearing date September 5, 1861, between said John Moore, Patrick Moore, and Edward Moore, of the one part, and said company of the other part, it was agreed that said John Moore, Patrick Moore, and Edward Moore should make the said railway and all works necessary to its completion, as specified in certain plans and drawings, which were prepared by the defendant, and referred to in the contract, and that they should complete the works according to the directions contained in said plans and drawings, or such explanatory plans and drawings as should be furnished them by the engineers for the time being of the company, and also according to the general instructions of the engineer, and that they should deliver over the railway completed to the company, or their engineer, in July, 1862; and it was provided that the company might make any alterations in omissions from, or additions to, the said works, and that the value thereof should be ascertained by admeasurement and valuation, according to the schedule of prices to the contract annexed, to be paid in same manner as the contract price, which was fixed (subject to the additions or deductions provided for) as £22,600; and as to the manner and times of payment, it was provided that during the progress of the works, not later than fourteen days after the termination of each calendar month when the engineer for the time being of the company should have certified that any part of the said works had been executed to his satisfaction, the company should pay nine-tenths of the value of such works, such value being also certified by the said engineer, and so from time to time until the works, or so much thereof as the directors should think fit, should be completed; and that the contract went on to provide for the payment of the balance of the contract price, &c., and to provide that the admeasurement agreed on should merely ascertain the sums from time to time to be paid, and should not alter or affect the gross sum payable to the company; and that the said John, Patrick, and Edward Moore, and the plaintiffs, as their assignees, with consent of the company, had respectively, since the date of the contract, fulfilled all its terms, and that in pursuance of it the railway had been completed; and that the defendant having been so appointed engineer of the said company for the purposes aforesaid under the contract duly accepted the said appointment for reasonable reward, and did act as engineer of the company under the said contract for the purposes aforesaid, and did, except as therein-after mentioned, perform the duties of such engineer named in said contract, and never ceased to act as such engineer, and never abandoned said appointment, and that it became the duty of the defendant, acting as such engineer under said contract, from time to time, as the works progressed, on request to give full and true certificates to the said John, Edward, and Patrick Moore, and to plaintiffs, of the amount of the work done, and of the value thereof, under the said contract, according to the opinion of defendant, as such engineer, of such amount and value, so as to entitle plaintiffs to be paid according to said agreement; and that although the said John Moore, Edward Moore, and Patrick Moore, and the plaintiffs, with consent of

the company, duly performed said work under the contract by direction of defendant, and whilst he was acting as such engineer as aforesaid, no other engineer having been appointed, and the said company paid a part of the sum due, leaving a balance of £6,659 0s. 6d. whereof defendant had notice; and although defendant inspected the works, and well knew that said sum was due under the contract, and although plaintiffs applied to defendant for the necessary certificates, and although said John, Edward, and Patrick Moore, and plaintiffs, had done every thing necessary on their part, and all necessary times had elapsed to entitle them to such certificates and payments; and although a reasonable time for defendant to estimate the value of the works, and to give the certificates, had elapsed, yet defendant had not given any certificates of the amount or value of said works, amounting to said £6,659 0s. 6d., and had wrongfully, improperly, and without any just cause, refused and neglected to estimate the value of said contract works, and to at all certify pursuant to said contract, by means of which premises plaintiffs had been unable to obtain payment of said balance, and it still remained due. And as special damage, the first count averred that plaintiffs sued the Finn Valley Railway Company for said £6,659 0s. 6d., and that the company pleaded that said certificate was not given as aforesaid, and said monies were wholly lost, to plaintiff's damage of £8,000. The second count was in substance the same with the first, except the breach. It averred that the defendant had only certified for sums amounting to £18,788 12s. 6d., and also had, with intent to injure the plaintiffs, wrongfully and fraudulently refused to certify the value of the works which he knew to have been executed by the plaintiffs pursuant to the contract. It concluded by alleging the same special damage as the other count. The third count was in substance the same with the first count, except in the breach. It averred that defendant had wrongfully and injuriously, and without just cause, and in collusion with the said company, refused, and did still refuse, to give the necessary certificates. It averred the same special damage as the first count. The defendant demurred severally to each count, and assigned the following causes of demurrer—It is not shown that the defendant ever contracted with the said Edward Moore, John Moore, or Patrick Moore, or plaintiffs, to give certificates, or perform the duties of engineer under said contract deed. The duty of the defendant relied on is a duty not to the plaintiffs or the said Edward Moore, John Moore, Patrick Moore, but to the company whose engineer defendant was. The said counts are actions upon duties arising out of contract, of which persons not parties to the contract are endeavouring to take advantage. And as to the second count, the fraudulent breach of a contract or duty arising solely out of contract can give no cause of action except to a party to the contract. And as to the third count, a breach of contract, or of duty arising out of contract, committed by one party to a contract in collusion with the only other party to said contract, is insensible, and gives no cause of action to any person, and particularly not to a stranger to the contract.

*W. Boyd* (with him *Butt*, Q.C., and *Palles*, Q.C.) in support of the demurrer.—No contract is stated between plaintiff and defendant, nor can such a contract be inferred from that stated.—*Riley v. Bazendale* (6 Hurls. & N. 445, 448). As the count is framed, we cannot traverse such a contract. As defendant was no party to the contract stated, he cannot be sued for a breach of duty arising out of it.—*Tollit v. Sherstone* (5 M. & W. 283); *Winterbottom v. Wright* (10 M. & W. 109); *Alton v. Midland Railway Company* (19 C. B. N. s. 213). There is no remedy under such circumstances in the absence of fraud, nor is there any at law even in case of fraud.—*Scott v. Corporation of Liverpool* (3 De G. & J. 334, 363). The first count would be demurrable even if defendant were a party to the contract for fraud, or collusion must be imputed.—*Clarke v. Watson* (18 C. B. N. s. 278); *Batterbury v. Vyse* (2 Hurlst. & C. 42).

*Martin and Heron*, Q.C. contra.—A contract may be inferred from what is stated; the objection of its not being stated would only be good on special demurrer. Besides, an action for a misfeasance may be supported without any contract.—*Hodges on Railways*, 4th ed. p. 56; *Milner v. Feild* (5 Ex. 829); *Everard v. Hopkins* (2 Bulstr. 332); *Pippin v. Sheppard* (11 Price, 400); *Boorman v. Brown* (3 Q. B. N. s. 511); *Langridge v. Levy* (2 M. & W. 519; s. c. on appeal, 4 M. & W. 337); *Howard v. Shepherd* (9 C. B. o. s. 297). [*Per Curiam*.—Have you found any case showing that if two parties make a contract, a third person may sue for damage occasioned by one of them not performing the contract?] Ro. Abr. Action s. Case; *Stock v. Harris* (5 Bur. 2715–16); *Collett v. London and North-Western Railway Company* 16 Q. B. N. s. 984; *Balfe v. West* (13 C. B. 466); *Thorne v. Deas* (4 Jon., American, 84); *Story on Bailm.* ss. 402, 409. Fraud is not the only ground for relief in equity.—*Scott v. Hawkeley and Corporation of Liverpool* (25 L. J. Ch. 227); *Kemp v. Rose* (1 Gitt. 258); *Pauley v. Turnbull* (3 Giff. 70). As relief will be given in equity against the engineer on account of his misconduct, so an action will lie against him on account of his fraud. When a man does an act injurious to another, there must be some remedy, some action must lie.

The Court of Chancery cannot compel the engineer to pay the amount which he has fraudulently refused to certify for. It can only make him pay the costs.—*Russ. Arbitr.* 467. Therefore, the remedy must be at law. *Scott v. Corporation of Liverpool* does not govern this case. That was a case of nonfeasance—this of misfeasance. On the third count defendant is clearly liable, as he would have been on an action for conspiracy. The confidence induced by undertaking to do any thing for another's benefit is a consideration sufficient to create a duty; and every one who does an act by which injury accrues to another, is responsible.—*Whitfeld v. Lord Le Despencer*, (Cow. 765).

*Butt*, Q.C. replied.—This case is without precedent. *Collett v. London and North-Western Railway Company* does not govern this case. There the duty was imposed by law; here it arises from

contract. The only authority for bringing the engineer before the Court is *Scott v. Corporation of Liverpool*, and that is no authority that relief will be granted. Nor can an action for conspiracy be maintained; that action only lies for conspiring to withhold something to which plaintiff has a right. Here plaintiff has no right to the certificates for defendant did not contract with him to give them. No contract between them is stated, and it is not matter of special demurrer, but a broad question of pleading, that the contract between the parties, with its consideration, and not mere matters of evidence, should be pleaded.

*Cur. adv. vult.*

June 2.—*MONAHAN*, C. J.—This case comes on a demurrer to the summons and plaint filed by the plaintiff. The summons and plaint has three counts. [His Lordship stated what was in the counts.] The case has been argued at considerable length. The facts I have mentioned show that this engineer was no party to the deed, or to the original contract. Neither is it stated in any way in the plaint that any parol contract was entered into between the contractors and Bower. It is merely stated that he acted as such engineer, and as such discharged the duties which it was contemplated he should discharge. But no privity of contract is stated between them, and, therefore, the question is, if in a case of that description an action can be maintained against this man for wrongfully, or fraudulently, or collusively withholding the certificate. The grounds of demurrer relied on are these:—Since the duty of this party to give the certificate arises out of a contract, and perhaps out of a contract between the Messrs. Moore and the railway company (because it has been suggested that the railway company, by entering into such a contract, impliedly contract that the engineer will properly discharge his duty by giving the certificate); if we are to suppose that a contract has been entered into, and that this is a portion of the duty, then the Messrs. Moore being no parties to it, they or their assignees cannot maintain an action of this kind; and the only party who can maintain it is the party with whom it is entered into, and therefore the present plaintiffs cannot maintain an action either upon an express contract, or the supposed contract entered into between Bower and the railway company. It was argued that as this man acted as engineer, it might be inferred he had expressly contracted with the Messrs. Moore to perform the duty of such engineer. The answer is, if that was the way this summons and plaint is to be sustained, it ought to have been stated that a contract was in fact entered into, and we should see the consideration of that contract, and it would be competent for the defendant to question the consideration. We think there is no ground for that argument, and that if the party meant to rely on any such case, it would be necessary to state the existence of the contract. If the contract stated in the summons and plaint was an express contract between the railway company and the Messrs. Moore, or between the railway company and the engineer there is no doubt if the engineer had properly discharged his duty, a right would have accrued to maintain an action against the railway company, but several cases



have been referred to in which it has been decided that though a third party has sustained an injury where the foundation is contract, no action can be maintained, except by a party to that contract. In the case of *Alton v. Midland Railway Company* (19 C. B. n. s. 213) a commercial traveller bought a railway ticket. In the course of the journey he was injured, and no doubt he had a right of action against the railway company. The master brought an action for the loss of his services. No doubt, if the injury had been inflicted in the absence of a contract, if he had been going along the line, and had been injured, the master might maintain an action. But in that case it was held that no such action could be maintained, because the foundation was contract. *Tollitt v. Sherstone* (5 M. & W. 288) and *Winterbottom v. Wright* (10 M. & W. 109) were cases on the same point, and decided on the same principle. The only exception is the case of *Levy v. Langridge* (4 M. & W. 337), where the defendant sold a gun for the use of a father's family, and it was held that the son might maintain an action for the injury he sustained. I do not mean to question that case, but it has been questioned, and very great pains have been taken to distinguish it from a subsequent case in the same Court. It is asked what remedy has the plaintiff? for there is no doubt that on the second and third counts fraud and collusion are alleged. What remedy has the plaintiff? The answer is, if in fact this collusion exists, or if fraud exists, but most certainly if collusion, there is a remedy, but against the party who, it is alleged, is a party to the fraud, and a party to the collusion. The cases on that are—*Milner v. Field* (5 Exch. 829); *Clarke v. Watson* (18 C. B. n. s. 278). *Clarke v. Watson* is an express decision that in the absence of fraud and collusion, there is no action, though there be a wrongful withholding. [His Lordship referred to *Batterbury v. Vyze* (2 H. & Colt. 42).] The proper course is to proceed, not against the engineer alone, but to proceed at law against the company, or in equity against both engineer and company. We have no authority to introduce a new party, who never before was made responsible, and therefore there must be

*Judgment for the defendant.*

LEACH v. PALMER.—Nov. 16.

*Pleading—Action for goods sold and delivered—Traverse—Defence of an unexpired credit.*

*To an action for goods sold and delivered, and bargained and sold, the defendant pleaded that no goods were sold and delivered, or bargained and sold as alleged. At the trial he proved that the goods were sold and delivered on the terms of the defendant being at liberty within five weeks to accept a bill at three months for the invoice price. Held, on motion to turn verdict for the plaintiff into one for the defendant, that under the plea pleaded the defendant could not rely on the unexpired credit.*

*Boake v. McCracken* (6 Ir. C. L. R. 259) distinguished.

THIS was an action for goods sold and delivered, and bargained and sold, tried before Monahan, C. J., in the sittings after last Trinity Term. Plaintiff claimed the price of a parcel of goods sold and delivered in the month of October, 1865. The defendant pleaded—1. That no goods were sold and delivered or bargained and sold by the plaintiff to the defendant as alleged; and 2. That the goods were sold on a credit of six months, which had not expired when the action was brought. At the trial it appeared that the parcel of goods was sold and delivered to the defendant on the terms of the defendant being at liberty to pay in cash within a month or five weeks, and deduct 2½ per cent. discount, or if he did not do so he was to accept a bill at three months for the invoice price. Monahan, C. J. was of opinion that under the plea of no goods sold and delivered, or bargained and sold, or sold and delivered, at six months' credit, it was not competent for the defendant to rely on the fact that they were sold on the terms above stated. And therefore he directed a verdict for the plaintiff for the sum of £30 14s., being the price of the parcel of goods sold and delivered; and with the assent of plaintiff's counsel reserved liberty to the defendant to apply to have the verdict entered for him if on the pleadings he should have directed so. The summons and plaint issued on the 5th February, 1866. A conditional order to turn the verdict into one for the defendant was accordingly obtained, against which

*Harris, Q.C.* (with him *J. Harris*) showed cause, and referred to *Boake v. McCracken* (6 Ir. C. L. R. 259). Under a plea that the goods were not sold and delivered, it is not competent for the defendant to set up what avoids the contract by a postponement of the payment.—*Lawrenson v. Hill* (13 Ir. C. L. R. 1.)

*The Attorney-General* and *O'Moore* in support of the order.—This is not a plea of avoidance, nor of justification. It is a direct traverse. There is no contract of sale. If these goods had been a gift to the defendant he would traverse the contract of sale; so there is a traverse here. There was no sale from which the law implies a promise to pay. The Common Law Procedure Act in Ireland says that the defendant is to traverse a material fact. There was no sale upon which an action lies, because there was not a sale as alleged by the plaintiff. The plaintiff put himself out of court when he showed that there was at all events a four months' credit.—*Paul v. Dod* (2 C. B. 800); *Mussen v. Price* (4 East. 147).

*J. Harris* in reply.—This case is similar to *Boake v. McCracken*. The defence here seeks to rely on matter of discharge. The section of the Common Law Procedure Act mentions "release, payment, or performance," &c., as what must be pleaded. The defence here admits the contract in fact. But the strongest of all the authorities for the plaintiff is *Lawrenson v. Hill*. A judge cannot put to the jury what does not arise upon the pleadings.

MONAHAN, C. J.—In this case we are of opinion that the ruling made by me was right. It was an action simply for goods sold and delivered, which were

proved to be sold for a sum of £30 14s., but on a credit. There is no doubt that the present action is not strictly maintainable; and it was capable of being defended. No doubt, if the defendant was aware of the real facts it would have been competent to him to plead that though sold and delivered, it was on a credit not expired, and the action was not maintainable. But the question is not if the action is not maintainable, but if under this plea the defendant can rely on the credit. It occurs to us that the goods were sold and delivered; but under special circumstances rendering the amount not payable at the time, and which ought to have been pleaded. *Boake v. M'Cracken* is distinguishable on this ground. My judgment has been read. But it will be seen I held as I did because there never was in fact a sale or delivery on any terms at all. Here, on the contrary, we think there was an actual sale and delivery. The plea is not sustained.

CHRISTIAN, J.—I wish to say a few words as to the cases which have been cited. Under the defence, *nil debet*, the question was whether there was a cause to be tried when the action commenced. Anything which goes to show there was not then a cause (as a credit unexpired) shows *nil debet*. But we have no general issues under the Common Law Procedure Act. The question under the Common Law Procedure Act is whether the averments are or are not proved irrespective of other things which would constitute a defence. Here there is a traverse. What was it necessary for the plaintiff to prove, remembering that this is not a general issue but a special defence? He is to prove the contract and delivery. He has proved that the property in the goods passed, therefore there was a sale, therefore there was a delivery. Outside all that there existed a defence. An attempt was made to raise that defence, but it failed by reason of the frame of the pleadings.

*Rule discharged.*

M'CORMICK v. REILLY.—Nov. 3.

*Trover—Insufficient tender.*

*The defendant for the sum of £35 agreed to sell to the plaintiff a quantity of peas then fit for gathering, and to give him the right to plant cabbage plants in the ground between the drills of peas, £20 to be paid at once, and the balance before the removal of the cabbages, which were to be taken off the ground and paid for before a particular day. The plaintiff paid the £20, planted the cabbages and removed the peas, and before the day agreed on tendered to the defendant a sum less than the balance, which the latter refused. Subsequently the defendant sold the cabbages. The plaintiff having brought trover for the value of the cabbages, Held, that the action was not maintainable.*

THIS case was tried before Monahan, C. J., at the sittings after the last Easter Term. The summons and plaint contained two counts. The first alleged a contract between plaintiff and defend-

dant that in consideration of £35, £20 in hand, and £15 to be paid on or before the 20th March, the defendant sold to the plaintiff a crop of peas then growing on defendant's land, and also gave liberty to plant between the drills of peas a crop of cabbages, same to be removed and the balance paid on or before the 20th March then next. The summons and plaint alleged that plaintiff had paid the £20, and taken away the crop of peas, and was ready and willing, and offered to pay the £15 before the 14th March, but that the defendant refused to accept same, or permit plaintiff to remove the cabbages, and that the defendant had converted same to his own use. There was also a count in trover for defendant's converting to his own use a quantity of cabbages. To the first count the defendant pleaded first a denial of the contract as stated; secondly, a rescission of the contract; thirdly, a denial of the payment of the sum of £20, and a denial of an offer to pay the balance due before the time when same should have been paid. To the count in trover defendant traversed that the cabbages were the goods of the plaintiff, or that he had converted same to his use. The facts, as they appeared in evidence, having regard to the findings of the jury, were as follows: The defendant was a farmer and market gardener residing at Donnecarney, in the county of Dublin. The defendant had, in the month of July last, on his farm, a small field of garden peas, just ripe, and fit for gathering. He agreed to sell same to the plaintiff, and also the right to plant cabbage plants in the ground between the drills of peas, for the sum of £35, £20 to be paid at once before the peas were pulled, and the balance, £15, to be paid before the removal of the cabbages, which were to be taken off the ground, and paid for before the 17th of March then next, the cabbages not to be removed until the balance was paid. In a few days after the contract was so entered into, the plaintiff paid the defendant the £20, and removed the peas in some short time after. Plaintiff, while removing the peas, planted a quantity of cabbage between the drills. Plaintiff and defendant met in the month of February. Defendant alleged that on that occasion it was agreed between them that the defendant should retain the cabbages in place of the balance due. This the plaintiff contradicted, and alleged that he stated he could pay the balance due within the specified time, and remove the crop of cabbages. About the 13th or 14th of March the plaintiff went on the lands and demanded the cabbages, and brought a cart to remove them, and he offered to pay what he alleged was the balance due, namely, £12, as he insisted that the sum to be paid was altogether £32—that he had paid £20, and owed only £12. The defendant, on the other hand, alleged that the sum agreed to be paid was £35; that the plaintiff had paid, not £20, but only £17, and therefore that the balance due amounted to £18, and he stated that though he insisted the contract had been rescinded, still he was willing to allow the plaintiff to take the crop if he paid the sum of £18, which he, the defendant, insisted was the balance due. It appeared on the evidence that whether anything was said on the subject or not, a purchaser circumstanced as the plaintiff was, was not entitled to remove the crop till it was paid for, but there

was no evidence one way or the other as to the vendor under such circumstances having a right to sell the crop. The plaintiff having omitted to pay or tender the sum claimed by the defendant, the defendant, in the latter part of said month of March, sold the cabbages, and received for same a sum of £25. At the close of the case the Chief Justice left the following questions to the jury:—1. What sum was agreed to be paid by plaintiff to defendant for the crop of peas and use of the land? To which the jury answered, £35. 2. Was the contract mutually rescinded as to the cabbages after the removal of the crop of peas? To which the jury answered that it was not. 3. How much was paid by the plaintiff to the defendant on foot of said contract? To which the jury answered £20. 4. What was the value of the cabbages included in the contract, and sold by the defendant? To which the jury answered, £25. It resulted from the findings that the sum tendered by plaintiff to the defendant in the month of March being only £12, was £3 less than the sum which should have been paid by the plaintiff to the defendant, while, on the other hand, the sum claimed by the defendant as due was £18, being three pounds more than the sum which should have been paid. On these findings it was conceded that the plaintiff should not maintain the special count, he not having offered to the defendant the sum really due, but plaintiff's counsel insisted that he was entitled to a verdict on the count in trover, that the cabbages were the plaintiff's property, and that though the defendant had a lien thereon for the balance due, he had no right to sell same, and therefore that the plaintiff was entitled to a verdict for the full amount of the value of said crop, although he, the plaintiff, stated that he was willing to give credit to the defendant out of said verdict for the sum of £15, being the balance due by plaintiff, and that he was willing to consent to enforce same only for the sum of £10. The defendant's counsel, on the other hand, insisted that the plaintiff, not having tendered the sum due by him to the defendant, was not entitled to the property in the cabbages, and that he, the defendant, was entitled to sell same. The Chief Justice directed a verdict for the plaintiff for the sum of £25, by consent of the parties, reserving liberty for the defendant to apply to the Court to have the verdict set aside, and a verdict entered for him on the trover count, or to have same reduced to the sum of £10, the Court to be at liberty to draw all inferences that the jury ought to draw on any other questions that the judge should have submitted to them, and he respite execution.

A conditional order in these terms, and also for a new trial on the ground of misdirection by the learned judge, was accordingly obtained, against which

*Serjeant Armstrong* (with him *O'Driscoll*) showed cause.—Though the cabbages must be growing till they are severed, yet, when once severed, trover will lie for them. The case of tithes is analogous.—*Shapcott v. Mugford* (1 Lord Raymond, 187); *Williams v. Ladner* (8 T. R. 72). The property in these cabbages must be held to have passed to the plaintiff, so as to entitle him to maintain trover. This count is scarcely distinguishable from a count in trespass.—*Edmondson v. Nuttall* (17 C. B. N. S. 280).

*Heron, Q.C.*, and *Martin*, in support of the order.—Trover will not lie for these cabbages. There was no demise of the land. The case of trade fixtures which a tenant neglects to remove is analogous. The case of trees planted in a nursery is analogous, also that of the sale of growing apples. A vendor's lien is distinct from the ordinary one. Payment was a condition precedent. To maintain the action there must be in the plaintiff either actual possession or the right to immediate possession. It will not do for the plaintiff to say that the defendant asked a wrong sum from him; he ought to have tendered the right sum.—*Lyde v. Russell* (1 B. & Ad. 394); *Lee v. Riddon* (7 Taunton, 191); *Milgate v. Kebble* (3 M. & Gr. 100); *Bloxam v. Sanders* (4 B. & C. 941); *Wilmshurst v. Bowker* (5 Bingh. N. C. 541); *Blackburn on Contract of Sale*, 308.

*O'Driscoll* in reply.—These cabbages were never the property of the defendant. The contract is like a consacre contract. A party having only a lien cannot convert what he had a lien on.

*MOWHAN, C. J.*—By the terms of the agreement as found by the jury, the plaintiff was not entitled to remove or take possession of the crop of cabbages, unless he paid a sum of money before a certain day. Not having paid before the day, he is not entitled to the property or right of possession, so as to maintain either trover or trespass. The verdict must be for the defendant on that count, as it has been by the jury on the special count, but by consent of the parties, £10 is to be allowed in part satisfaction.

*Rule absolute.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

*SHEA v. PLUNKET.*

*Motion to set aside defence—Distress—9 & 10 Vict. c. 8.*

*A plea to an action for a wrongful distress must aver that defendant in making the distress duly complied with the provisions of 9 & 10 Vict. c. 8.*

THE pleadings were as follows:—*Victoria &c. Bridget Shea*, plaintiff, complains that defendant, to wit, on the 1st day of October, 1866, broke and entered a certain dwelling-house of plaintiff situate at Mountpleasant, in the county of Dublin, and stayed and made a noise and disturbance therein for a long time, to wit, six hours then next following, to plaintiff's damage of £20. And also that defendant converted to his own use and wrongfully deprived plaintiff of the use and possession of plaintiff's goods and chattels, that is to say, two beds, one dresser, one table, one press, a large quantity of timber, a large quantity of old iron, one wheelbarrow, a heap of manure, and

a large quantity of bricks, of the value of £20. And also that defendant detained from plaintiff goods and chattels of a like quantity, quality, and value as in the preceding count mentioned; and plaintiff claims a return of said goods and chattels or their value, £20, and £10 for their detention; and plaintiff prays judgment against said defendant to recover the sum of £50 and her cost of suit. The defendant traversed all the counts of the summons and plaint, and further pleaded "that the alleged causes of action in the said three counts mentioned were one and the same transaction; and the goods and chattels in the said 2nd count mentioned were the goods and chattels in the said 3rd count mentioned and not other and different goods and chattels; and that before and at the time of the committing of the said alleged grievances, or any of them, and during all the time for which the rent hereinafter mentioned to be distrained for, accrued due and thence until the time of the committing of the said alleged grievances, plaintiff held the dwelling house in the said first count mentioned as tenant thereof to defendant under a demise thereof at the weekly rent of 2s. 3d. thereby reserved and payable weekly; and £6 1s. 6d. of the said rent for fifty-four weeks of the said tenancy was then due and in arrear from plaintiff to defendant, therefore defendant, whilst the said arrears of rent remained so due as aforesaid, entered into the said dwelling-house through the outer door thereof, the said outer door being then open, and stayed in the said house for a reasonable time in that behalf and no longer, making no unnecessary noise or disturbance in order to take and seize; and there then took and seized the said goods and chattels in the said 2nd and 3rd counts respectively mentioned, there being then found as a distress for the said arrears of rent according to the form of the statute in such case made and provided, which are the alleged grievances; and therefore, &c."

*M'Kenna*, for plaintiff, applied to set aside the above plea on the grounds that it was embarrassing and calculated to prejudice and delay the fair trial of the action, inasmuch as it was uncertain whether the distress therein mentioned was duly made; or under what statute said defendant seeks to justify said distress or whether the requirements of the 9 and 10 Vic. c. 3 were observed. This allegation, "In making the distress the defendant duly followed the provisions of 9 & 10 Vic. c. 3," ought to be in the plea.—*Spratt v. Murphy* (6 Ir. C. L. R. 489); *Goggins v. Trench* (10 Ir. C. L. R. 472).

*Curtis* contra for defendant, in support of the plea.—1. It is not necessary to refer to the statute. 2. If it is we have done so. 3. It is matter of evidence and ought not to be pleaded.

PER CURIAM.—Let the plea be amended by adding the words, "in making the distress defendant duly complied with the provisions of 9 & 10 Vic. c. 3." There will be no costs.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

BYRNE AND ANOTHER v. REDDY.—Nov. 17.

*Setting aside caveat—No plea—Costs.*

*In cases in which the defendant has duly appeared to the warning, but omits to plead to the declaration, the party propounding the will is entitled, on motion, to set aside the caveat and appearance and get probate in common form, and will get the costs of the motion but not of the cause.*

*E. Gibson*, for the plaintiff, applied to set aside the caveat and appearance entered on behalf of the defendant, and for letters of administration to the goods of Denis Doyle deceased, and for the costs of the motion. Denis Doyle died in the year 1861, having made his will previously, by which he named Maria Doyle sole executrix. She died afterwards without having proved his will, and by her will she named the plaintiff her executors. A caveat had been entered by the defendants in the *Goods of Denis Doyle*, and the appearance to the warning was duly entered on the 11th October, 1866. On the 30th October following the declaration was filed by the plaintiffs propounding the will of Denis Doyle, but no plea had been since filed by the defendant.

No one appeared for the defendant.

KEATINGE, J.—You are entitled, if you choose, to go on and take a decree to establish in solemn form of law the will that you have propounded. But, if you desire it, I will now make an order on your motion to dismiss the caveat and appearances entered by the defendant and will give you leave to apply for and obtain in the Registry letters of administration of the goods of the deceased, with his will annexed; and I will give you also the costs of the motion, which is all that you ask for by your notice; the costs of the cause I cannot give unless you take a decree.

Counsel having elected to take the order as suggested,

*Order made accordingly.*

CATHERINE MURPHY, PLAINTIFF; ELEANOR HAYES, DEFENDANT.—Nov. 17.

*Presumption of death—Survivorship—Grant under 78th section of Probate Act—Security.*

*Where a son who was entitled under a settlement, made when he was in this country, to a part of a trust fund, afterwards went to America, and had not been heard of for sixteen years, save that it was sworn, on information and belief, that he had been killed in Savannah in 1851; and his father, who was a clerk in an American house in Cork, by his will, in 1859, treated him as dead, and disposed by his will of such trust fund in favor of the plaintiff, who was his second wife, and whom he named his executrix. On proof of advertisements duly*

*issued in America, and of no answer, the Court gave to the plaintiff, as legatee in her husband's will, administration of the goods of the son, but required justifying security.*

**Dr. Ball, Q.C.** (*Dr. Miller* with him), moved that the caveat entered by the defendant be set aside, and that the plaintiff might be allowed to apply for and obtain a grant of administration to the goods of David Murphy junior, as of an intestate, and to swear, not positively but the best of her belief, to the time of his death. The caveat was lodged by the defendant as a sister and (if he were dead) a next of kin of the supposed deceased, on the 11th May, 1865. The appearance followed on the 21st June. On the 12th May, 1865, an affidavit was made and filed by the plaintiff detailing the circumstances respecting the said supposed deceased; and it stated that on the 2nd March, 1819, a policy of insurance had been effected by David Murphy senior, the father of the said supposed deceased, on his own life for £500, and that on the 5th September, 1846, on the marriage of the defendant, a daughter of the said David Murphy senior, that policy was with other property put into settlement; and as to the policy, the sum of £300, part of the produce thereof, was settled for the benefit of the defendant and her issue; and the residue of such produce was settled in trust for David Murphy jun. and his personal representatives. In 1848 David Murphy the younger left this country and went to America; and it was sworn by a man named Thomas Burrows, a ship carpenter, who was acquainted with said David Murphy junior, that in New York, in 1851, he heard from several persons of the death of the said David Murphy junior in a street row in Savannah, in Georgia, in the United States. This information Burrows communicated to the father of the supposed deceased, who held the position of American consul, and was conducting clerk in a mercantile house in Cork connected with America. He mentioned it to several members of his family, who also made affidavits of their belief in his (the son's) death. David Murphy the elder by his will, dated the 26th September, 1859, mentioned the fact of his two daughters, the defendant and another, being then his only surviving children; and he disposed of the balance of the produce of the policy after deducting the £300 settled on the defendant, to the plaintiff for her absolute use, and appointed her sole executrix. Advertisements had in March, 1866, been inserted in several papers in New York and Savannah for information of David Murphy junior (giving a full description of him and of the intended application to this Court), but no answers had been given to them.

**J. B. Murphy**, for the defendant, said that she believed that her brother was alive and had been a lieutenant in the Confederate army, but the application made for information was not answered.

**Dr. Miller**, in reply, referred to the case *In the Goods of Smith* (2 S. & Tr. 508) as a similar case of survivorship, and was not so strong as this. Besides the son here was aware of his rights under the settlement, as he did not leave this country for several years after its execution.

**KEATINGE, J.**—That case is quite in point, and I

will make a similar order; but as security is required in such cases the form of my order will be to give you, under the 78th section of Probate Act, a grant of administration; with the will annexed, as *legatee*, and not as executrix, giving justifying security.

*Order accordingly.*

#### O'REARDON v. THE ATTORNEY-GENERAL.

*Costs—Motion for leave to bring ejectment.*

*Where the landlord, on a motion for leave to bring an ejectment, agrees to accept less rent than is due to him, he is entitled to the costs of the motion.*

**Exham, Q.C.**, moved that the receiver appointed by this Court over the real estates of the deceased should be ordered to pay to his client, the head landlord of a part of the premises, one and a half year's rent now due, or be at liberty to proceed at law for recovery of same.

The solicitor for the receiver (Mr. Bennett) attending and undertaking to pay out of the rents in the receiver's hands of other premises one year's rent, in order to avoid the costs of an ejectment, which counsel for the landlord agreed to accept, the only question was as to the costs of the motion.

**Exham, Q.C.**—In Chancery the rule now is—that the landlord in getting leave to bring an ejectment, if the order is made, is not allowed the costs of the application; but if on the motion he waives part of his rights by accepting part of the rent due, he gets his costs of the motion.—*Harris v. Shea* (8 Ir. E. R. 571).

**R. Perse** appeared for the Attorney-general.

**KEATINGE, J.**—I will, on the authority of the case allow you £4 for the costs of the motion.

#### MULVANY v. MULVANY.—Nov. 22.

*Practice—Joint grant of administration.*

*A joint grant of letters of administration, with the will annexed of the deceased; was given to two residuary legatees, who each applied for it, but justifying security was required.*

**Dr. Ball, Q.C.**, for the plaintiff, Christopher Mulvany, applied for letters of administration, with the will annexed, of Patrick Mulvany, dated 13th September, 1862, to be given to the plaintiff. The deceased was possessed of certain lands of Moyvally, County Kildare, besides stock, furniture, and other effects; and he gave to his sons, James, Christopher, John, and Andrew, £300 each; and to his son Patrick £200 if he returned to this country, otherwise said legacy to lapse; and subject to other legacies, he nominated his sons Christopher and An

drew his joint residuary legatees, and appointed Thomas Brangan and Patrick O'Brien his executors. There was a codicil to that will, dated the 6th July, 1864, but it did not alter the residuary or executorial clauses. The affidavit of the plaintiff stated that the executors had renounced, and the assets of the deceased amounted to £2384; and he relied on the consent of several of the legatees in the will.

*Dr. Townsend, Q.C.*, for the defendant, relied on his claim to administration, it appearing from his affidavit that he had managed the property for the deceased for sixteen years up to his death. Each residuary legatee has an equal right to administration, and would as of course get administration in the office on notice (*Miller's Pr. Fr.* 371); but here each of the residuary legatees asks for the grant.

*KEATINGE, J.*—This is a case in which I think a joint grant should be given to the plaintiffs and defendants, and security must be given.

*Order accordingly.*

## Landed Estates Court

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

[BEFORE JUDGE LONGFIELD.]

Nov. 14, 1866.

IN RE ESTATE OF THOMAS HUTCHINS, OWNER; RICHARD J. T. ORPEN, PETITIONER.

*Costs—Practise—Petition by puisne incumbrancer—Fund insufficient to reach his demand.*

*A puisne incumbrancer who presents a petition for a sale with a reasonable expectation of being paid will be entitled to his costs, even though the proceeds of sale fail to reach his demand; but the rule will not be applied if, owing to negligence or delay in proceeding to a sale, prior incumbrancers have sustained damage.*

In this case an objection was filed by the petitioner to the final schedule in this matter under the following circumstances:—John Payne obtained a judgment for £507 17s. 2d. against the owner, which being duly registered as a mortgage constituted a first charge on said lands. Subsequently the petitioner obtained a second charge on said lands. The petition for a sale was presented by the puisne incumbrancer on the 10th of May, 1864, and in the following March the lands were put up for sale, but the sale was adjourned for want of an adequate offer. The petitioner having allowed much time to elapse without proceeding to a sale, the carriage of the proceedings was transferred to Mr. John Orpin, solicitor for Payne, on the 31st of May last, who sold the property on the 6th of July for £710. The schedule having been lodged, the examiner placed the petitioner's costs in the same

priority with his demand, and the petitioner now filed an objection claiming to be entitled to his costs (which as lodged for taxation amounted to £97 6s. 1½d.) next in priority in the Landed Estates Court, duty and succession duty, the two first items on the schedule.

*R. R. Warren, Q.C.*, for the petitioner, opened the objection.

*Vereker*, for the solicitor having carriage of the proceedings, opposed the objection, and cited the *Acts*, 21 & 22 Vic. c. 72, ss. 77 & 78. *Kennedy's Estate* (7 Ir. Jur. n. s. 34).

*LONGFIELD, J.*—In coming to a conclusion in cases of this kind the Court must be influenced very much by the surrounding circumstances; and here I must begin by observing that this is not one of those cases in which a petition has been recklessly presented without any reasonable probability of the fund realised by the sale reaching the petitioner's demand. On the contrary, while the total principal sum due to the prior creditor amounted to no more than £507 17s. 2d., the sale actually produced a sum of £710; and it has been stated that this was in point of fact less than the real value of the estate. Accordingly, there was a reasonable probability (which unfortunately has not been realised) that the first incumbrancer would be paid in full. In the face of this fact I don't think I ought to deal too rigidly with the petitioner, more especially when I bear in mind that the greater part of the costs and expenses he claims are costs and expenses of which the first incumbrancer has had the full benefit, costs and expenses which if they had not been incurred by the petition must have been incurred by him. So far then as the abstract question of costs is concerned I should have no difficulty in deciding this case upon the principle I have laid down, which has always prevailed in this Court, viz. to give the costs to a creditor who undertakes *bona fide* proceedings with every reasonable probability that his demand will be paid out of the proceeds of the sale. But there is another point in this case which I consider of some importance. It is admitted that the petitioner delayed the sale at the instance of the landlord, who was at that time in the receipt of the rents. Now the petitioner had a right to be good-natured if he liked, but he had no right to be good-natured at the expense of the prior incumbrancer; and as it is plain the prior incumbrancer will not be paid in full, and that he has lost a portion of his demand through the unreasonable delays of the question, I shall make an order giving the petitioner his choice to take either his costs out of pocket or his full costs, deducting from them the value of one half year's net rent, which I compute to be the amount lost by his delays.

[Acting on this order the costs were reduced by consent, and with the approbation of the Court, from £97 6s. 1½d. to £60.]

Solicitor for petitioner—Orpin, Sweeny, & Co.  
Solicitor having carriage of sale—John Orpin.

## Court of Chancery.

Reported by Oliver J. Burke, Esq. Barrister-at-Law.

[BEFORE BLACKBURN C.]

CARROLL v. BARRY.—Nov. 26.

*Will—Construction of—Children—Class.*

*Testator by his will made shortly previous to his death, in 1838, gave and devised his messuages, farms, tenements, &c., situate in the county of Cork, to trustees, for 500 years, upon trust amongst others "to levy and raise a sum of £11,000 for the portions of any younger children I may have by my wife.....to be paid to such younger children, in equal shares, and to become payable when and as soon as each and every of my younger sons shall severally and respectively attain his age of 21 years, and unto each and every of my daughters when and as soon as each and every of such daughters shall severally and respectively attain the said age of 21 years or marriage.....said portions hereby given to my younger children shall not be considered as vested in any such younger child, if a son, until he shall attain 21, or, if a daughter, until she shall attain said age or marry.....although such portions shall bear interest." Testator having then added a maintenance and advancement clause thus proceeded, "If any of my said younger sons shall become an eldest son and take a life estate in the lands and premises hereby devised, before he shall be entitled to take his proportion of said £11,000, then such younger son taking a life estate in said lands shall not take any part of said £11,000, but that the same shall be divided amongst his brothers and sisters in equal shares." Testator having then devised his said lands, &c., to J. B., his eldest son, for life, with remainder to J. B.'s first and other sons in tail male, closed his will. Testator left 15 children, him surviving, of whom two daughters died unmarried and under 21 years of age. Petitioner, one of the surviving younger children, now claimed to be entitled to a distributive share of the portions of his said two deceased sisters in said £11,000. Held, that said portions sank in the inheritance and did not become divisible amongst the surviving sisters.*

THIS was a cause petition presented by John Carroll and Charlotte, his wife, the petitioners, against James Barry and Lucy E. M. Hodder, the respondents. The question for the consideration of the Court was one entirely upon the construction of the will of Henry Green Barry, deceased. The facts of the case, as disclosed on the face of the cause petition, are these—Henry Green Barry, late of Ballyclough, in the County of Cork, who was the father of the petitioner, Charlotte Barry, died on the 18th May, 1838, having previously thereto made his last will, dated the 17th Jan. 1837, which contained the provisions following—"I give and devise my messuages, farms, lands, tenements and hereditaments, situate in the County of Cork, unto William Stewart and William H. Moore Hodder, their executors, administrators and assigns, for the term of 500 years from the day of my decease, upon the trusts, and for the intents and

purposes, and subject to the proviso herein-after declared, expressed and contained, of and concerning the same; and as to the said term of 500 years herein-before limited to the said William H. Moore Hodder and William Stewart, their executors, administrators, and assigns, of and in the said hereditaments and premises herein before mentioned, my will is, and I do hereby declare, that the said hereditaments and premises are so limited to them upon and for the trusts and purposes herein-after expressed of and concerning the same, that is to say, upon the trust that if the personal estate of which I may die possessed (exclusive of my plate, books, household furniture, stock of cattle, and soforth, herein-after specifically bequeathed to my sons, James and Redmond, and to my wife, Phoebe, respectively) shall prove insufficient for the payment of my just debts, funeral expenses, and the legacies given by this my will, or which shall and may hereafter be given by any codicil or any codicils thereto, then and in such case that the said trustees, (naming them) do and shall, by, with, and out of the rents, issues, and profits of the said hereditaments and premises comprised in the said term of 500 years, or by mortgage or sale of all or any of the said premises for all or any part of the said term, or by all or any of the ways and means aforesaid, or such other ways and means as to the said trustees (naming them), shall seem fit, do and shall by, with, and out of the rents, issues, and profits of the said hereditaments and premises comprised in the said term of 500 years, or by mortgage or sale of all or any of the said lands and premises for all or any part of the said term, or by all or any of the ways aforesaid, or such other ways and means as to the said trustees, shall seem expedient, levy and raise a sum of £11,000 for the portions of any younger child or children I may have by my wife, Phoebe, living at my decease (or born in due time afterwards, excluding, however, my eldest daughter, Letitia, the wife of the Rev. Robert Bury, whom I have heretofore provided for upon her marriage with him), to be paid to such younger children in equal shares, and to become payable when and as soon as each and every of my younger sons shall severally and respectively attain his age of 21 years, and unto each and every of my said daughters when and as soon as each and every such daughter shall severally and respectively attain the said age of 21 years or marry, provided such marriage shall be with the consent of the guardian or guardians for the time being. Provided always, and I do hereby declare that the said portions hereby given to my said younger children by this my will, in manner aforesaid, shall not be considered as vested in any such younger child, if a son, until he shall attain his age of 21 years, or if a daughter, until she shall attain the said age or marry, with such consent as aforesaid, which shall first happen, although such portions shall bear interest according to the legal rate of interest in Ireland from the time of my death." The said will contained a maintenance and advancement clause in the words following—"I do hereby declare and direct that in the meantime it shall and may be lawful to and for the said trustees "to pay and apply such interest or so much thereof as may be necessary in each year during the minority of such younger child



or children for the purposes of his or her maintenance and education, as the guardian or guardians of such younger child for the time being shall think expedient, and further, that it shall and may be lawful to and for the said "trustees "during the minority of such younger son, with the consent of the guardian or guardians of such younger son for the time being, testified by some writing under his or their hands, to raise or apply, by any of the means before mentioned with respect to the said term of 500 years, any sum not exceeding the sum of £650 in and towards the placing of such younger son in any profession, or for the purchase of a commission in the army, or otherwise for his benefit and advancement in the world, in such manner as his guardian or guardians for the time being shall think proper, and my will is, that such sum or sums of money which may be so raised and applied as last herein-before mentioned, shall be taken as part of, and deducted from the portion of the said sum of £11,000, whereto such younger son would be entitled to by virtue of this my will, after attaining his said age of 21 years." The said will contained a further proviso in the words following: "And my will further is, that if any of my said younger sons shall become an eldest son, and take a life estate in the lands and premises hereby devised and settled, before he shall be entitled to take his proportion of the said sum of £11,000 under this my will, that then and in such case such younger son taking a life estate in said settled lands, shall not take any part of the said sum of £11,000, but that the same shall be equally divided amongst his other brothers and sisters in equal shares, excluding my daughter, Letitia Bury, as aforesaid." Subject as aforesaid, the testator devised said lands to the Right Hon. Hayes Viscount Doneraile and William Cooke Collis, and their heirs for ever, to the use of the respondent, James Barry, his eldest son, for life, with remainder to his first and other sons in tail male, with remainders over. Said James Barry was tenant for life of the first estate of inheritance, the remainder being also vested in him. The testator left him surviving an eldest son, James Barry, the present respondent, and fourteen younger children, viz., Letitia Elizabeth, Henry, Elizabeth Phoebe, Redmond, Caroline, Henrietta, St. Leger, Catherine, John, Richard, Phoebe Maria, Charlotte (petitioner), Louisa Octavia, and William, of whom Letitia was excluded from any participation in the sum of £11,000 so provided. Said Phoebe Maria, one of the younger children, died in 1842 under age, and unmarried, and Louisa Octavia, one other of the said younger children, died under age and unmarried in the year 1845. Petitioner, Charlotte, attained her full age in 1844. John Barry, one other of the younger children died in 1847, having attained his full age of 21, and having made a will dated 26th June, 1844. Henry Barry, one other of the children, died 23rd December, 1853, having attained the age of 21 years, and having duly executed his will dated 11th December, 1858, whereby he willed and devised "the residue of the money left me by my father, and at present in the hands of the above-named James Barry, as well as any money, or other personal or real property, that may since by any chance have been left me, or that may be left me

hereafter, over which I have any control, be equally divided between my brothers and sisters," naming seven of them. Petitioner, Charlotte, in the month of May, 1865, intermarried with John Carroll, upon and previous to which marriage a settlement was executed, whereupon petitioner's (Charlotte's) £1,000, her portion of the charge of £11,000, was put in settlement, and also the sum of £142 17s. 4d., being petitioner's (Charlotte's) one-seventh of her brother Henry's £1,000, was vested in the trustees of her settlement upon the trusts thereof. Petitioner, John Carroll, in right of his wife, Charlotte, also insisted to be entitled to the following shares of the £11,000 under the will of testator:—to the principal sum of £222 4s. 4d. being the proportion of said sum of £11,000 to which, by reason of the deaths of Phoebe and Louisa under age and unmarried, petitioner became directly entitled to in addition to said sum of £1,000. Petitioner further claimed under the said will of Henry Barry, and the bequest therein contained, to be entitled to a distributive share of Phoebe's and Louisa's portion of said £11,000, to which Henry was entitled as one of their next of kin. Said sums so claimed by petitioners, amounted to £31 14s. 11d., or one-seventh of the sum of £222 4s. 4d., said Henry's accrued shares, for said two sisters, Phoebe and Louisa. John Barry, one other of testator's sons, died in 1847, unmarried and without issue, and neither of the testator's four surviving sons, viz., James, Redmond, St. Leger, or William Wigram, have any issue, so that James Barry, the respondent, represents the first estate for life in possession, and also the first estate tail in remainder in the said lands. The said James Barry, as tenant for life of the lands and premises so charged by said will with said sum of £11,000, was in possession and receipt of the rents and profits. The respondent insisted that upon the deaths of Phoebe and Louisa Barry their respective portions of the sum of £11,000 sank into the inheritance of the said lands. The respondent, Mary Hodder, was the surviving trustee.

The petition prayed that upon the true construction of the will of said Henry Green Barry, petitioner, John Carroll, in right of petitioner, Charlotte Carroll, otherwise Barry, was entitled to the sums of £222 4s. 4d. and 31 14s. 11d., portions of the sum of £11,000 in the will of Henry Green Barry mentioned, and thereby charged upon the lands and premises comprised in the said term of 500 years, in the said will, limited to trustees, for the purpose of securing said sum of £11,000 and interest.

*Pilkington, Q.C.* (with *Dames*), were heard in support of the prayer of the petition. This is a gift of a sum of £11,000 in gross, to a class, and not of any specific sum to each member of a class. It is a gift to a class of persons, who may be in existence at the death of the testator, and to be paid to them at 21; and that class that are so to take are his younger children, excluding thereout one that has been provided for; and testator actually names the class, for he bequeaths the £11,000 "to be paid to such younger children." The rule is thus laid down in *Hawkins on Wills*, 75—"When there is a bequest of an aggregate fund to children as a class, and the share of each child is made pay-

able on attaining a given age, or marriage, the period of distribution is the term when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded.—*Andrews v. Partington* (3 B. C. C. 403); *Whitbread v. Lord St. John* (10 Ves. 152). And as a corollary to this—those coming into *esse* before are to be included. Now, therefore, this is a gift of £11,000 to the class that ultimately are to take, and it is not a gift of aliquot parts of £11,000, or of one-eleventh of said £11,000 to each child of the said eleven children; if therefore there was only one younger child that younger child would take the entire £11,000; and the testator puts it beyond all doubt, for he says, "I wish my elder son to take my estates; but I intend they shall come to him burthened with £11,000 for younger children." He, therefore, now holds those lands burthened for the claims of younger children. Again, all through this will he speaks of £11,000 as "such sum," and not diminishing by the deaths of any of the children; and should the eldest son die, then the next eldest takes, but the £11,000 remains.—1 Roper on Legacies, 650, 651. As to the proposition that "legacies to be raised out of real estates sink for the benefit of the estates, *unless* all the conditions upon which the legatees are to take are fulfilled," not a single case can be produced where such a rule is applied to gifts to a class.—*Powlett v. Powlett* (1 Vern. 321); *Smith v. Smith* (2 Vern. 92); *Duke of Chandon v. Talbot* (2 P. Wms. 602); *Harrison v. Naylor* (3 B. C. C. 108); *Myrkin v. Philipson* (3 Mylne & K. 257).

The Solicitor-General (*Chatterton*), with *Campion* contra.—On the death of the testator the £11,000 became divisible equally among the younger children; but the portion of each child was not to vest, nor was it payable until 21 years of age, or marriage of the daughters, and as two of the daughters died without being married their respective portions merged in the inheritance, and did not become divisible among the surviving brothers and sisters. No doubt, this legacy vested subject to be divested by the death of any of the children under the age of 21.—*Davidson v. Dallas* (14 Ves. 576); *Brown v. Nesbitt* (1 Cox 13) is the leading case on our side.

THE LORD CHANCELLOR.—In this case a petition has been filed by John Carroll and Charlotte Carroll, his wife, for the purpose of being paid the several sums of money so frequently spoken of in the course of the cause, and mentioned in the petition. The late Mr. Henry Green Barry, by his will, made in the year 1837, devised his estates (subject to a term of 500 years, vested in trustees of the term) to trustees, upon trust to the use of his eldest son, James Barry, and his assigns, for the term of his life, with remainder to his first and other sons in tail male. That term of 500 years the testator then declared in this his will, was so limited to trustees upon trust to raise a sum of £11,000, for the portions of any child or children he might leave by his wife, Phoebe Barry, living at his decease (excluding, however, one of his daughters, whom he had provided for at the time of her marriage) to be paid to such younger children, in equal shares, and to become payable to them as soon as they shall, respectively attain, if sons, 21 years of age, and,

if daughters, 21 years of age or marriage. The testator then declares that the portions so given to his younger children should not be considered as vested in any of such younger children, if a son, until he should attain 21 years of age, if a daughter, until she should attain that age or marry, although such portions should bear interest thereon. Testator left, at his death, thirteen younger children (exclusive of his daughter he had provided for). After Mr. Barry's death two of his daughters, Phoebe and Louisa, died under the age of 21, and unmarried, and the question we have now to consider is, what became of the shares of those two young ladies. Did they go among the surviving brothers and sisters, or did they then merge in the inheritance? There was a clause that if any of the younger sons should become an eldest, he should be entitled to take his proportion of said sum of £11,000; but that the same should be equally divided among his other brothers and sisters. [His lordship here recapitulated the facts, as stated in the petition.] I am clearly of opinion, then, that the shares of the two daughters that died under age and unmarried, that their respective portions sunk in the inheritance, and did not become divisible amongst the surviving sisters. I shall, therefore, dismiss the petition, but without costs, inasmuch as this was a very fair case to have brought before the Court, the embarrassment being caused by the testator himself.

## Court of Queen's Bench.

Reported by William Woodcock, Esq. Barrister-at-Law.

*McGEAGH v. THE REV. JAMES GERAHTY.*—Nov. 5, 13.

*Arrest—Protection—Visitation—Clergyman.*

*A clergyman of the Established Church attending, under a summons, an episcopal visitation, is protected from arrest.*

THIS was a motion to discharge the defendant from custody. It appeared that the defendant, a beneficed clergyman of the Established Church, was, on or about the 7th September, 1866, summoned by the Archbishop of Armagh, to attend at the visitation at Armagh on the 26th September. He, accordingly, did attend before the Primate and the Vicar-general; and while returning from the visitation to his hotel on the same day to take conveyance to his own glebe-house, and in the direct route to said hotel, and carrying his clerical gown, he was arrested by a bailiff of the high sheriff of the County of Armagh, at the suit of the plaintiff, and had since remained in Armagh gaol on foot of this execution and other detainers.

*Harrison, Q.C., and Purcell, Q.C.* (with them *Kaye*), appeared for the defendant, and argued that a clergyman of the Established Church, while going to, attending at, and returning from a visitation, was privileged from arrest.

*J. P. Hamilton and Shegog* contra, denied the existence of the privilege.

The line of the arguments and the authorities cited appear sufficiently from the judgment.

*Cur. adv. vult.*

November 13. WHITESIDE, C. J.—Said that the question was whether, under the circumstances, the defendant was entitled to his discharge. The summons, under which he had attended the visitation, was according to the form contained in the Schedule to the Rules and Orders framed under the provisions of sec. 7 of statute 27 & 28 Vic. c. 54. The schedule of forms relating to visitations came within the 112th to the 114th. Part 10, sec. 66 of the statute was also to be observed. The next inquiry was, what was a visitation? In Ayliffe's Parergon the word was stated to signify a right of power and jurisdiction over words and persons. At page 515, he stated that a bishop might visit his diocese. In the 2nd Institute, p. 398, the explanation of the word "ordinary" was given: Lord Coke said the word was "derived *ab ordine*, to put him in mind of the duty of his place, and of that order and office that he is called unto." His lordship also referred to Littleton, sec. 136, and to Coke's Commentary on that passage: It had been asserted that the visitation depended altogether on the Canon Law; but Lord Coke had said that it depended on the common law, and the House of Lords upheld Lord Coke's view. *Philips v. Bewley*, shewed distinctly the truth of this. The full significance of the term "visitation" was found in the case of *The Bishop of St. David's v. Lucy* (1 Salk. 134), decided by Lord Holt. An ordinary at a visitation might administer an oath, summon persons before him, and exercise jurisdiction as a judge. In Comyn's Digest it was laid down that the jurisdiction was derived from the crown. That the tribunal of the ordinary was a Court was laid down in Noy. 123, which referred to *Fitzherbert. The King v. The Bishop of Chester* (1 Wilson 206), deserved attention: it shewed that the authority of the bishop, in his visitatorial capacity, was superior to that of the visitor of a charitable institution. The passage in Burns' Ecclesiastical Law, title Visitation, p. 14 to 18, where the jurisdiction and authority, and mode of proceeding were set out, might be referred to. The clergy were required to bring to the visitation their articles and titles to orders. None but the bishop had a right to require this *de jure*. The power of the bishop to punish for contempt was indisputable. That a person, then, who was liable to be censured and to have his benefice sequestrated, who went to the visitation in obedience to a mandate settled by Act of Parliament—that he should be liable to be arrested for acting in obedience to the duty thrown upon him by the law was, in the words of Lord Chief Justice de Grey in *Miller v. Seare*, absurd and impossible. It had been attempted to take a distinction between the first and the second summons. That appeared to be untenable. It was clear, on comparing the second summons with the first, that the disobedience to the first was the act of contempt, which might bring on ecclesiastical censure, and, perhaps, deprivation. The case of *In re the Dean of York* (2 Q. B. 1), was relied on, on both sides; but, when rightly considered, it did not weaken the foundation of the rule which the Court was about to pronounce. The precise point of that case was, that as the stat. 3 & 4 Vict. c. 86, in England had pointed out the exact course to pursue in the case of a par-

ticular offence, no other mode of procedure could be adopted; but it by no means followed that the authority of the bishop to punish in that case did not exist, if the right procedure had been taken. It had been said that there was no case in point here, and that the Court was not called upon to make a precedent. Law would not deserve the name of science if such a principle was to prevail. We should search, therefore, for a principle which would be of more value than a case which was only the exposition of a principle. Such a case was *Arding v. Flower* (2 T. R. 534), where Lord Kenyon held that a bankrupt attending upon notice for that purpose, a meeting of the commissioners to declare a dividend of his estate is protected from arrest at the suit of a creditor during such attendance, although several years after his examination. That case had been followed by Lord Eldon, in *Ex parte King* (7 Ves. 312), and in *Ex parte Byne* (1 Ves. & Beames 316). The words of Chief Justice De Grey, in *Miller v. Seare* (2 Wm. Bl. 1142), were important, when he said that witnesses should be protected when appearing before the commissioner of bankrupts; that otherwise, they would be in a strange dilemma: "If they do not appear they are liable to be committed by this Court for their contempt; if they do, they are liable for arrests, which would be absurd, and, therefore, impossible." So here the Court would hold in the same way, that those persons who were subject to the jurisdiction of the ordinary, being liable to punishment for contempt if they omitted to attend at the visitation, and being, when doing so, in the performance of a legal duty imposed on them, their arrest was absurd, and, therefore, impossible. Lord Hardwicke, in *Ex parte Turner* (1 Atk. 148) had dealt with a case of this kind with a high hand. It was also to be borne in mind that the visitation would be very seriously affected if a sham arrest could excuse a man from attending at a visitation and giving evidence. The visitation would be at an end, if, by means of a civil bill process, a clergyman who feared the result of the inquiry could procure himself to be arrested, and so prevented from attending. It had been pressed by Mr. Hamilton that the visitation was more properly a court of preliminary inquiry for serious matters which might or might not end in deprivation. That view was met by *Mountague v. Harrison* (3 C. B. n. s. 292), where it was held that a person attending a police-court as prosecutor or witness on a charge there pending, is privileged from arrest on civil process, even though he is not attending under compulsion. And if a person attending a police-court was privileged on the ground that he was performing a public duty, why should not the defendant here be so, on the ground of public privilege and legal compulsion? Here was a Court, an ancient tribunal having jurisdiction known to the law, and the true principle was, that where a party acted in obedience to the requirements of the law, and gave his attendance for the purposes for which he could be compelled to attend, he was privileged from arrest at suit of a creditor. He, therefore, thought that the defendant was entitled to his discharge.

FITZGERALD, J. said that he concurred in the result of the judgment, on the ground that the defendant was duly attending an ancient and lawful tribunal,

which had jurisdiction to compel attendance, and inquire into matters of deep public interest. In the course of that attendance he was privileged from arrest, and his Lordship said that in so holding he was not afraid of laying down a new precedent.

O'BRIEN J. and GEORGE, J., concurred.

THE QUEEN AT THE PROSECUTION OF LAURENCE CONLAN  
v. THE JUSTICES OF THE COUNTY OF WESTMEATH.

Nov. 6, 10.

*Custom—Churchyard—Trespass.*

*A custom to cut a sod in a remote part of a churchyard, for the purpose of covering a newly opened grave, is illegal and bad, and a claim under the custom is not such a reasonable claim of title as will oust the jurisdiction of magistrates at petty sessions proceeding summarily for trespass on the complaint of the rector of the parish, in whom the freehold of the churchyard is vested.*

THIS was a motion to make absolute a conditional order for a certiorari to remove, for the purpose of being quashed, all records of conviction of trespasses on the churchyard of the parish of Killucan, of which Laurence Conlan was convicted at the Killucan Petty Sessions on the 11th of November, 1865, on the grounds that such convictions were made without and in excess of jurisdiction; that such jurisdiction was ousted by reason of a question of title to do the acts complained of having arisen, and being involved in the investigation of the complaint; that such acts were done in the *bona fide* exercise and assertion of such right, and under a fair and reasonable supposition thereof; and that such convictions, and the summons whereon same were founded, disclosed no offence punishable by summary jurisdiction. The summons, which was at suit of the Rev. William Lyster, the Rector of Killucan, was for that Laurence Conlan did aid and assist in wilfully committing damage, injury, and spoil on complainant's property at Killucan, by cutting and removing a portion of the soil and earth of the churchyard there. The trespass consisted in removing a sod from a portion of the graveyard to cover a newly-made grave. The defendant below set up the case that he had done this under a custom so to do, which had existed from time immemorial in the parish. On the other hand the custom was denied. The magistrates were asked to dismiss the case on account of a question of title by reason of the custom having arisen, but they refused to do so, and made an order against defendant to pay five shillings fine and one and sixpence costs. It appeared that a practice such as that complained of had prevailed, and that the defendant below, the present prosecutor, and others, had often been warned to desist, and that there had been previous convictions of other persons. It also appeared from the affidavit of the Rev. Mr. Lyster that though the trespass complained of had been committed in a remote part of the churchyard, there were in that part human remains, which had been disturbed on the removal of the sod.

*Palles, Q.C., and Molloy, for the prosecutor.—*

There was a *bona fide* claim of right here which brings the case within the proviso in st. 24 & 25 Vict. c. 97, s. 52.—*Hudson v. MacRoe* (4 B. & S. 585); *Cornwell v. Sanders* (3 B. & S. 206); *The Queen v. Nunneley* (Ell. B. & Ell. 852); *Paase v. Chaytor* (3 B. & S. 620). The custom here alleged is good and lawful.—*Lousley v. Hayward* (1 Y. & J. 588); *Hilliard v. Jefferson* (1 Lord Raym. 212); *Cockredge v. Fanshaw* (Dy. 118); st. 13 Edw. 1, s. 2, c. 6; 2 Rolle's Abr. 265, F.

*Ball, Q.C. and Lyster, contra.*—The custom is illegal and bad.—*Com. Dig., Cemetery, A.; Ex parte Blackmore* (1 A. & E. 122); *Fryer v. Johnson* (2 Wils. 28). There was not such a reasonable claim of right here as would out the jurisdiction of the magistrates.—*Whistler v. Bryan* (8 B. & Gr. 288); *Reg v. Dodson* (9 A. & E. 704); *Swinfen v. Bacon* (6 H. & N. 184); *Buckmaster v. Reynolds* (13 C.B. 62).  
*Cur. adv. vult.*

Nov. 10.—WHITESIDE, C. J. delivered the judgment of the Court.—It was obvious that the principal question was as to the validity of the alleged custom, and it was important that there should be no misunderstanding as to the opinion of the Court upon this point. They were all of opinion that the pretended custom was wholly invalid. It was hardly necessary to refer to the authorities on the subject of churchyards. *Comyn, in his Digest, Cemetery, A. 2.* said, "The soil and profits of the church and churchyard belong to the parson, and the parson may make a lease of the churchyard. If any cut corn or trees there growing, trespass lies by the parson or his lessee." Further on, B. 2, the same writer said, "and therefore, every person (who may have Christian burial) may have burial in the churchyard where he dies, by the general custom of England." That right he had, but no other. The parishioner had no right to compel the parson to assign a particular place in the church-yard to him, and when such a right was alleged it was denied by the Court, as in *Fryer v. Johnson* (2 Wils. 28). That was a special action upon the case against the parson of the parish, setting out that there had been a custom in the parish time out of mind, that every parishioner had a right to bury his dead relations in the churchyard as near to their ancestors as possible, and that the defendant refused to permit the plaintiff to bury a relation as near as possible to his ancestor. And there, after a verdict, this was held clearly to be a bad custom by the whole Court upon the first argument. Again, in *Ex parte Blackmore* (1 Ad. & Ell. 122), the Court refused a mandamus to compel a rector to bury the corpse of a parishioner in a vault, or in a particular part of the church-yard, and *Bayley, J.* in delivering judgment, said, "We cannot grant a mandamus to a rector to bury a corpse in a particular part of the church-yard. He has a right to exercise a discretion on that subject. If he had refused altogether to bury the corpse we would have compelled him." Again, if we looked at the law of the Church on the subject, we would find what the writers on that subject thought of a parishioner who meddled with the soil of the church-yard against the will of the rector. He quoted from 1st Burns' Ecclesiastical

Law, p. 346, where Stratford was cited. It was, therefore, impossible, in the opinion of the Court to establish such a custom. The indecency and the contentions which might arise from it were apparent. But secondly, they were of opinion that the applicant could not establish his title to a *certiorari* by the proviso in the Act as to the claim of title. That claim was unsustainable. There must be some show of reason in the claim. A claim, to be reasonable, must be one which could legally exist, and the justices had determined that the applicant had not shown that he had ground for the claim. The jurisdiction of the justices could not be ousted by a party merely making an extravagant claim—*Cornwell v. Landers* (3 B. & S. 213). Now, the case in which the Court ought to act, and the cases in which they ought not to act, were clearly shown by two cases, namely, *Reg. v. Dodson* (9 A. & E. 704), and *The Queen v. Nunneley* (Ell. Bl. & Ell. 852).

O'BRIEN, J.—In this case I am also of opinion that the cause shown should be allowed. With respect to the provision at the end of section 52 of the Malicious Trespass Act, 1861, I concur with my Lord Chief Justice that the alleged custom relied on by Conlan as a justification for the act complained was an unreasonable and illegal custom, and one that could not exist in law, and that therefore it cannot be considered that Conlan did that act under a "reasonable" supposition of right. I think, however, that the use of the word "wilful" in the early part of that section shows that the section was not intended to apply to a case in which there was no "guilty mind" in the party doing the act complained of, but in which he did the act under the *bona fide* belief that he was justified in doing it, and that in order to sustain a conviction under that section, it is necessary to establish that the party did the act complained of, not only intentionally, but knowing it to be wrong. It does not appear that this question was decided by or raised before the magistrates. My brother Fitzgerald, who was present during the argument (but is unable to attend here to day) has written to me mentioning his opinion, which is to the same effect as I have already stated. It appears to me that the fact of the alleged custom having been for so many years acted on without any interruption by the previous rector of the parish, would go far to shew that Conlan might have done the act complained under the belief (though a mistaken one), that he was justified in doing it. We both, however, think that under the circumstances of the case, the application for a *certiorari* (the granting of which is, to a certain extent, discretionary with the Court) should not be complied with, and that the cause shown should be allowed, but without costs. The act complained of, though not "wilful" within the meaning of the statute, was decidedly wrongful; the only punishment inflicted was a small pecuniary fine, which, I have no doubt, is much less in amount than would have been recovered against Conlan by a civil bill proceeding.

GEORGE J. concurred.

CURRIGAN v. RYAN.—Nov. 8, 10, 14.

*Libel—Privilege—Innuendo—Common Law Procedure Act, 1853, s. 65.*

*Defendant was member of a parochial relief committee, the object of which was to collect funds from the inhabitants of the parish of P. and from the public generally, for the relief of the distressed inhabitants of the parish. Plaintiff was secretary and treasurer of the committee. Defendant, upon information which he had received, spoke, believing them to be true, in the presence of certain of the parishioners, words imputing fraudulent and dishonest conduct to the plaintiff in his office of treasurer and secretary, for the purpose of preventing further subscriptions being received by the plaintiff. Held, that the occasion was not privileged, and that an action of slander having been brought by plaintiff, a defence setting up these circumstances was bad.*

*In order to make words not actionable per se, actionable by reason of being spoken of the plaintiff in his character of holder of a particular office, the office must be one of profit, the loss of which would entail some pecuniary or temporal damage.*

*The question whether words complained of are capable of bearing the sense put on them by an innuendo, is, since the Common Law Procedure Act (Ireland), 1853, s. 65, altogether for the jury, and cannot be decided by the Court on demurrer.*

*The decision of the Court of Queen's Bench in the case of Lavelle v. Granmore (7 Ir. Jur. N. S. 55) has been reversed by the Court of Exchequer Chamber.*

DEMURRER:—The first paragraph of the summons and plaint complained that before and at the time of the committing, &c., the plaintiff was secretary and treasurer of a certain parochial relief committee called the Lisacull Relief Committee, which was established for the purpose of soliciting assistance in money and otherwise from charitable persons, in order to relieve the distress of the poor in the parish of Tibolin, in the County of Roscommon; and as such secretary and treasurer it was the duty and office of the plaintiff to obtain assistance in money and otherwise for the purpose aforesaid, and to disburse all moneys so received in such manner and amongst such persons as should be recommended for relief by a member of the said committee; that as such secretary and treasurer he received large sums of money for the purpose aforesaid, and disbursed and distributed the same, after deducting the proper and necessary expenses, to and amongst the poor of said parish as recommended by said committee, and duly rendered to the said committee correct accounts of the receipts and disbursements of said moneys, and of the persons to whom same were distributed; that whilst he was such secretary and treasurer, and whilst he was employed in such duties and office as aforesaid, the defendant, contriving, and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed by his neighbours that the plaintiff was dishonest, and not a fit and proper person to be trusted with the custody of the said moneys,

and thereby to injure him in his said office and situation, and in his good name, fame, and character, and to subject him to punishment for the offence and misconduct imputed to him by the defendant as after stated, on the 25th May, 1862, at Tibolin aforesaid, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in the execution of his said office of secretary and treasurer of said relief committee, in the presence and hearing of divers good subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his conduct in his said office and situation, the several false, scandalous, malicious and defamatory words following—"It is generally reported that Pat Currigan" (meaning the plaintiff) "is getting more money than he is acknowledging; he must have no more to do with the relief business. I" (meaning the defendant) "withdraw my authority to him. If there is anyone here from Kiltobrank" (meaning plaintiff's residence); "I hope they will take that home to him; and if that does not do, I must drop a few lines through the press to put a stop to him;" meaning thereby that the plaintiff in his conduct and proceedings as such secretary and treasurer, with respect to said moneys and accounts, acted corruptly and fraudulently, and that he was obtaining moneys secretly, and without the knowledge of said committee, and was dishonestly concealing from the said committee some of the money so received, and was misappropriating the same, and was not a fit and proper person to be trusted with the said money, or to be the secretary and treasurer of said relief committee. The second paragraph, repeating the statements in the first as to plaintiff being secretary, &c., complained that the defendant, on the 13th July, 1862, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his conduct in his said office and situation the several other false, scandalous, malicious and defamatory words—"Now, as Currigan's character is at stake, let him come forward and redeem it;" meaning thereby that the plaintiff was a corrupt and dishonest person, and had been guilty of bad and disreputable acts as such secretary and treasurer, and was not a fit and proper person to fill said office; whereby the plaintiff had been greatly injured in his character, credit, and reputation, and brought into scandal, infamy and disgrace with his neighbours in so much that several of those neighbours had thenceforth suspected and believed the plaintiff to have been a person guilty of corrupt, dishonest, and fraudulent practices, and to have acted dishonestly, fraudulently and improperly in his office and duty as such secretary and treasurer, and had, by reason of the committing of the said grievances by defendant, thenceforth refused to have any transaction or acquaintance with the plaintiff as they were before used to have, and also by means of the premises the plaintiff had been and was much injured and damaged. To the first paragraph the defendant pleaded, thirdly, that at the time of the grievances in said count alleged, the defendant was a member of the relief committee in said first count mentioned, the object of which committee was to collect funds as well from the inhabitants of said parish of Tibolin as from the public

generally, and to administer the same for the relief of the distressed inhabitants of said parish; and as such member of said committee it was the duty of the defendant to see that all moneys coming to the hands of the plaintiff as secretary and treasurer of said committee, should be made known to said committee, and properly accounted for by the plaintiff; that before the speaking and publishing of the words in the said first count alleged, the defendant had been informed by certain faithful persons (naming two) that the plaintiff, as such secretary and treasurer, had received certain moneys to be distributed according to the directions of said committee, and that he had failed to make known to said committee the receipt of said sums, or to account for the same as it was his duty to do, and that the plaintiff had misappropriated said sums, or a portion thereof; and defendant, believing said information to be true, did, in discharge of his duty as a member of said committee, and *bona fide* and without malice, and believing same to be true in the sense in the said first count alleged, speak the words in said count mentioned in the presence of certain inhabitants of said parish of Tibolin, who were all, for the reasons aforesaid, interested in the subject-matter of said communication, and for the purpose of preventing any further moneys or subscriptions being received by the plaintiff as such treasurer of said relief committee, which were the grievances complained of in said first count. The defendant pleaded a precisely similar defence, thirdly, to the second paragraph. To these two defences the plaintiff demurred, saying that the matters therein respectively pleaded were not sufficient at law to constitute the speaking and publishing of the words in the said first and second paragraphs mentioned a privileged communication; first, because it did not appear in and by the said defences or either of them, how the certain inhabitants of said parish of Tibolin therein referred to, and in whose presence the words complained of in said first and second paragraphs of the summons and plaint were spoken, were interested in the subject-matter of said communication; secondly, because it did not appear in and by the said defences, or either of them, how the certain inhabitants of said parish of Tibolin, in whose presence the words complained of were spoken, had any interest whatever in the subject-matter of said communication; thirdly, because it did not appear in and by the said defences, or either of them, how it was the duty of the defendant to speak and publish the words complained of in the presence of the said inhabitants of the said parish; fourthly, because for anything that appeared in and by said defences, or either of them, the said inhabitants of said parish in whose presence the said words complained of were spoken, may have been distressed inhabitants of said parish, or might have been a portion of the general public who were temporarily resident within the limits of said parish, or were persons not in any way interested in said communication; fifthly, because the occasion on which the words complained of were spoken and published, as same was pleaded in said several defences, was not sufficient in law to constitute the speaking and publishing of said words a privileged communication; sixthly, because the claim of privilege in manner and

form as the same was pleaded in said several defences was too large.

*Roper* (with him *Carleton*, Q.C.) in support of the demurrer. All the authorities shew that this plea of privilege is bad. It does not come within the rules laid down in any of them.—*Harrison v. Bush* (5 Ell. & Bl. 348); *Dickson v. Lord Cardigan* (1 F. & F. 426); *Bell v. Parke* (10 Ir. C. L. R. 279); *Ede v. Scott* (7 Ir. C. L. R. 607); *Tuson v. Evans* (12 A. & E. 733); *Murphy v. Kellett* (13 Ir. C. L. R. 488); *Cassidy v. Kincaid* (10 Ir. Jur. n. s. 176); *Hamerton v. Green* (16 Ir. C. L. R. 77); *Davis v. Reeves* (5 Ir. C. L. R. 79); *Bromidge v. Prosser* (4 B. & Cr. 257); *Blagg v. Sturt* (10 Q. B. 899).

*Ad-Dermot* and *Beytagh* contra.—*Bell v. Parke* and *Ede v. Scott* are the only two cases cited on the other side, in which the plea was held bad. The parishioners had an interest in the communication, and the defendant had a duty in making it.—*Davis v. Reeves*; *Taylor v. Hawkins* (16 Q. B. 321). The occasion rebuts the presumption of malice.—*Somerville v. Haughton* (11 C. B.); *Ruckley v. Kiernan* (7 Ir. C. L. R. 75); *Cothead v. Richards* (2 C. B. 569); *Searrell v. Dixon* (4 F. & F. 250). It is not necessary that the person to whom the communication is made, should be one who can give redress.—*Too-good v. Spiring* (1 Cr. M. & Ross. 251); *Hamerton v. Green*. If there is anyone among the auditors who has an interest in the communication, the presence of others does not destroy the privilege, and the question of excess of the privilege is for the jury.—*Wallace v. Carroll* (11 Ir. C. L. R.); *Cooles v. Potts* (11 Jur. n. s. 949); *Whitely v. Adams* (15 C. B. n. s. 392), have a strong bearing on this case. At all events the second count is bad; the innuendo is wholly unjustified by the words complained of. It is quite consistent with the words that they contained no imputation on the plaintiff. This is still a question for the Court. Before the Common Law Procedure Act it undoubtedly was so.—1st Chitty on Pleading, 436. The Irish Common Law Procedure Act, s. 65, differs in some respects from s. 61 of the English Act, 15 & 16 Vict. c. 76, and the old rule is only altered in Ireland in this way, that you need not now introduce statements of fact to show the meaning of the words complained of, but without doing that, you can put on the words a meaning which is deducible from them; but if you attribute to them a meaning which is wholly impossible, the count is still demurrable.—*Galloway v. Marshall* (9 Exch. 294); *Barnet v. Allen* (3 H. & N. 376); *Hemings v. Gason* (1 Ell. Bl. & Ell. 346) does not really decide the question. In *Lavelle v. Oranmore* (7 Ir. Jur. n. s. 55), the Court decided on the question whether the words justified the innuendo.—*Connors v. Justice* (13 Ir. C. L. R. 451); *Kelly v. Tintling* (1 Law Rep. Q. B. 699); *Hartley v. Herring* (8 T. R. 131); *Westwood v. Cowne* (1 Stark. 172); *Browning v. Newman* (1 Str. 666); *Smith on Master and Servant*, 287, citing *Gassett v. Gilbert* (8 Gray, Am. Rep.); *Bullen and Leake*, p. 265.

*Carleton*, Q.C. in reply.—The words in the second count are not merely innocent words. They appear to have been spoken of the plaintiff as secretary and treasurer. When you say of a man that his charac-

ter is at stake, and call on him to redeem it, you mean that there is something against it. At all events, s. 65 of the Common Law Procedure Act has altered the old rule, and the question as to the innuendo is now altogether for the jury. In *Lavelle v. Oranmore*, the innuendo was not justified by the prefatory matter which there was put into the count.—*Gompertz v. Levy* (19 A. & E. 282); *Galloway v. Marshall*; *Barnet v. Allen*. *Hemings v. Gason* decides the very point on the English Act, and there is no difference between it and the Irish one.

*Cur. adv. vult.*

Nov. 14.—*WHITEHEAD*, C. J., after reading the pleadings, said that no facts were shown, or occasion averred in the defence which would justify or excuse the communication, or rather the proclamation to the whole world of the crime imputed to the plaintiff. The Court were of opinion that there was no duty cast upon the defendant to make this communication, nor was there any occasion suggested to excuse the use of the defamatory words. The cases of *Bell v. Parke*, *Murphy v. Kellett*, and *Clanthy v. Cahill* (Smith and Batty's Rep. 232) proved this. The last case especially had in its facts an important application to the present case. In his opinion the argument of Mr. Carleton should prevail, namely, that a communication of matter, in which a person has an interest or a duty, is privileged, if made to a person having a corresponding duty or interest, and they were of opinion that there was no duty in the defendant to make the communication, no corresponding interest or duty in the persons to whom it was addressed, and no privileged occasion. They also thought that the doctrine laid down by an English judge applied, namely, that the duty of not slandering your neighbour on insufficient grounds is so clear that communications of this kind should not be made except in cases of great gravity. The demurrer to the defence should therefore be allowed. With respect to the question upon the second paragraph of the summons and plaint, it had been insisted that even if the words themselves complained of in that paragraph were not actionable, yet if the interpretation given of them in the innuendo was sufficient to make them so, the Court under the Common Law Procedure Act, had no right to consider whether they were capable of that interpretation, and that was now altogether a matter for the jury. On the other hand it was insisted that *Lavelle v. Oranmore* had decided that this was still a matter for the Court. Against that it was said that the Common Law Procedure Act had been overlooked in *Lavelle v. Oranmore*, and that the law in Ireland in spite of a slight dissimilarity between the Irish and English Common Law Procedure Acts was the same as in England. The first thing was to see what was done in *Lavelle v. Oranmore*, and they were relieved from all difficulty on that point, because the decision in that case had been overruled. O'Brien, J. had searched and had ascertained that the judgment of the Queen's Bench in *Lavelle v. Oranmore* had been reversed in the Exchequer Chamber by five judges against two. We should, therefore, look to the reason of the thing. And on the language of the 66th and 81st sections of the Common Law Proc-



ture Amendment Act (Ireland), and combining those two sections, there was no material difference between the law here and the law in England as stated in s. 61 of the English Act. They were all of opinion that if the words, either with or without the meaning put upon them by the innuendo showed a cause of action, that was sufficient, and it was for the jury to try the question; and on that point they felt themselves concluded by the authority of *Hemmings v. Gason*. But still there was this difficulty, that it was necessary to show that the words with the meaning put on them by the innuendo gave a cause of action, and in the present case the words in that meaning did not impute an indictable offence. Neither was there any sufficient special damage averred, for it had been decided that the general words used in the paragraph did not imply special damage. Then, were the words actionable or spoken of the plaintiff in his character as treasurer of the relief committee? They were not, for it did not appear that this office was any place of profit, or that Currihan was likely to incur any temporal loss by losing the place. It had been held that to impute incontinency to a clergyman did not, in the absence of special damage, afford a ground of action, unless it was shown that he held a place of profit, of which he might be deprived if detected in that vice. For these reasons his Lordship was of opinion that the second paragraph of the plaint was bad.

O'BRIEN, J.—With respect to the demurrer taken to the plea of privilege to the first count in the summons and plaint (which was the question principally argued), I am of opinion that the demurrer should be allowed on the ground that the words complained of were not spoken on any lawful occasion that would have raised the privilege relied on. I admit that under certain circumstances the defendant, as a member of the committee by whom the plaintiff had been appointed their secretary and treasurer, might have been privileged in speaking those words to parishioners, though not members of the committee. If, for instance, it appeared that the plaintiff, as such secretary and treasurer, was about to collect and receive monies from some of the parishioners to whom those words were addressed, then indeed the defendant might have been privileged in mentioning to those parties the information which he had received, in order to prevent their monies from being received and misappropriated by the plaintiff, provided that the defendant really believed such information to be true, and made the communication *bona fide*, and without malice. But that is not the present case. There is no statement in the defence that any of the persons to whom the communication was made had subscribed, or were going to subscribe, to the fund, or had any such interest or concern in the matter as would render the communication to them privileged, or that the occasion on which the communication was made, was such as called for it. The decision in the case of *Clanchy v. Cahill* (Smith and Batty, p. 232), which has been referred to by my Lord Chief Justice is an authority against the validity of the present plea, as in that case there were stronger grounds for contending that the communication was privileged, having been made to the bishop, than there are in the pre-

sented for contending that it was privileged when made to the parishioners generally, without stating that any of them were or intended to be subscribers, or had any sufficient interest in the matter. It is unnecessary for me to refer to any of the other authorities which have been so fully stated by the Chief Justice. With respect to the plea of privilege to the second count, I am of opinion that although it is bad for the same reasons as that to the first count, still that defendant is entitled to judgment on the demurrer to it, inasmuch as the second count itself is bad. The ground upon which I am now of that opinion is different from that which was at first suggested. It had occurred to me during part of the argument, that the second count was bad, on the ground that the slanderous words complained of in that count were not in themselves actionable, and that the construction put upon them by the innuendo was not warranted either by the words themselves, or by any statements in the second count; and the decision of the majority of this Court in *Lavelle v. Oranmore* (7 Ir. Jur., N. S. 55), from which my brother Fitzgerald dissented, was referred to as an authority to show that it is for the Court to decide whether the words complained of are capable of bearing the construction put upon them by the innuendo. I was not present at the argument of that case, and took no part in the judgment. I have, however, ascertained since this case was first argued before us, that the judgment of this Court was reversed by the Court of Error in June, 1862, a fact which is not noticed in the reports. There were other questions in that case, and as the judgment of the Court of Error is not reported, it does not appear on what ground it proceeded. Under these circumstances, and having regard to the provision of the 65th section of the Common Law Procedure Act of 1853 (which materially altered the law as to the necessity of prefatory statements supporting an innuendo), and also to the decision of the Court of Queen's Bench in England in *Hemings v. Gason* (1 El. Bl. & El. 352), upon a corresponding provision in the 61st section of the English Common Law Procedure Act of 1852, I think the case of *Lavelle v. Oranmore* cannot be relied on as to that question, and that the objection to an innuendo upon the ground I have stated is not one that can be raised by demurrer. In that case of *Hemings v. Gason* (which was on a motion in arrest of judgment) Lord Campbell states as the opinion of all the Court that the 61st section of the English Act, and the two forms in the Schedule B. to that Act (32 & 33) enabled the pleader to put by innuendo any construction he pleased upon the words complained of, and that it was for the jury to say whether the words were spoken with such meaning. I am, however, of opinion that the second count is bad, though we put upon the words complained of the meaning attributed to them by the innuendo. They are not, even with that meaning, actionable of themselves, as they do not charge any indictable offence. It is certainly alleged that they were spoken of plaintiff in the execution of his office of secretary and treasurer, and therefore stated by the innuendo as meaning that he was guilty of bad and discreditable actions as such secretary and treasurer, and was not fit for such offices; but it is

not stated that he thereby lost his office (which is not even alleged to have been one of profit), or that he suffered any other special damage thereby; and the general charges of loss of character and acquaintances, &c., are not statements of special damage sufficient to sustain an action for words not actionable of themselves. The case of *Gallwey v. Marshall* (9 Exch. 294) shews the necessity of stating special damage where the words are not actionable of themselves, even though spoken of plaintiff in his professional character. In that case the plaintiff stated in his declaration that he was a clergyman of the Church of England, and complained of certain words spoken of him in that character, and imputing to him "gross and scandalous conduct and incontinence." But the Court held, on demurrer, that the declaration was bad, Pollock, C. B., stating in his judgment that the declaration would be good if it had stated that the plaintiff was a beneficed clergyman, or was in the actual receipt of professional temporal emolument as preacher, lecturer, &c., as in such case the charge, if true, would have caused his deprivation, &c., and consequent loss of emoluments in other cases, but that as the declaration did not aver that plaintiff had any office or employment of temporal profit, the action would not lie, as no actual damage or loss of temporal profit had been proved. The principle of that decision is, in my opinion, applicable to the present. On these several grounds I concur in the rule pronounced by the Chief Justice, that there should be judgment for the plaintiff on the demurrer to the plea of privilege to the first count, and for defendant on the demurrer to the plea of privilege to the second count.

FITZGERALD, J., concurred as to the plea. As to the second paragraph, he had not heard the argument, and therefore expressed no judgment. At the same time he had read the count, and thought it unsustainable.

GEORGE, J., said that it was settled that to privilege words, it should appear that three things concurred—that the party speaking them was bound by an interest or duty to do so; that he did so *bona fide*; and lastly, that he took a fit and proper occasion to do it. That had not been shown here. As to the second point, he thought the 65th section of the Common Law Procedure Act dispensed with the necessity of the *colloquium*. He thought that the words here came as near as possible to a libel, but, on the grounds stated by O'Brien, J., he concurred in the judgment of the Court.

*Judgment for the plaintiff upon the demurrer to the third defence to the first count; judgment for the defendant upon the demurrer ore tenus to the second paragraph of the summons and plaint.*

## Court of Exchequer.

Reported by William A. Sargent, Esq., Barrister-at-Law.

KEENE v. M'BLAIN.—Nov. 3.

*Motion to set aside plea as embarrassing—Ejectment.*

*To a summons and plaint in ejectment for non-payment of rent, directed to "James M'Blain and others, defendants," defendant (James M'Blain) pleaded, "Defendant does not hold the premises in the plaint mentioned as tenant to plaintiff as alleged." Held, on motion to set aside this plea as embarrassing, that it was the proper plea.*

THE summons and plaint was the ordinary one in ejectment for non-payment of rent, directed to "James M'Blain and others defendants." The defence was as follows:—Defendant, James M'Blain, appears and takes defence to the action of the said Kliza Jane Keene and Augustine Keene, and says that defendant does not hold the premises in the plaint mentioned as tenant to plaintiffs as alleged, and therefore he defends the action.

*Gamble*, for plaintiff, applied to the Court to set aside the defence as ambiguous and embarrassing, and calculated to delay the fair trial of the action, inasmuch as it does not deny that the premises in the plaint mentioned are held of plaintiffs by some of defendants, nor deny the title of plaintiffs to same, nor that the rent is due as alleged.—*Murphy v. Carey* (12 Ir. C. L. R. Ap. 9) will be relied on by the other side, but it is a distinct case from this.—*Figgis v. Hickey* (7 Ir. Jur. 160); 23 & 24 Vict. c. 154, ss. 55, 194; *Murphy v. Toohey* (3 Ir. C. L. R. 226); *Bell v. Beatty* (6 Ir. C. L. R. 399); *Dillon v. Mangan* (1 Ir. Jur. n. s. 335).

*M'Mahon* contra, for defendant, in support of the plea.—It is impossible for us to traverse the plaint otherwise than as we have done. *Murphy v. Carey* is directly in our favour.

*Gamble* in reply.

PIGOT, C.B.—The only difference between *Murphy v. Carey* and this case is, that in the former the writ was directed to several persons named, and to others also. Those named were made parties to the suit by being summoned to answer the plaint which followed the form given in No. 15 in the Schedule to the Act. Mr. Gamble says "defendants" in the plaint means all, both those named and those unnamed and unknown; if we were to hold it to be so, it would be very absurd. In that case a landlord would be bound to prove, not only that a defendant named and known held under him, but also that others not named and unknown held with him. If "defendants" means all, it would not be enough to prove that those named were tenants. The meaning of the plaint clearly is, that those named are the only defendants, but that the writ is directed to others in order to warn them that the proceedings are instituted to recover possession of the land, and not to make them defendants. In the present case the plea is distinct, as also is the plaint that the defendant (naming him) holds the land; then the plea is a traverse of a material allegation exactly the same as in *Murphy v. Carey*. There exists a difficulty for the landlord in finding out who

are his tenants, but that is to be found in every action of covenant where assignees are sued. There you must show that defendant is assignee, and he may have become an assignor, and made another his assignee. There is, then, this great difficulty for a landlord to meet a defence, when the assignment is traversed similarly in replevin. The difficulty in the landlord's case here might be removed at the trial by the judge amending in the ordinary way. If a tenant proved that he was not a tenant, by showing a conveyance to a third person, I, for one, would accommodate his proof to his case. We must, therefore, give judgment for defendant.

*Motion refused with costs.*

[BEFORE THE FULL COURT.]

DOWLING v. ADAMS.—Nov. 9.

*New trial motion—What constitutes a yearly hiring—Evidence of usage.*

*An indefinite hiring is a yearly hiring, but this general rule may be varied by a usage existing in the trade with respect to which the parties are contracting.*

THIS was an action tried before Fitzgerald, B. at the sittings after Hilary Term, 1866. The summons and plaint stated a hiring of plaintiff by defendant as a clerk, &c., in defendant's trade for a year at 17s. 6d. per week to be raised to £1 per week after three months upon certain events, and alleged a discharge of plaintiff before the expiration of year. There were three defences—1. A traverse of the alleged hiring. 2. Misconduct of plaintiff in furnishing erroneous and fraudulent returns of the men in defendant's employment, with the view of getting money from defendant. 3. Habitual neglect of duty by plaintiff.

Plaintiff's evidence was as follows.—Had been in the employment of Messrs. Pim & Co. for 17 years, ending in 1865, as second store-keeper. On the Saturday prior to Feb. 27, 1866, had two interviews with defendant, and had some conversation about the situation of foreman in defendant's establishment, which was then vacant; that on the Monday afterwards, defendant offered him 17s. 6d. for six months, and if he satisfied him he would give him afterwards £52 a year, and at the rate of £1 per week; that on plaintiff's refusal to take that, defendant said, "I'll give you 17s. 6d. per week for three months, and after that to £1 per week, if you give me satisfaction;" that his duty was to keep and furnish weekly returns of the names of the workmen employed, the number of days each man worked, the work at which he was employed, and the sum due for such work, also to superintend the stores, the discharging of vessels, and the general business of the concerns, and that he had power to employ whatever number of men he thought necessary; that he entered on his duties on Feb. 28, 1865; that he was not furnished with proper books to keep the accounts; that he paid the wages to the workmen as he received them; that for the first three months he was paid 17s. 6d. per

week, and afterwards £1 per week; that on Sept. 2, defendant, without any previous notice, told him he had made up his mind to part with him for having employed more men than he ought, and for having embezzled some money; that he left defendant's employment that evening.

At the close of plaintiff's case, Exham, Q.C., for defendant, called on his Lordship to non-suit plaintiff, on the ground that the contract proved was not for a year, but was either a weekly hiring, or, at the most, a hiring for three months certain.

His Lordship declined so to do, being of opinion that the contract proved was for no definite time, and therefore must be taken to be a yearly hiring.

Defendant examined.—Had been for 11 years in the corn trade in Dublin; that the word "year" did not occur at all in the making of the contract.

Witness was then asked, "Do you know what is the usage of the trade as to hiring foremen?"

Plaintiff's counsel objected to this question as not applicable to any issue joined between the parties. His Lordship allowed the question, and witness deposed that the invariable custom in this trade as to the hiring of foremen is to engage them by the week, and discharge them on giving them a week's notice, or paying a week's wages, and that nothing was said between the parties as to the custom.

William Megaw examined.—I am a corn merchant; I have been in the trade 11 years; I am a corn commission agent; I buy and sell corn; I have a foreman in my employment; there is a usage in the trade as to the hiring of such persons. (This evidence was objected to as before, and allowed.) I have been told by corn merchants what the usage is, and have myself hired foremen; the usage is to hire by the week; I never heard of any custom unless hiring by the week.

Richard Perrin examined.—I am a corn broker; I have a foreman to take charge of corn going in and out of my stores, and to see vessels discharged, and to pay workmen; I know there is a usage in the trade as to hiring foremen (this objected to, and allowed as above); the hiring is by the week; I never heard of them being hired otherwise.

George Clibborn examined.—I am a corn and flour merchant; I keep a foreman for our stores and business; I do not import cargoes; the usage in the branch of the trade in which Mr. Adams is, is to hire foremen and pay them weekly (objected to as above, and also because witness was not in same trade, and allowed).

On cross-examination, witness said there was no rule to prevent any corn merchant from hiring a foreman for the year.

Baron Fitzgerald told the jury that a general hiring of a servant, that is to say, a hiring in which the duration of the service is not specified, is a hiring for a year, and is such even though, by the terms of the hiring, the wages are paid weekly, and the service determinable by a week's notice or payment of a week's wages; but that this general rule is not without exception. That if the hiring be in a certain trade, and there is a recognized usage in that trade as to the hiring of a servant therein—as to the duration of the hiring, or the notice required to determine

it—such usage is to be considered as imported into the contract, unless the terms of the contract exclude it. That there was nothing in the terms of the contract as deposed to by plaintiff to exclude the usage alleged by defendant's witnesses; that the hiring in the trade was a weekly one, and determinable on a week's notice, or by payment of a week's wages. And his Lordship left to the jury the question as to whether there was such a recognized usage in the trade, directing them to find for or against plaintiff on the issue on the first defence according as they found against or for the usage.

Heron, Q.C. for plaintiff, objected to the learned Baron telling the jury that there was nothing in the terms of the contract as deposed to by plaintiff to exclude the usage alleged, and asked his Lordship to tell the jury that it was inconsistent with the contract as proved by plaintiff or defendant, also to leave the question of inconsistency to the jury. The learned judge declined to do either, and the jury found for defendant on the first issue, and for plaintiff on the other two defences.

Heron, Q.C. for plaintiff, having obtained a rule nisi for a new trial on the grounds of misdirection and the reception of illegal evidence.

*Exham*, Q.C. for defendant (with him *Walker*) showed cause against the conditional order.—*Baxter v. Nurse* (6 M. & Gr. 935); *Metzner v. Bolton* (9 Exch. 518); *Packer v. Ibbotson* (4 C. B. n. s. 346); *Fairman v. Oakford* (5 H. & N. 635); *Grant v. Maddox* (15 M. & W. 737).

*Heron*, Q.C. (with him *Keough*) contra, for plaintiff in support of the rule.—The usage here, if proved, was one directly contradicting the express contract entered into between the parties. Implied usage is a different thing engrafted on many contracts. This is a custom to hire foremen weekly, and from that they draw the inference that the weekly hiring was determinable by a week's notice or a week's wages. This is not analogous to the case of domestic servants, whose hiring is a yearly one, determinable by a month's warning or a month's wages.—*Roberts v. Barker* (1 Cr. & M. 808); *Webb v. Plummer* (2 B. & AL. 746); *Beeton v. Collyer* (4 Bing. 309); *Hackett v. Royal Exchange Assurance Co.* (2 Cr. & Jer. 244); *Trueman v. Loder* (11 A. & E. 589).

*Keough* on same side.

*Walker* was not called on to reply.

*Pigot*, C.B.—The notes of my brother *Fitzgerald* plainly show that there was a usage in the trade that the hiring should be a weekly one, and on that point Mr. *Heron* addressed the jury, and they, by the light afforded to them by the contract as proved by plaintiff, came to the conclusion that the custom controlled the contract. There was no objection to the verdict on the grounds of surprise, or that the evidence was ambiguous, and surely it is quite impossible for us to set aside the verdict. The law, as laid down by my brother *Fitzgerald*, is quite settled, viz., that an indefinite hiring is a hiring for a year, but this indefinite hiring may be explained by usage existing in the trade with reference to which the parties are dealing. In the present case the only mention of time is in the sentence referring to plaintiff's salary "£52 a year, and at the rate of £1 a week." The,

what is said about six or three months totally displaces plaintiff's contention, for that would point to a hiring for six months, or three months, and not for a year. A yearly payment may be consistent with a weekly hiring. For these reasons we are all of opinion that the judge's direction was right.

*Rule discharged with costs.*

[BEFORE FITZGERALD, HUGHES, AND DEASY, B.B.]

DORAN v. CHANCELLOR.—Nov. 14.

*New trial motion—Action pending.*

*A* *plaint* *was* *issued* *on* *October* *14th*, *1865*; *filed* *November* *6th*, *ordered* *to* *be* *amended* *November* *13th*, *and* *no* *time* *was* *fixed* *within* *which* *the* *amendment* *was* *to* *be* *made*. *A* *second* *plaint* *for* *the* *same* *cause* *of* *action* *was* *issued* *May* *14th*, *1866*. *Defendant* *pleaded* *action* *pending* *to* *this*; *but* *the* *judge* *was* *of* *opinion* *that* *no* *action* *was* *pending*, *and* *the* *jury* *found* *for* *plaintiff*, *with* *£50* *damages*. *Held*, *on* *motion* *for* *a* *new* *trial* *that* *the* *order* *of* *amendment*, *specifying* *no* *time* *within* *which* *the* *amendment* *was* *to* *be* *made*, *and*, *therefore*, *allowing* *it* *to* *be* *made* *at* *any* *time* *within* *a* *year*, *had* *the* *effect* *of* *keeping* *the* *action* *in* *being* *for* *a* *year*; *and*, *therefore*, *that* *the* *former* *action* *was* *pending* *at* *the* *time* *the* *second* *was* *brought*, *and*, *consequently*, *that* *the* *verdict* *must* *be* *entered* *for* *defendant*.

This was an action for breaking and entering plaintiff's house, converting her goods, and for arrest and false imprisonment, and malicious prosecution. It was tried before Deasy, B., at the sittings after last Trinity Term. The defence was that another action in the same matter was pending. Plaintiff's case was stated and proved as if there was no defence, and the sole inquiry was as to the amount of damages. All evidence on the part of defendant to prove that defendant had not authorized the arrest and imprisonment, that he did not prosecute plaintiff, and that he entered her house at her own request and did not convert her property, was tendered at the trial, but excluded by the learned judge. Defendant gave in evidence an attested copy of a summons and plaint, issued by same plaintiff, dated Oct. 12th, 1865; also an order of the Court of Exchequer, dated Nov. 13th, 1865, to amend the plaint. The plaint had been served before the order was made. The summons and plaint in the present action was served, and bears date May 14th, 1866. Plaintiff's counsel admitted that the cause of action in both plaints was the same, and asked no question to be left to the jury on that point. Defendant's counsel called on his lordship, on this admission to direct a verdict for defendant, which his lordship refused to do; but, on the contrary, ruled that there was no action pending when the present plaint was issued, and reserved leave to defendant to move to have the verdict entered for him, should the Court be of opinion that he should have so directed.

Baron Deasy then charged as if there was no defence, and the jury found for the plaintiff, with £50 damages.

The summons and plaint in the former action was "Victoria, &c., to the said John Chancellor greeting. John Chancellor, the defendant, is summoned to answer the complaint of Alicia Doran, the plaintiff, who complains that defendant, contriving and intending to injure plaintiff, maliciously caused two policemen to enter her premises at South Frederick-street, in the City of Dublin, on or about the 12th day of January, 1865, to search therein for stolen goods, falsely alleged by defendant to have been received by plaintiff knowing them to have been stolen, and to assault plaintiff herself, and to take her into custody, and to imprison her in the cell of the station-house of College-street from the hour of four o'clock in the afternoon of that day, the 12th day of January aforesaid, until the sitting of the police court of the next day; then to bring plaintiff before a police magistrate, by whom she was remanded for a week, when she was again brought before the police magistrate upon said false charge, and further caused by defendant to be bound in recognizance for her due appearance at the next following Commission, to be held at Green-street in the City of Dublin, to await and abide any indictment which might be framed against plaintiff at said Commission, which was afterwards held at said place upon Tuesday, the 7th day of January, 1865; but, although defendant caused said false charge to be prosecuted against plaintiff before the grand jury at said Commission, yet this grand jury could not, and did not, find any indictment upon said false charge, and ignored the bill grounded thereupon, by which several grievances plaintiff suffered great pain of body and mind, and was exposed and injured in her credit and circumstances, for which injuries plaintiff claims £100. And that defendant, on the 10th of January, 1865, seized and took plaintiff's goods and chattels; that is to say, an Indian box of considerable value, and five dozen of stereoscopic slides, and other valuable articles, for which injuries plaintiff claims £50. And further, that defendant, upon said 10th day of January, 1865, converted to his own use, or wrongfully deprived plaintiff of the use and possession of the aforesaid articles, that is to say, an Indian box of considerable value, and five dozen of stereoscopic slides, and other valuable articles, for which injury plaintiff claims £50. And further, that defendant, though repeatedly applied to for them, still detains from plaintiff her said goods and chattels, that is to say, an Indian box of considerable value, and five dozen of stereoscopic slides, and plaintiff claims, under the 4th count, a return of said goods and chattels, or their value, and the sum of £50 for their detention, the particulars of which are endorsed hereon. And plaintiff prays judgment against said defendant to recover the said sum of £250, and her costs of suit," &c. The 1st count was afterwards, by order of the Court, amended.

The following are the dates connected with the former suit:—

Plaint issued, October 14th, 1865.

Served personally, October 23rd.

Filed, November 6th.

Notice of filing served on defendant's shopman, November 6th.

Order to amend, November 19th.

The following are the dates connected with the present suit:—

Plaint issued, May 14th, 1866.

Served personally, May 15th.

Filed, May 16th.

Defence filed, May 23rd.

*Dowse*, Q.C., having obtained a rule nisi accordingly.

*Heron*, Q.C., for plaintiff (with him *Waters*), showed cause against the conditional order. The former action was out of court and at an end, and, therefore, there was but the one action in existence against defendant.—*Thomson v. Armstrong* (1 Ir. Jur. N. S. 335); *Mullin v. Bonjor* (5 Ir. C. L. R. 475); *Cooper v. Nias* (3 B. & Ad. 271); *Rorke v. McCarthy* (6 Ir. L. R. 29); *Worley v. Lee* (2 Term R. 112).

*Meredyth*, contra for defendant (with him *Dowse*, Q.C.) in support of the rule.—The former action was pending, and was a bar to the second one.—C. L. P. Act (1853) s. 37; *Pollard v. McDermott* (1 Smythe 1); *Richardson v. Daly* (7 Dowl. P. C. 25); C. L. P. Act (1853) s. 39; *Lord Clifton v. Boulger* (6 Ir. Jur. 102).

*Dowse*, Q.C., on same side.

*Waters* in reply.—The first action was out of court.—C. L. P. Act (1853) s. 44.

*Cur. adv. vult.*

November 17.—The judgment of the Court was now delivered by

FITZGERALD, B.—[His lordship referred to the pleadings]. The only question for us is, whether there ought to have been a direction for defendant under the circumstances of the case. A summons and plaint was issued by plaintiff on October 14th, 1865, and another, for the same cause of action, on May 14th, 1866. By s. 37 of the Common Law Procedure Act, 1853, a summons and plaint becomes ineffectual, unless filed within a certain number of days. Here the original plaint was served on October 23rd, but not filed until November 6th; it was then too late to enforce an appearance on the part of defendant. There was no evidence at the trial that a notice of the filing of the plaint was served on defendant. Sec. 37 further provides. [His lordship read it.] Then, as plaintiff could not enforce a defence, unless within six months from the filing of the plaint, it is contended on his part that the former action was out of court, and at an end before the second was brought. Defendant, on the other hand, says it was not out of court, nor at an end; but only that power was taken from plaintiff of prosecuting it, or that it acted as a protection to defendant against a second action, and he relies on sec. 39. In the view of the case which I take, it is not necessary to determine this. If there were not the following circumstances in the case, the first action would have been sufficiently out of Court to allow the second to be brought, viz., the order to amend, bearing date November 19th, 1865. Under the Common Law Procedure Act, 1853, no appearance of defendant is requisite before the defence; but when defendant has been served with the writ he is to be deemed in Court. The plaint is a process only, and not a pleading until filed;

afterwards it becomes a pleading. There was a motion to set aside the first count of the summons and plaint for embarrassment, therefore, the plaint was then a pleading; and, therefore, it had been filed, and, consequently, defendant had had notice of the filing of the plaint. It seems to me that defendant, after the order of November 13th, 1865, must be deemed to have been served with a notice of the filing of the plaint. We must assume that he was, and there was then no new proceeding requisite to enforce a defence; but defendant was then bound to appear and defend the action. The order fixed no time within which the amendment was to be made, and, therefore, it might be made at any time within a year, and this kept the action in being for a year; also, therefore, the first action was pending at the time the second was brought, and, therefore, we are of opinion that the verdict should be entered for defendant.

*Conditional order made absolute with costs.*

RINDER v. DEACON.—Nov. 19.

*Motion to set aside judgment—Amount paid by defendant without the knowledge of plaintiff's attorney.*

*Defendant paid the amount of his debt to plaintiff without informing plaintiff's attorney, and without paying the costs. The attorney, knowing nothing of the payment, marked judgment, and levied an execution. Held, on motion to set aside the judgment, that the motion must be refused with costs, but that the judgment should be reduced by the amount paid.*

THE summons and plaint was issued on October 27, 1866, for £8 7s. 6d. Defendant forwarded that sum to plaintiff without acquainting plaintiff's attorney, on Nov. 6. On Nov. 12, plaintiff's attorney, in ignorance of the payment, marked judgment for £8 7s. 6d. and £4 7s. costs, and levied an execution on defendant's house on November 13.

Heron, Q.C. (with him M'Dermot) for defendant, applied to set aside the judgment. He relied on an affidavit of defendant setting forth the above facts. Defendant showed plaintiff's receipt for the sum claimed to the bailiffs at the time of the execution, but they carried off his goods notwithstanding. The judgment, under these circumstances, ought to be set aside.

Byrne, contra, for plaintiff, in support of the judgment.—The judgment is perfectly regular; defendant paid the amount of the debt to plaintiff behind the back of his attorney, in order to deprive the attorney of his costs. Counsel relied on an affidavit of plaintiff's attorney, stating that he marked judgment believing the debt was unpaid. Plaintiff, on receipt of the actual sum due, without any sum for costs, would naturally think that there was no action commenced.—*Blew v. Steinau* (11 Exch. 440); *Brien v. Walsh* (H. & J. 23).

M'Dermot in reply.—It could not have been any trick on our part, for if so we would not have paid

the debt five days before we need have.—*M'Kenna v. Sexton* (8 Ir. Jur. n. s. 216); *Harbison v. Wilcox* (11 Ir. L. R. 500).

PIGOT, C.B.—We are of opinion that this motion ought not to be granted on the terms sought. We refuse the motion, though defendant may obtain a reduction of the amount for which judgment has been marked, but he must pay the costs of this motion. I hesitate about giving costs in favour of plaintiff's attorney, for I think this motion indicates that it is the practice prevailing too much at present that an attorney instructed to collect in the debts of an English client, makes the summons and plaint the medium of his demand. The attorney's duty to the community at large and to his client was, not to make the summons and plaint the first means of collecting his client's debts, but to apply by letter in the first instance to defendant. It is perfectly plain that his client meant to ask his aid in two capacities—first, as a correspondent; secondly, as an attorney, if he could not otherwise get in his debt; but he did not mean to have the plaint issued in the first instance for a debt which might have been paid at once if defendant had been properly applied to. Defendant, on the other hand, was a defaulter here as in another case, with the same plaintiff, though he was aware of his claim. As to the merits of the case, defendant was served on Oct. 27 with the plaint. He does nothing, says nothing, till Nov. 5, when he goes to plaintiff's attorney, and pays to him a debt due by him to plaintiff in another proceeding. On the next day he transmits a cheque to plaintiff for the sum claimed in the present action. This plaint is not the first he was served with. By the other plaint he was apprised that he should pay the costs if the case were settled after the issuing of the plaint, and still after that he pays the amount of this debt to plaintiff in person, saying nothing to the attorney of his intention so to do, though speaking to him the very day before. For what reason did he act thus? A man of business pays a debt behind the back of his creditor's attorney, and he did it knowingly, forbearing to tell the attorney, and evidently intending some inconvenience to plaintiff or plaintiff's attorney, or else some benefit to himself, and he could not benefit himself otherwise than by having the chance of escaping costs, which a man ignorant of law might imagine he could do. When he got the receipt from plaintiff he did not tell the attorney. Why? Was it from fear of the attorney proceeding against him for his costs? Whatever his reason was, the result was that plaintiff's attorney remained in ignorance of the payment, and having sued for the debt, and not hearing of the payment drew the natural inference that the money had not been paid, and he then made the affidavit, which was perfectly true as far as he could judge, though actually untrue. Thus defendant is to blame for having voluntarily deceived plaintiff's attorney, for the judgment would not have been entered in this form were it not for defendant. We have held before this that when there is a fair opportunity in the ordinary course of business a plaintiff should apprise his attorney of his dealings with a defendant; but here is a client with a great deal of business, with many printed receipts to save time, and if he lived near his attor-

ney he would be in default if he did not apprise him of the payment by defendant, but he lives at a considerable distance, having his residence in England, and corresponding with defendant. This, I think, presents a different aspect. Here the time was so short and the correspondence of such a nature that there is no default in plaintiff. I think from the multiplicity of his business transactions, and his many accounts in England and Ireland, plaintiff could only send instructions to his agents in various parts, and then leave the matter in their hands. It would be a great nuisance to a trader to have to write to his attorney at every step of the case, and it would entail great expense on clients, and these considerations appear to me to absolve plaintiff from all blame in the matter. With his attorney in Dublin it was a natural inference for plaintiff to draw when he received defendant's letter that the suit had not been commenced, and that defendant had sent the debt without the costs as he had not been sued at all, or else that defendant had settled the costs in Dublin with the attorney there. As to the costs, defendant misled the other side, and therefore he ought to pay the costs. I am struck by this, knowing, as I do, the object of this motion, which is made for the purpose of laying the foundation for an action which ought never to be brought, viz., an action against plaintiff for the seizure of defendant's goods. We think we ought to make the order in these terms that all further proceedings in this case should cease. We refuse this motion, but on the terms of defendant paying the costs of the action and of this motion, full satisfaction will be entered on the judgment. I have made the foregoing observations in order to show distinctly that the Court will look with sharpness at the conduct of attorneys, who, in the case of small debts, act as the attorney has done here.

*Motion refused with costs, which were fixed at £4 4s.*

MURPHY v. FIELDING AND BACON.—Nov. 19.

*Motion to set aside defence—The general issue—Mutiny Act, 1866.*

*A. brought an action against B. for false imprisonment. B. pleaded that he did the acts alleged solely as governor of a military prison, to which plaintiff was committed. Held, on motion to set aside this plea, that it must be amended by adding the words, "in pursuance of the Mutiny Act, and any Acts incorporated with it."*

THIS was an action for false imprisonment brought by plaintiff, who was tried by a court-martial, at which the defendant, Fielding, was the prosecutor, and defendant, Bacon, the governor of Arbour-hill military prison, to which he committed plaintiff when brought to him previous to the court-martial. The court-martial acquitted plaintiff on the ground of mistaken identity; he was supposed to have been a military deserter named Lynch. Defendant's (Bacon) plea now was, "that the action was brought against him solely as governor of Arbour-hill prison."

Butt, Q.C. (with him O'Loghlen) for plaintiff, applied to set aside this plea as embarrassing. The plea is one of the general issue. The Mutiny Act, s. 89, of this year strangely gives the plea of the general issue to Ireland; this will be relied on by the other side. But that Act does not *authorise* the plea of "not guilty" here, as it does not in England, where defendant could plead the general issue without the aid of this Act. They ought to have averred in their plea that they did the act complained of under the Mutiny Act. But there is nothing in the Mutiny Act authorising the confinement ordered here by defendant. Plaintiff here was never subject to the Articles of War at all, as it was a case of mistaken identity. They ought to have pleaded "not guilty by statute," as in England.

Sullivan, Q.C. contra, in support of the plea.—[Pigot, C.B.—You need not address us upon the point as to the general issue, for we must consider the Common Law Procedure Act abolishing the general issue in Ireland as *pro hac vice* repealed by the express words of the Mutiny Act.] Very well.—*Richards v. Easto* (15 M. & W. 244); Mutiny Act, 1866, s. 82.

Pigot, C.B.—Let the defence be amended by introducing the words, "in pursuance of the Mutiny Act and any Acts incorporated with it." The issue will then be whether defendant is guilty or not. The costs of the motion will be costs in the cause.

*Motion granted.*

MURPHY v. FIELDING AND BACON.—Nov. 22.

*Application to postpone trial—Absence of witnesses.*

*A reasonable time will be given to a defendant to prepare his defence, and procure the attendance of his witnesses.*

THIS case came again before the Court to-day in the form of an application by

Sullivan, Q.C. (with him Harrison, Q.C. and Murphy, Q.C.) for defendants, that the trial be postponed until the sittings after next Hilary Term. Counsel relied on an affidavit of defendant, Bacon, which stated that he had material witnesses—private soldiers—stationed at Gibraltar, whom it would not be possible to have here before the ensuing after-sittings were ended.

Butt, Q.C. contra, for plaintiff (with him O'Loghlen) to resist the motion.—The motion is intended for the purpose of looking for witnesses rather than anything else.

O'Loghlen on same side.—The summons and plaint was issued on October 29, thus defendant had plenty of time to get these witnesses if he had wished. He has time enough even now to have them before the end of the ensuing after-sittings.

Harrison, Q.C. was not called on to reply.

Pigot, C.B.—We are of opinion that this motion ought to be granted. We cannot apply technical rules to cases like this; we must apply common sense. This is a peculiar case. From the nature of this action, as explained on this motion and the former



one a few days ago, it is indispensable for defendants to have great latitude in preparing their defence. Their case may be that by the construction of the Mutiny Act and the Articles of War, a person once subject to those articles may be committed to such custody as plaintiff was here. Defendant, Bacon, was exposed to two fires—the civil fire and the military. He was obliged to obey the military order to take plaintiff into custody, and now he is in danger from the civil tribunal, from his obedience to that very order. I can understand that though the writ was served on October 29, time ought yet to be given to defendants. As my predecessor, Lord Guillamore, said, "It is possible to prosecute an equity suit with a coach and six," yet we ought not thus to hasten on matters. Defendants may wish to consider the Mutiny Act and the Articles of War, and the practice in England and elsewhere. It is quite possible that the witnesses might be here in time; but are we to tie up a party's hands in this way? I must say that it appears to me there is a vast quantity of unnecessary matter in plaintiff's affidavit, of which it is impossible to speak otherwise than with disapprobation. I am almost inclined to ask my brothers to say that this should be a reason for giving the costs of this motion to defendants. I see no reason for the long statements in the affidavit.

*Motion granted. Costs to be costs in the cause.*

[BEFORE THE LORD CHIEF BARON AND FITZGERALD AND DEASY, BB.]

HARBISON v. FOREST.—Nov. 24.

*Motion to set aside award—Evidence at arbitration.*

*It is the duty of arbitrators to hear evidence and to give the parties an opportunity to produce evidence. Hence, an award made without evidence will be set aside.*

THIS was an action for seduction; damages laid at £300. There was a submission to arbitration, and plaintiff's arbitrator assessed the damages (which were the sole question in the case) at £100; defendant's arbitrator at £50; and the umpire at £90. The arbitrators heard no evidence whatever; they merely acted on their knowledge of the condition in life of the parties (farmers), and in fact only took into consideration what sum defendant could pay. The award was then drawn up by defendant's attorney, but without defendant's authority.

Harrison, Q.C. for defendant, applied to set aside the award, relying on an affidavit of defendant setting forth the above-mentioned facts.

J. Hamilton, contra, for plaintiff, and in support of the award.—The only question was as to the amount of damages, and the arbitrators, as knowing the parties, were in a position to estimate the damages without witnesses. Plaintiff says in his affidavit that he was under the impression that no witnesses were to be examined. Defendant is estopped from questioning the award by the fact that his attorney drew it up, and by his not having tendered his witnesses at the time of the award.

PIGOT, C.B.—This award must be set aside, but it is a great calamity to the parties concerned, for it is an exceedingly probable thing that until the event of the award was known, both plaintiff and defendant were satisfied that witnesses were not wanted for the purpose of enabling the arbitrators to decide the matter. I cannot understand what light could be thrown on defendant's case by any evidence he might have adduced; but still we must act judicially; we must take care that this forum acts properly. It is contended now that because evidence was not tendered to the arbitrators, they were to make the award without hearing any evidence; but this is a fallacy. It was the duty of the arbitrators to hear evidence, and also to give an opportunity to the parties to give evidence, but the arbitrators determined the matter by themselves. It was most improper of defendant's attorney to draw up the award without authority from his client.

*Motion granted with costs.*

[BEFORE THE FULL COURT.]

HEMPTON v. HUMPHREYS.—Nov. 26.

*Striking of jury under old system—Action for bribery at an election.*

*An affidavit that it would be unsatisfactory to one party to have his case tried by a jury struck under the present system, if not met by a counter-affidavit, is ground for granting a motion to strike the jury under the old system. Semble, the Court will not be bound by authorities in motions depending on their discretion.*

THIS was an action to recover £100 for defendant's alleged bribery at the last election at Londonderry.

M'Donagh, Q.C. (with him Ball, Q.C., and J. Hamilton) for defendant, applied to have the jury struck under the old system. Political matters will prevail here. Defendant is the land agent of His Excellency the Marquis of Abercorn.—Barron v. West of England Insurance Company (3 Ir. C. L. R. 113); Fleming v. Taylor (3 Ir. C. L. R. 75); M'Lester v. Fegan (9 Ir. C. L. R. Ap. 44). The earlier cases were *ex parte*, though, at present, notice is required.—Harrison v. Lynch (3 Ir. C. L. R. 257); Magee v. Mark (5 Ir. Jur. n. s. 134).

Pallas, Q.C., contra (with him M'Laughlin) for defendant.—As to political feelings in the case.—Dowling v. Sadlier (3 Ir. C. L. R. 603); Smyly v. Hughes (7 Ir. Jur. 139).

M'Laughlin on the same side.—Hirsch v. Best Sugar Company (6 Ir. Jur. 291); Hughes v. Shirley (16 Ir. C. L. R. Ap. 6).

Ball, Q.C., in reply.—I rely on these three points. 1. The nature of the action. 2. The constitution of the existing jury pannel in this Court. 3. The absence of a denial that our application, if granted, would further the ends of justice in this case.

PIGOT, C.B.—This is manifestly a case when the less said in giving judgment the better. There has been a distinct and positive statement here made, not on behalf only, but upon the oath of defendant's solicitor, that he has ascertained there would be a pre-

ponderance of jurors of one political tendency if the jury were struck on the present system in this case. On the other side there is an absence of anything encountering this statement—a total absence of any statement, that the striking the jury on the old system would occasion a preponderance the other way. There exists that, which under the new system would be unsatisfactory to one party, while to the other party there would be nothing unsatisfactory under the old. I disclaim all idea of deciding this case upon any former authorities. In my opinion nothing is so mischievous as to tie up the hands of a Court in motions when their discretion is to be exercised. It is extremely possible that if I had been in the Queen's Bench when the decision referred to was given, I would have thought that the jury ought to have been struck under the old system; but I am not called on here to give an opinion either for or against that case. It is essential that notice be given to the opposite party; for *prima facie* the jurisdiction ought not to be changed. We, therefore, think the motion must be granted, the costs to be costs in the cause.

*Motion granted.*

#### SITTINGS IN BANCO AFTER TERM.

[BEFORE FITZGERALD, HUGHES, AND DEASY, BB.\*]

KIERNAN v. BRERETON.—Nov. 27.

*New trial motion—Furnishing of bill of costs by attorney previous to action brought—12 & 13 Vict. c. 53, s. 2.*

*The bill of costs to be served on a defendant by an attorney under 12 & 13 Vict. c. 53, s. 2, must show on the face of it an intention to charge the defendant, or else this intention must appear on a writing served on defendant contemporaneously.*

This was an action by an attorney for his costs, and for £100 lent, against three defendants, Robert Lawrence Brereton, William Watson Brereton, his brother, and Caroline Catherine Brereton, his sister. The case was tried at the last after-sittings before Deasy, B. Defendants severed in their defences, the two latter pleading that plaintiff did not, one month before action brought, furnish them with, or leave at their house, &c. a bill of charges and disbursements, &c. as required by statute. There was no doubt of such delivery to the first defendant, and there was a verdict against all three, leave being reserved to reduce the verdict by £87 Os. 6d. as against the two latter defendants, if the Court should be of opinion that there was no delivery to them within the stat. 12 & 13 Vict. c. 53, s. 2. In May, 1858, plaintiff was retained by defendants to act for them in certain matters pending in Chancery. In June, 1859, plaintiff got a power of attorney from the same parties to act for them. The bill of costs was entitled—"In Chancery. In re Robert Lawrence Brereton, William Watson Brereton, and Caroline Catherine Brereton. Miscellaneous costs between solicitor and client."

\* The Lord Chief Baron being at the Nisi Prius after-sittings.

And the envelope was addressed, "Robert Lawrence Brereton" alone.

*Palles*, Q.C. having obtained a rule nisi, in pursuance of the leave reserved,

*Shaw*, Q.C. (with him *Litton*) for plaintiff, showed cause against the conditional order.—As to the intent of the Legislature in passing 12 & 13 Vict. c. 53, s. 2—*Crowder v. Shee* (1 Camp. 437); *Frowd v. Stillard* (4 C. & P. 51); *Champ v. Stokes* (6 H. & N. 683); *Booth v. Mason* (1 H. Bl. 291); *Roberts v. Lucas* (11 Exch. 41). The authorities decide that a bill of costs entitled in the cause, signed by the attorney, and served on one of several defendants jointly liable, is a sufficient compliance with the statute.—*Finchett v. How* (2 Camp. 275); *Holmes v. Magrath* (5 Ir. L. R. 376); *Daubney v. Phipps* (16 Q. B. 507, 514); *Grinley v. Austen* 18 Q. B. 504; *Mant v. Smith* (4 H. & N. 324); *Bromlow v. Lowry* (Batty, 234).

*Bewley*, contra (with him *Palles*, Q.C.) for defendant, in support of the rule.—The two defendants for whom we appear are not liable, because—1. The heading of the bill shows no intention of charging them. 2. The individual items of the bill show an intention to charge R. L. Brereton, and not the other two defendants. The envelope is addressed to him only. There is no allusion by name to these two defendants in the will; in six instances they are referred to as the brother and sister of R. L. Brereton. Take one item, for instance, in the will—"Letter sent to plaintiff saying I had transmitted £10 to his brother and sister." This shows a decided intention not to charge the other two defendants.—*Pulling's Attorneys*, 328; 1 Lush. Practice, 292; *Manning v. Glynn* (1 Jones, 513); *Engleheart v. Moore* (15 M. & W. 548); *Dimes v. Wright* (8 M. & Gr. 831); *Taylor v. Hodgson* (3 Dow. & Low. 115).

*Palles*, Q.C. on same side.

*Litton* in reply.

*Fitzgerald*, B.—It is not necessary to let this case stand. There is some difference between the case of *Manning v. Glynn* and some others, but the result of all the authorities is, that the intention to charge a defendant must appear either on the face of the bill of costs itself, or on some writing served contemporaneously on defendant. It seems to have been held that if there is ambiguity in the writing, attending circumstances may be looked to to explain it, but that is not necessary to decide here, for there is no intention to charge those two defendants; but on the envelope there is the name of R. L. Brereton alone. Therefore, this verdict must be reduced, in the terms of the conditional order, by £87 Os. 6d. as against those two defendants."

*Rule made absolute, with costs.*

[BEFORE THE FULL COURT.]

HODGENS v. POE.—Nov. 23

*New trial motion—Blank warrants of Commitment—14 & 15 Vict. c. 93.*

\* See a motion of *King v. Poe*, reported in 10 Ir. Jur. n.s.

*A warrant for committal to safe custody, omitting defendant's name in the body of the warrant, though in all other respects correct, is void.*

THIS was an action for assault and false imprisonment tried at the last after-sittings, before Fitzgerald, B. Plaintiff, together with one William King and John Smith, created a disturbance in a church, at Nenagh, during divine service; thereupon defendant, a justice of the peace, took them into custody. They were subsequently committed under a warrant, which was as follows:—

"James Jocelyn Poe, of Nenagh, complainant; William King, Robert Hodgens, and John Smith, defendants.

Petty Sessions, District of Nenagh,  
County of Tipperary.

Whereas, a complaint was made, and that the said defendants did, &c. This is to command you to whom this warrant is addressed to lodge the said of Nenagh, in the gaol, &c."

The warrant followed the form (E. b.) in the schedule to 14 & 15 Vict. c. 93, with the exception that the blank for the defendant's name, after the words "to lodge the said," was not filled up. The jury found for plaintiff, with £5 damages, to be increased in accordance with the leave reserved by £5 more if the Court should be of opinion that the above warrant was an illegal and bad one.

*Dowse, Q.C.*, having obtained a rule *nisi* accordingly.

*M'Donagh, Q.C.* (with him *Ryan*), for defendant, showed cause against the conditional order. The only question in the case is, as to the illegality of the warrant, and we contend it is a perfectly good warrant; for there is no uncertainty as to who was to be committed when the defendants' names appear already in preceding part of the warrant. [*Fitzgerald, B.*—The difficulty I have is this—the words "of Nenagh" occur immediately after "the said"—and the only person mentioned as belonging to Nenagh is the complainant]. There is but *one* complainant; therefore, this could not refer to him, especially as the words "they" and "the said defendants" occur just before. It would be absurd to refer "the said" to the complainant. Committals for safe custody need not be as accurate as committals for execution.—*Levinge, Justice of the Peace* (2nd Ed.) 105, and cases referred to there; *Rex v. Gourlay* (7 B. & C. 679); *Re Elderton* (6 Mod. 75). The Queen's Bench do not at once discharge a prisoner if the warrant for his committal be bad; but they call for the informations, and enquire if the offence is set forth there or not.—1 Chitty Criminal Law, 111, 115; *Prince v. Nicholson* (5 Taunt. 333); *Broom's Legal Maxims*, under the head of "*Verba illata inesse videntur*."

*Lover, contra* (with him *Dowse, Q.C.*) for plaintiff in support of the rule.—As to the omission of the name in the body of the warrant.—*King v. Hood* (1 Moo. C.C. 281); *Fletcher v. Calthrop* (Bit. & Sym. 223); *Queen v. Bartlett* (12 Law J. n. s. M. C. 127); *Money v. Leech* (1 W. Bl. 554); *Shadgett v. Clipson* (8 East. 329); *King v. Cooper* (6 Term R. 509); *Re Tordorf* (Bit. & Sym. 17); *Van-*

*derburg v. Spooner* (1 Law R. Exch. 316); *Housin v. Barrow* (6 Term R. 122); *Boyd v. Durand* (2 Taunt. 161). "They" in the warrant would include, at least, two of the defendants, and if so, which two would it be?—*Rex v. Horne* (Cooper 672); *King v. Hazell* (13 East. 139); *Butler v. Bianconi* (11 Ir. L. R. 276); *Re Byrne* (11 Ir. L. R. 538); 1 Hales' Pleas of the Crown, 587; *King v. Rees* (16 State Tr. 1); *Queen v. Pelham* (2 Cox Cr. Cases 17); *Queen v. Galvin* (16 Ir. C. L. R. 452).

*Dowse, Q.C.*, on same side.—Is there a substantial uncertainty in this warrant? I do not contend that the name itself must appear; but the warrant must contain such an accurate description of the person to be committed, giving the reason why he is not named as will prevent any mistake.—*Paley Convictions*, 276; *Chitty Criminal Law*, 110; 1 Burns' Justice, 179.

*Ryan* in reply.—I don't dispute the authority of the cases cited on the other side; but the question is do the names of defendants appear in the warrant? for it is clear law that they must.—*King v. Goodall* (Sayers 129); *Re Elderton* (6 Mod. 75). The warrant is quite clear.

*Pigor, C.B.*—My opinion has changed during the argument. At first, I was inclined to yield to Mr. M'Donagh's contention, and to say that, as "the said" appeared in the warrant just after "defendants," we ought to hold the warrant sufficiently certain; but irrespective of the authorities cited by Mr. Lover, and looking at the warrant, and considering the kind of obligation intended to be cast on a constable, we ought to hold this warrant bad. It is of the utmost importance that instruments of this kind should be intelligible and capable of being at once understood, and so intelligible that by the perusal of persons of ordinary, and even inferior, knowledge they should indicate clearly the person to be dealt with by the warrant. A warrant for committal is directed to a class of officers who are not of the highest degree of constables; often of inferior education and diligence, and sometimes not well versed in the reading or construction of legal documents, and what is as important when these documents are addressed to this inferior class, they are obliged to resort to the nearest person who can read to explain the warrant to them. There are two main objects to be attained—1st. That the officer who is to execute the warrant shall know his duty. 2nd. That the person against whom the warrant is issued shall know whether he ought or ought not to obey it. The books are full of instances of ambiguity in warrants leading to calamitous results; for the parties are in doubt whether to obey the warrant or not, and are tempted to resist it, if from any uncertainty in it there exists any apparent ground for resistance; whereas, if the warrant were quite clear in terms, they would yield obedience to it. These are the general principles, irrespective of the Act, which apply here; but that Act inclines us to the same opinion, in order that we may comply with its provisions. In its enacting parts it prescribes what course is to be followed; and also, to prevent any mischief, provides certain forms to be observed. These are the helps to justice; the means by which the statute imparts, by example, a knowledge as to how its provisions are to be

carried out. We ought not to sanction any departure from these forms, unless that departure is sanctioned by the Act itself. In this instance, no other form is provided by any other Act. Does the form here used suffice, in substance and effect, or clearly express the intention of the person using it? The omission appears in that part where we cannot ignore the maxims of law, as laid down in Hale's Pleas of the Crown, viz., that the warrant of committal for safe custody should contain the name and surname of the person to be committed, if known; otherwise his age, complexion, the colour of his hair and eyes, &c., with the addition, that he refuses to tell his name. Why is not the name inserted here? From pure carelessness. It is a wholesome rule to guard against that carelessness, for where would it end? How far should it be permitted? Here it is in the most essential part of the warrant; and, as my brother Hughes suggests, is there, or is there not, a blank here? The Court discourages blank warrants, because they are a temptation to a passionate man to resist, on the grounds that he has not been named in the warrant. The interview between a bailiff and a person to be arrested is generally very short and sudden, sometimes effected with difficulty. Then, the person is suddenly applied to by the bailiff late in the day; it may be with defective light, or at night; the warrant should, therefore, be quite clear, and not require any collating of words from one part of it to another, which is certainly necessary here. It is proper that the heading of the warrant should contain the names of all the defendants, even if in the body one only occurs for committal. In my opinion, the departure from the form given in the Act in this instance, and the consequent ambiguity in the warrant, is sufficient to invalidate it at common law, independently of the statute. The conditional order must, therefore, be made absolute.

FITZGERALD, B.—I also have changed my opinion during the arguments, and now agree with the rest of the Court.

PIGOT, C.B.—Here we are—two judges—changing our opinions thus; and it certainly would be very hard to oblige a bailiff to construe a document like this on the spur of the moment.

*Rule made absolute with costs.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

KELLY v. DUNBAR.—Nov. 19.

*By a decree made in the cause, by consent, a sum of £500 was ordered to be paid to A. B., the father, and C. D., the curator, of a minor, to be invested for the benefit of the minor. The Court refused to pay said money to A. B. and C. D., considering that it should be lodged in the Court of Chancery.*

Falkiner, solicitor for the defendant, applied for leave to lodge a sum of £500 which, by the decree made on consent, was ordered to be paid to the father and guardian of the minor intervenient (Olibborn), to be invested for his benefit.

Hackett, solicitor for the father and guardian, asked for the money to be paid over to them as directed by the decree. The object was to avoid the expense of proceedings in Chancery and to get a higher rate of interest.

KEATINGE, J.—I certainly never will order payment to the father and guardian. The order is—that the money is to be invested for the benefit of the minor, and that implies that it should be lodged in Chancery and protected for his benefit. The father, *prima facie*, is bound to support and educate his son out of his own means; but if a fit case is made out of his inability to do so, the Court of Chancery can order the dividends or a sufficient part for such purpose.

*No rule.*

DORAN AND LALOR, PLAINTIFFS; MICHAEL KENNY, DEFENDANT. AND IN THE GOODS OF MICHAEL KENNY, DECEASED.

*Minors—Election of curators when dispensed with Where minors, above seven years old, were inmates of a convent, and the superioress refused to allow them to sign an election of their mother as curator, the Court dispensed with it and ratified the Registrar's order appointing such curator.*

C. Coates moved on behalf of Philip Clinch and Mary Anne Clinch, his wife, who was the mother of Anne Kenny; Sarah Teresa Kenny, and Mary Agnes Kenny, minor children of the marriage of said Mary Anne Clinch with the late William Kenny, deceased, her first husband, who was the brother of Michael Kenny, the deceased in this cause, for an order that said Philip Clinch and Mary Anne Clinch should be appointed curators of the said minors, and to appear for them in this matter; and that the election of said minors of said curators should be dispensed with. The petition stated that Michael Kenny died on the 1st May, 1866, having made his last will, dated the 26th May, 1866, and thereby appointed the plaintiffs his executors. The defendant pleaded to the declaration disputing the validity of the will. The defendant was a brother of the deceased, and his only next of kin; the minors, for whom this application was made, were nieces of the deceased, and entitled in distribution as in cases of intestacy, being children of William Kenny, a brother of the deceased, and who died in his lifetime, and were cited by the plaintiffs to see proceedings. William Kenny, the father of the minors, died in 1858; he was a brother of the deceased. William Kenny made a will appointing two testamentary guardians to his said children, one of whom was dead, and the other declined to act. The ages of said children were respectively of the ages of 13, 11, and 9 years of age; and they were resident, for the purpose of education, in a convent at Blackrock, county of Dublin. The applicant, Mary Anne Clinch, had endeavoured by a personal application to the minors at the convent to get from the minors an election of guardians, but the superioress of the convent positively refused to allow them to execute any election. The registrar had made an order appointing the applicants curators of the minors, but required that an application should be made to the Court for an order dis-

pensing with the election of the minors. The petition stated that the applicants had no conflicting interest with the minors.

KEATINGE, J.—In this case I will dispense with the usual election of the minors, and my order will be that, having regard to the registrar's order appointing the applicants curators of the minors, the election of the minors be dispensed with, and that such order be acted on.

*Order accordingly.*

NEALE v. MORTON.—Nov. 19.

IN THE GOODS OF SARAH NEALE, DECEASED.

*A will apparently duly executed, lodged, but not pronounced, passed by, on affidavits of undue execution, and administration given as in case of intestacy.*

*W. Harty*, on behalf of Lydia Neale, the sister and one of the next of kin of the deceased, applied for letters of administration of the personal estate and effects of Sarah Neale, notwithstanding an alleged will of said Sarah Neale dated the 8th January, 1861, lodged in the registry. It appeared from the affidavit of the applicant that the deceased died at Kilmoney, County Kildare, on the 19th January, 1861, unmarried; and some days previously she executed a paper writing purporting to be her will, and appointing George Penrose Neale, her brother, sole executor and universal legatee. He died on the 7th April, 1866, having by his will, dated the 28th day of October, 1865, and codicil of the 30th October, 1865, appointed Joseph Morton and William Henry Morton executors. J. Morton alone proved on the 7th May, 1866, but Lydia Neale's will never was proved. A citation issued at the suit of the applicant against Morton to bring in the will, and show cause why

the same should not be condemned. That was served on the 13th July, 1866. On the 18th July, 1866, a notice was served by Morton's solicitor on the plaintiff that he had no knowledge of the facts connected with the execution of said will, and did not intend to take any step as to litigating same save lodging said will in court, which he accordingly did. The two attesting witnesses to the alleged will were servants of George Penrose Neale, in whose house the deceased lived, and made affidavits from which it appeared that deceased was in a weak state of health for many years before she died, and was confined to her bedroom for three years prior to her death. A few days before her death George Penrose Neale got a will prepared by an attorney, and desired one of the attesting witnesses to tell her to communicate the fact to his sister. On the day of the execution of the will George Penrose Neale and the witnesses went into his sister's room, when he brought in the will and put the pen into his sister's hand and held it until she made a mark to the will. The will was then taken by G. P. Neale into a china closet, several rooms intervening and in which the two witnesses wrote their names on said will; and it was impossible for the deceased to see the witnesses signing; and the two witnesses identified the will. The will had a full attestation clause. The deceased was entitled to two sums of £100 each and some plate and other effects. Counsel cited *The Goods of Holmes* (8 Ir. Jur. n.s. 159); *Germain v. O'Dwyer* (6 Ir. Jur. n.s. 91); *Morton v. Thorpe* (3 S. & T. 179).

*F. Johnstone*, for the defendant, said he did not offer any opposition.

KEATINGE, J.—The case cited (*Goods of Holmes*) is quite in point; and I will follow it and make a similar order—not condemning the will, but reciting in my order my opinion of the invalidity of the paper, and will allow you to apply for and obtain a grant of administration as in a case of intestacy.

*Order accordingly.*

END OF REPORTS.

# Law and Equity Index

## TO

# THE IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE EIGHTEENTH VOLUME OF THE IRISH JURIST (THE ELEVENTH OF THE NEW SERIES.)

AND IN THE

SIXTEENTH VOLUME OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

\* \* The letters at the conclusion of each paragraph indicate the titles of the Reports digested, and the names of the respective Courts, thus:—Ir. Jur. *Irish Jurist*. Ir. C. L. R. *Irish Common Law Reports*. Ir. Ch. R. *Irish Chancery Reports*. H. L. *House of Lords*. C. *Chancery*. R. *Rolls*. Q. B. *Queen's Bench*. C. P. *Common Pleas*. Exch. *Exchequer*. Cir. Cas. *Circuit Cases*. Ex. Cham. *Exchequer Chamber*. Reg. C. *Registry Cases*. Crim. Ap. *Court of Criminal Appeal*. L. E. C. *Landed Estates Court*. M. O. *Master's Offices*. Consol. Cham. *Consolidated Chamber*. Bank. *Bankrupt Court*.

ACCOUNT STATED. See GUARANTEE.

ACT OF STATE.

See LORD LIEUTENANT.

ACTION.

1. *Action against trustees for the Crown.*
2. *Action against Lord Lieutenant.*
3. *Action for discharging prisoner against his will.*
4. *Action for maliciously issuing trader debtor summons.*
5. *Liability of poor law guardians to action for damages.*

1. *Action against trustees for the Crown.*

A. demised certain lands to Brigadier-General Fisher in trust for King George III. and his successors, in 1809. The demised lands afterwards vested in her present Majesty's Secretary-at-War, and the rent being unpaid, B., who claimed as assignee of the reversion, brought an action for the rent against the Secretary-at-War, who pleaded that he held only in trust for the Crown. *Held*, on demurrer to this plea, that the demurrer must be overruled, the action not lying against the Crown. *Ryan v. Lord de Grey*, 11 Ir. Jur. n. s. 236, Exch.

2. *Action against Lord Lieutenant.* See LORD LIEUTENANT.

3. *Action for discharging prisoner against his will.*

A., a prisoner for debt, brought an action against B., the governor of a gaol, for discharging him from prison against his will, whereby his petition in bankruptcy pending was discharged, and he suffered damage. *Held*, on demurrer to the plaint, that it must be amended as not averring that defendant had notice or knowledge of the petition pending in bankruptcy. *Kearney v. Price*, 11 Ir. Jur. n. s. 198, Exch.

4. *Action for maliciously issuing trader debtor summons.* See MALICIOUS PROSECUTION.

5. *Liability of poor law guardians to action for damages.*

To an action brought by the plaintiff, a linen manufacturer, against the defendants, the poor law guardians of the Lurgan Union, for opening a sewer and causing impure matter to be discharged into the stream of a river, the water of which the plaintiff was entitled to have flow past his premises, the defendants pleaded—1. That the poor law commissioners had issued a general order which directed the defendants whenever there should be such a defect in the drain-

age of the Lurgan Union Workhouse as might tend to injure the health of the inmates, to remedy such defect; that such defects had arisen; that it was necessary that they should open a sewer, &c., and that they did so; and that in no other way could they have remedied the defects so existing; and that they acted *bona fide*, with due skilfulness, and without negligence. 2. That under the powers conferred by 1 & 2 Vict. c. 56, the defendants ordered one R. M. to construct a sewer, &c., which he did; and that that order made by the defendants had not been quashed. Upon demurrer, *held*—1. that the pleas were bad, but 2. that the action was unmaintainable, as the damages, if recovered could not be levied out of the rates of the union, and that there must be judgment for the defendants. *Levingston v. The Guardians of the Lurgan Union*, 11 Ir. Jur. n. s. 317, C. P.

#### ADMINISTRATOR AND ADMINISTRATION.

An administrator is not bound to sell chattels real of his intestate in order to distribute the produce among the next of kin, when there are no debts to be paid. He may, if any of the next of kin require it, convey to them their respective shares. *Bradley v. Flood*, 16 Ir. Ch. Rep. 236.

In a suit for the administration of an intestate's assets, the Court may, after payment of the debts, &c., declare the rights of the next of kin to chattels real, without directing a sale, if any of them require it. *Ib.*

A judgment at law was obtained against the indorsee of a bill of exchange. In a suit for the administration of the assets of the acceptor, the report found the full amount of the debt. After the report, the indorsee paid several sums on account of the debt. The assets being deficient, the debts were decreed to be paid rateably. *Held*, that the sums paid by the indorsee should be deducted from the amount reported in calculating the rateable proportion of the assets to which the creditor was entitled. *Cummins v. Cummins*, 16 Ir. Ch. Rep. 156, R.

#### ADMISSIONS AND CONFESSIONS.

See CRIMINAL LAW, 5, a.

#### ALIENATION, CONDITIONS AGAINST.

1. *Power of Crown to annex condition to grant in fee.*
2. *What amounts to breach of.*

1. *Power of Crown to annex condition to grant in fee.*

The Crown, by its prerogative, may annex a condition against alienation to a grant in fee. *Fowler v. Fowler*, 16 Ir. Ch. Rep. 507.

2. *What amounts to a breach of.*

An annuity was granted by the Crown to a trustee, on trust, to pay it into the hands of M. B. alone, her executors or administrators, and that she was not to have the power of depriving herself thereof, either by sale, mortgage, or anticipation. *Held*, that a judgment registered as a mortgage, under the 13 &

14 Vict. c. 29, was an involuntary alienation, and was not a breach of the condition. *Fowler v. Fowler*, 16 Ir. Ch. Rep. 507.

#### ANCIENT LIGHTS.

See INJUNCTION.

#### APPEAL (IN EQUITY).

The Court is at liberty, on appeal from the Master's decretal order (15th sec.) to receive documentary evidence which was not before the Master. *Boag v. Bradford*, 11 Ir. Jur. n. s. 226, R.

#### APPEAL FROM MAGISTRATES. See MAGISTRATES' LAW.

#### APPORTIONMENT OF RENT.

See LANDLORD AND TENANT.

#### APPRENTICE.

*Damages in action by.* See DAMAGES.

#### ARBITRATION AND AWARD.

1. *Setting aside award.*
  2. *Notice of objection to award under 174th General order.*
- See COSTS.

1. *Setting aside award.*

A. cause of action having been by consent referred to two arbitrators, with power to nominate an umpire, they, and the umpire nominated by them on the 21st August, adjourned the arbitration to the 29th August. On the 22nd August the arbitrator nominated by the defendant withdrew from the arbitration. On the 29th August the plaintiff, by notice in writing, called on the defendant within seven days to appoint a new arbitrator. On the 31st Aug. the defendant's attorney received notice of an application to be made to a judge in Chamber to extend the time for making the award, and on the 12th September an order was obtained extending the time to the 20th October. On the 16th of September the plaintiff served the defendant with a notice that as the latter had failed to appoint an arbitrator by way of substitution, the former had appointed the arbitrator previously nominated by him to act as sole arbitrator, and on the 17th Oct. that arbitrator made his award in favour of the plaintiff. Upon cause shown by the defendant against making absolute the conditional order to confirm the award, the Court set aside the award. *Semble*, that the refusal by one of the arbitrators to act, after having heard a portion of the case, constituted such a disagreement as devolved on the umpire the duty of making an award. *Healy v. Healy*, 11 Ir. Jur. n. s. 34, C. P.

It is the duty of arbitrators to hear evidence, and to give the parties an opportunity to produce evidence. Hence, an award made without evidence will be set aside. *Harbison v. Forest*, 4 Ir. Jur. n. s. Exch.

2. *Notice of objections to award under 174th General Order.*

Defendant's attorney served a notice on a plaintiff's attorney that counsel for defendants would show



cause why a conditional order should not be made absolute, "which motion," the notice went on to state, "would be grounded on the said order, the award therein mentioned," &c. without stating any grounds of objection. After the receipt of this notice, plaintiff filed two affidavits, and the matter came on in Chamber before two judges on two different occasions, when no objection was taken by plaintiff to the notice. Plaintiff now objected to it on the grounds that it did not specify the grounds of objection to the award which was made. *Held*, that this was a valid objection, and that the subsequent proceedings of plaintiff had not the effect of waiving the objection. *Noonan v. Higgins*, 11 Ir. Jur. n. s. 39, Exch.

### ARRANGEMENT.

See BANKRUPTCY AND INSOLVENCY.

### ARREST.

1. *Privilege of clergyman of Established Church from.*

2. *Discharge of seaman in actual service from.*

1. *Privilege of clergyman of Established Church from.*

A clergyman of the Established Church attending under a summons, an episcopal visitation, is protected from arrest. *McGeagh v. Gerahty*, 11 Ir. Jur. n.s., 403, Q. B.

2. *Discharge of seaman in actual service from.*

On *habeas corpus* obtained by the Crown, an order was made discharging from custody a seaman in actual service, who had filed a petition as an insolvent debtor, and had been remanded for five months at the suit of two of his creditors, the debts having been contracted by him while in actual service, and no cause having been shown to the creditors against the conditional order for the *habeas corpus*. *In re Archbold*, 11 Ir. Jur. n.s. 175, Q. B.

### ASSIGNMENT.

1. *Assignment pendente lite.*

2. *What amounts to an assignment in Equity.*

1. *Assignment pendente lite.*

A. had a claim against B. for an apportionment of a gale of rent allocated and paid to B. by the receiver in a cause. In another cause A. and B. were entitled to portions of the interest on a mortgage. B. assigned his claims to C. pending the latter suit, in which sums were allocated to A. and C. in respect of their claims. The Court refused, on a motion by A. to pay the claim for apportionment out of the sums allocated to C. *Russell v. Barrington*, 16 Ir. Ch. Rep. 175, R.

In a suit against an executor for a breach of trust committed by the testator, a decree was pronounced, declaring the executors liable for the breach of trust, and directing an account of the assets. The executor was reported a creditor against the assets, for a debt of a firm of which the testator was a member. After the filing of the bill, but before the decree, the executor had assigned the debt. By the final decree the sum found due in respect of the breach of trust

was ordered to be paid by the executor; and a sequestration was afterwards obtained to attach a sum which had been carried to the separate credit of the executor, on account of the debt reported due to him. *Held*, that the assignment of the debt due to the executor having been made *pendente lite*, the plaintiff was entitled on the final allocation, to be paid the sum decreed to him in preference to the assignee. *Cummins v. Cummins*, 16 Ir. Ch. Rep. 156. R.

2. *What amounts to an assignment in Equity.*

A being indebted to B., and C. being indebted to A., A. gave B. an order on C., directing him to pay to B. what he owed to him, A. At the time when the order was given, C. had in his hands goods belonging to A. of considerable value. Notice of the order was at once given to C. *Held*, that the order operated as an equitable assignment of the value of the goods to B., and took priority over garnishee orders subsequently obtained by other creditors of A. *Costello v. Moore*, 11 Ir. Jur. n. s., 371, Q. B.

Where a bank makes advances upon shipments to consignees upon the faith that they are to be paid out of the proceeds of the goods thus consigned, and the bankrupt gives an order to the bank upon such third person having the funds in his hands to pay his creditor, it is a binding equitable assignment of so much of the fund as will pay the advances made. In order to constitute an equitable assignment there must be an order to pay out of a certain fund. If a certain construction is put on a contract by one party who communicates to the other his own construction of it, and the other does not think fit to reject that construction, but suffers the opposite party to act on the view he has taken, he will not be suffered afterwards to repudiate it. *In re Thornton*, 11 Ir. Jur. n.s. 16, Bankr.

### ATTACHMENT.

See MAGISTRATE.

### ATTORNEY AND SOLICITOR.

See COSTS—EVIDENCE, 5.

### BAIL.

See CRIMINAL LAW, 6.

### BANKRUPTCY AND INSOLVENCY.

1. *Act of bankruptcy.*

2. *Trader debtor summons.*

(a.) *Where improper.*

(b.) *Action for issuing.*

3. *Certificate, adjournment of.*

4. *Effect of death before adjudication.*

5. *Order and disposition.*

6. *Fraudulent preference.*

7. *Lien and salvage claims.*

8. *Election by assignees, and rights of landlord.*

9. *Fixtures.*

10. *Power of committal.*

11. *Reference to arbitration.*

12. *Proceedings under, and effect of, arrangement clauses.*

13. *Trust deeds under English "Bankruptcy Act, 1861."*

14. *Effect of insolvency on right to specific performance of contract.*

#### 1. Act of Bankruptcy.

Where a trader who wishes to consult his attorney about signing a declaration of insolvency, makes an appointment to meet a creditor's attorney, after he sees his own, and he goes *bona fide* for the purpose of seeing him, but finds he is not at home; he then returns at nine o'clock at night to his own house, and leaves a note for the creditor's attorney if he should call, and then went out with his wife to sleep at a friend's place, he thereby commits an act of bankruptcy. *In re Donovan*, 11 Ir. Jur. n. s., 19, Bankr.

Where a trader, two or three days before a large bill becomes due which he owes, informs the trustees of his marriage settlement, that he is in a state of insolvency, and then upon being served with a summons and plaint at their suit, signs a consent for judgment, it will be an act of bankruptcy. *Id.*

#### 2. Trader debtor summons.

a—Where improper.

Where a trader was brought before the Court upon a trader-debtor summons to compel the payment of a debt composed of the costs of a demurrer to one of the defences filed by the trader as defendant in an action, the issues in fact being still untried; inasmuch as upon the general finding the defendant might be entitled to have the costs of the demurrer set off against the costs of the verdict, or there might be a verdict for the defendant, and the proceeding being evidently taken with a view of enforcing payment of an improper claim, the Court dismissed the petition with costs. *Re a Summoned Trader*, 11 Ir. Jur. n. s., 240, Bankr.

b—Action for issuing. See MALICIOUS PROSECUTION.

#### 3. Certificate, adjournment.

Where traders obtain forbearance from creditors by false representations as to their circumstances, and by family arrangements contrive to have their trade carried on by members of their family, and to place property beyond the reach of their general creditors, even though they make a full and true disclosure of their trade dealings and transactions, the Court will adjourn the granting of the certificate for twelve months, and give costs to the creditors opposing, to be paid out of the estate. *Re Scotts*, 11 Ir. Jur. n. s. 20, Bankr.

#### 4. Effect of death before adjudication.

Where an insolvent dies before adjudication, and his petition is dismissed, although the order of dismissal is of record, the Court will reinstate it so as to have the estate of the insolvent administered as if no dismissal had taken place. *Re Young*, 11 Ir. Jur. n. s. 323, Bankr.

#### 5. Order and disposition.

Where a bank made advances to T. upon the faith that said bank was to be repaid said advances out of the proceeds of certain goods which were shipped by said T. to certain foreign consignees, and where T.

had instructed said foreign consignees to remit to said bank the proceeds thereof, but the goods were at the time in the order and disposition of T. (who afterwards became a bankrupt), with the consent of said bank—*Held* (reversing the order of Judge Berwick), that the bank not having given to the consignees notice of their said transactions with T. the property was not taken out of the order and disposition of T., and therefore the produce of said shipments vested in the assignees. *In re Thornton*, 11 Ir. Jur. n. s. 63, Ch. App.

#### 6. Fraudulent preference.

Where distillers procure acceptances for their accommodation upon a general agreement that the party so accommodating them shall be secured by a transfer of whiskey in bond, and the distillers afterwards, when in a state of insolvency, transfer the whiskey, and a delivery order and invoice are made out in May, which it was alleged were in pursuance of the general agreement to secure the payment of the bills, which was made in March and April previous, this will not prevent the operation of law with regard to a fraudulent preference, and the assignees in bankruptcy will be declared entitled to the whiskey. *Re Lefroy, Stein & Co.*, 11 Ir. Jur. n. s. 179, Bankr.

#### 7. Lien and salvage claims.

Where in a composition after bankruptcy, a manager has been appointed by the resolution of the creditors, with a definite duty in the management of a grazing and farming estate, *Held*, that an auctioneer receiving from said manager the note mentioned in the case, and knowing the fact that he was then acting as such manager, had not thereby any specific lien on the property brought to sale by him in violation of the manager's duty. *Re Grehan*, 11 Ir. Jur. n. s. 40, Bankr.

*Held also*, that such letter did not give an equitable title against the assignees, and that neither under the Factors' Act nor in any other way could he make title to the proceeds of the sale of all the bankrupt stock taken possession of under color of the authority given him by the letter of the manager. *Id.*

Where, in a composition after bankruptcy, the manager of the bankrupt's estate was appointed, on his undertaking to provide a sum of £800, for the necessary outgoings of the estate, and likewise undertaking to have at all times forthcoming a sum of £5,000 for the benefit of unsecured creditors of the bankrupt, and the manager was to be considered a salvage creditor for all the necessary advances—*Held*, that such manager could not insist on the benefit of his salvage claim in priority to the creditors, or without providing in the first instance for the sum of £5,000 originally agreed to have on hands for their benefit. *In re Grehan*, 11 Ir. Jur. n. s. 98, Bankr.

#### 8. Election by assignees and rights of landlord.

Where the assignees elect not to take an interest held by the bankrupt, although the bankrupt has got his certificate, the Court will make an order on him to give up the possession to the landlord, and thus prevent the necessity of bringing an ejectment on the title. *Re John Lambert*, 11 Ir. Jur. n. s. 325, Bankr.

### 9. Fixtures.

Where trade fixtures are seizable under a *fi. fa.* they will pass to the assignee under the reputed ownership clause in case of bankruptcy. *Re Tracey*, 11 Ir. Jur. n. s. 100, Bankr.

Where there is a permanent annexation of machinery to the freehold, it will not be regarded as goods and chattels that will pass under the reputed ownership clause; but moveable fixtures that are changeable into the condition of chattels by the severance of a tenant, will be held to be chattels for the benefit of his creditors generally, as well as for the benefit of a particular creditor who seized under a *fi. fa.* *Ib.*

Fixtures that are totally unannexed to the freehold, and are made steady by their own weight, but are worked by moveable belts put on to communicate motive power, will pass to the assignees as goods and chattels; and where machinery is fixed or attached for the purpose of making it steady in working, it will not be held to be so attached to the freehold as to prevent it becoming goods and chattels under the reputed ownership clause.

### 10. Power of committal.

Although a bankrupt has a *bona fide* intention of shewing cause against his adjudication, on the ground that he has committed no act of bankruptcy, and has taken the necessary proceedings to do so, still he may be committed for unsatisfactory answering, and for not giving up money in his possession, before the validity of the adjudication is decided. *Re a disputed adjudication*, 11 Ir. Jur. n. s. 324, Bankr.

### 11. Reference to arbitration.

Where there is a dispute between the petitioning creditors and the alleged bankrupt, the matter may be referred to arbitration with the consent of the Court, pending the proceedings to show cause, and upon the arbitrators making their award, the bankruptcy will be annulled. *Re a disputed adjudication*, 11 Ir. Jur. n. s. 324, Bankr.

### 12. Proceedings under, and effect of, arrangement clauses.

Where a trader presents his petition for arrangement obtains his order of protection and lodges the money required by the Court, this will not prevent a creditor obtaining an adjudication in bankruptcy, upon an act of bankruptcy committed by the trader before he filed his petition for arrangement. *Re Kilmarion*, 11 Ir. Jur. n. s. 240, Bankr.

The Court has an equitable jurisdiction to direct that a particular creditor should be paid a portion of his debt in full if the proposal of the trader would not be reasonable or proper, as regarded that creditor, to be executed under the directions of the Court, and such time may be given for the payment as the Court shall direct. *Re an arranging trader*, 11 Ir. Jur. n. s. 323, Bankr.

Where an arranging trader presents his petition to the Court, and files the usual affidavit of assets, which partly consist of an interest in a valuable house of business, said to be made the subject of a marriage settlement, the trader having received four hundred pounds as a marriage portion, which is made a charge on his property, and the settlement is sub-

mitted to creditors and believed to be genuine, and a composition of ten shillings in the pound is agreed to, and actually paid, but it is afterwards discovered that no marriage took place, the man having at the time of the alleged marriage a wife living, the arrangement proceedings will be set aside, and the case turned into bankruptcy, although the composition has been paid. *Re an arranging trader*, 11 Ir. Jur. n. s. 336, Bankr.

An arrangement under the arrangement clauses of the Irish Bankrupt and Insolvent Act, 1857, is no statutory bar to an action until the certificate mentioned in s. 352 of the statute has been obtained. *Kennedy v. Blackburne*, 11 Ir. Jur. n. s. 388, Q. B.

See PROMISSORY NOTE.

### 13. Trust deeds under English "Bankruptcy Act, 1861."

A clause in a deed of arrangement, under the "Bankruptcy Act, 1861," authorizing the trustees of the deed to employ the debtor or any other person in winding up his business, and in realizing the property comprised in the deed, and to pay a salary to such person, *Held*, not to invalidate the deed against a creditor who did not assent to the deed. *Russell v. Murphy*, 16 Ir. Ch. Rep. 54, R.

A statement in the affidavit by the debtor, lodged with the Registrar of the Court of Bankruptcy in England, that the amount in value of his property, credits, estate and effects, comprised in a deed of arrangement is under a certain value, is a sufficient compliance with the fifth condition of section 192 of the "Bankruptcy Act, 1861." *Ib.*

### 14. Effect of insolvency on right to specific performance of contract.

An insolvent had, previously to his discharge, entered into a contract for a lease at a rent. No creditors' assignee was appointed. *Held*, that he could not sue for a specific performance of the contract. *McNally v. Gradwell*, 16 Ir. Ch. Rep. 512, R.

The Court will not decree the specific performance of a contract for a lease to an insolvent tenant. *Ib.*

*Quere*—Whether a discharged insolvent can sue for the specific performance of a contract for a lease, after his assignee has elected to abandon it. *Ib.*

### BIGAMY,

See CRIMINAL LAW, 1.

### CANCELLATION OF INSTRUMENTS.

See EQUITY.

### CARRIER.

A sent a parcel from Belfast by the Belfast Junction Railway Company, to Drogheda, carriage paid, directed "Mr. Patrick McBride, Virginia, per rail to Drogheda, thence per mail car to Virginia." B, a common carrier, conveyed parcels from Kells station, on the Drogheda and Kells railway line, to Virginia. Notwithstanding cautions from A to both the Kells Railway Company and to B, not to convey parcels directed as above; the Kells Railway Company and B persisted in conveying to Virginia parcels addressed as above by A. Upon the refusal of A to pay for and refusal of B to deliver to him a parcel brought to

Virginia via Kells, and thence per B's car—*Held*—that it was not the duty of B, as a common carrier, to convey the parcels in question; that B had no lien upon the parcel for its carriage, as the directions upon the parcel, and the cautions given to him by A, constituted express notice by A that his parcels should not be carried by that route. B was in the position of an innkeeper, receiving the horses of a guest of which he knows the guest is not the owner. *Waugh v. Denham*, 16 Ir. C. L. R. 405, Exch.

The Dublin and Belfast Junction Railway Company were the agents of A for a specific purpose, viz:—to forward the parcel by the route directed. Therefore, there was no privity between A and B relative to the carriage of the parcel. *Ib.*

### CEMETERY.

To convert lands into a cemetery is waste. *Croghan v. Cullen*, 16 Ir. Ch. Rep. 339, R.

Lands were demised for lives and years, with a covenant to yield them up in repair at the expiration of the lease; the assignee of the lessee agreed with the Poor Law Guardians, with the assent of the Poor Law Commissioners, not under their seal, to let a portion of the lands for a cemetery. The land was used for that purpose for many years. The reversion was sold in the Landed Estates Court, and conveyed, subject to the lease, to the petitioner, who had notice, before the conveyance, of the existence of the cemetery. *Held*—that the agreement with the Guardians was not a "purchase or hiring" by the Poor Law Commissioners, within the 10 Vic. c. 31, s. 20. *Ib.*

*Semble*.—Such a "purchase or hiring" must be by deed, and from, or with the concurrence of, the person entitled to the fee. *Ib.*

The Court accordingly granted an injunction to restrain future burials, but refused to order the surface of the land to be restored to its condition at the date of the demise. *Ib.*

### CERTIORARI.

See MAGISTRATE'S LAW.

CHALLENGE. See JURY AND JURY PROCESS, 1.

### CHARITY.

1. Construction, validity, and invalidity of bequest for.

2. Sale of lands of.

See LEGACY DUTY.

1. Construction, validity and invalidity of bequest for.

If a charitable bequest be void by the express enactment of a statute, the bequest cannot be carried out *cy pres*. But if the bequest be void as being contrary to the policy of the law, the bequest will, in general, be carried out *cy pres*. *Sims v. Quinlan*, 16 Ir. Ch. Rep. 191, R.; s. c. 9 Ir. Jur. n. s. 404.

If a testator show an intention not of a general character, but to give to some particular institution in some particular place, and such intention cannot be carried out, the Court will not hold that the gift is applicable to charities generally; it will fail altogether. *Ib.*

By a will made in 1861, a testator bequeathed £500 to two Roman Catholic priests and the survivor of them, to be applied as they should deem best, for the education and maintenance of two priests of the order of St. Dominick in Ireland. *Held*, first, that the bequest was void as contrary to the policy of the Roman Catholic Relief Act (10 G. 4, c. 7).

Secondly, that the bequest was for a general charitable purpose, and should be carried out *cy pres* under the sign manual. *Ib.*

The testator bequeathed a legacy to a Roman Catholic priest upon a secret trust, to apply it towards the redemption of the rent of a Roman Catholic Church, held by certain Dominican monks as trustees, subject to a rent of £60, and which was very largely frequented, and was one of the ordinary and principal places of Roman Catholic worship in the city of Cork. *Held*, that the bequest was void, as contrary to the policy of the 10 G. 4, c. 7, and that, being confined to a particular charitable purpose, it could not be carried out *cy pres*. *Ib.*

### 2. Sale of lands of.

Trustees for charity permitted to sell land on lease, the subject of the trust, though subject to a covenant to expend £3,000 in building; but rights of the landlord saved, and title not forced on an unwilling purchaser on account of the covenant. *Re the Catholic University*, 11 Ir. Jur. n. s. 250, R.

### CHARTER.

Queen Elizabeth, by her charter, made in the 20th year of her reign, enchartered the Hospital of the Holy Trinity at N. R., and incorporated the Master, Brethren, and Poor thereof, and their successors, thenceforth for ever, as a body incorporate, and her said Majesty did thereby ordain that the Masters of said hospital, and the heirs of one T. G., with the advice and consent of the sovereign, and four of the members of the council of the said town of N. R. for the time being, or the major part of them, might have power and authority of electing a secular priest for the said Master, Brethren, and Poor, who should be received as brethren of said hospital. And said charter granted that "the heirs of T. G., with the consent and advisement of the sovereign, and four elder councillors of the town of N. R., or the greatest part of them, for ever may have power and authority... of electing and making a master of the hospital from time to time for ever." The heirs of T. G. could not now be found. *Held*, that the Lord Chancellor, in his capacity of visitor as Chancellor, had full power and authority to appoint such persons as he might be advised thereto, to represent said heirs of T. G. *The Attorney-General v. Tottenham* 11 Ir. Jur., n. s. 107, Ch.

*Held* also, that the town commissioners constituted under the 3 & 4 Vict. c. 108 (the Act for the Regulation of Municipal Corporations in Ireland), represent the said sovereign and old corporation. *Ib.*

Said charter, though it provided for the appointment of said secular priest, was silent as to what the religion of the Master, Brethren, or Poor of said hospital should be. *Held*, that although the religion of the founder must be presumed to be that of the

Established Church, yet that as there was no preference given in said charter to any particular faith, members of all faiths were equally admissible thereto, notwithstanding usage to the contrary. *Ib.*

*Held* also, that as said charter only provided for the election and reception of a secular priest of the Established Church into said hospital, the exception to Master Murphy's scheme, which provided for the election and reception of a Roman Catholic priest thereto, must be allowed. *Ib.*

### CHURCHYARD.

See CUSTOM.

### CIVIL BILL PROCESS.

It is not necessary that a civil bill process in ejectment should be signed by the plaintiff's attorney with his own hand. Where, therefore, the process was filled up by the clerk of the attorney by the attorney's directions, and the attorney's name was signed to it by the same clerk also by his master's directions, this was held to be a sufficient compliance with sec. 60 of 14 & 15 Vict. c. 57, though the attorney did not see the process after it had been filled up, and before his name was signed thereto. *Lord Lurgan v. Douglas*, 11 Ir. Jur. n. s. 176, Q. B.

### CLERGYMAN.

*Privilege from arrest.* See ARREST, 1.

### CLERK OF THE PEACE.

*Action against, for issuing civil bill decree.*

A. brought an action against the clerk of the peace, for negligently and injuriously issuing a decree in a civil bill proceeding. *Held*—on demurrer to summons and plaint, that the clerk of the peace could not (on the state of facts disclosed in the plaint) be held liable, and that the plaint be set aside, with leave to amend, on payment of costs. *Ledlie v. Power*, 11 Ir. Jur. n. s. 54, Exch.

### COMMITTAL.

*Form of orders and warrants.*

A prisoner brought up by habeas corpus will not be discharged from custody for contempt, because the order under which he has been committed is in the words "that he be committed until further order," although the general rule is that the time should be specified, nor will the fact that there has been no warrant or examination of the prisoner entitle him to his discharge. *In re Mowlds*, 11 Ir. Jur. n. s. 157, Exch.

A warrant for committal to safe custody, omitting defendant's name in the body of the warrant, though in all other respects correct, is void. *Hodgens v. Poe*, 11 Ir. Jur. n. s. Exch.

### CONFESSIONS.

See CRIMINAL LAW, 5, a.

### CONTEMPT.

See COMMITTAL.

### CONTRACT.

1. *Evidence of acceptance.*

2. *Defences to actions and suits on contracts.*

(a.) *Conditions precedent.*

(b.) *Evidence of parol variation of contract.*

3. *Statute of Frauds.*

(a.) *Agreements not to be performed within a year.*

(b.) *Agreements relating to land.*

4. *Yearly hiring.*

5. *Privity of contract.*

6. *Specific performance of.* See BANKRUPTCY AND INSOLVENCY.

1. *Evidence of acceptance.*

A. having examined a horse belonging to B. said he would buy him, and desired B. to bring him to a railway station in order that he might be conveyed with A. in the train to Dublin. On the arrival of B. with the horse at the station the traffic manager declined to take the horse for want of room, and thereupon A. said he would send for the horse in a couple of days, and B. kept the horse meanwhile. A. not having sent for the horse, B. brought an action for the price, £38, and obtained a verdict for that amount. *Held*, on a motion to enter a non-suit or a verdict for defendant, or that there should be a new trial on the ground of misdirection of the judge on the above state of facts, that there was no evidence of acceptance to go to the jury, and that therefore the verdict should be entered for defendant. *Whitney v. Glass* 11 Ir. Jur. n. s. 79, Exch.

2. *Defences to actions and suits on contracts.*

(a.) *Conditions precedent.*

To an action brought for the non-acceptance of a cargo of sugar, the defendant pleaded that his undertaking and promise were made and given subject to a proviso (which had not been complied with) that the sugars should be shipped in a first-class vessel. *Held*, upon demurrer, that this was a condition precedent, the non-performance of which entitled the defendant to repudiate the contract. *Schmidt v. Boyd*, 11 Ir. Jur. n. s. 232, C. P.

(b.) *Evidence of parol variation of contract.*

Although a respondent may rely on a parol variation of a contract, by way of defence, it must be clearly established. The Court will not refuse relief on that ground if there be a conflict of testimony. *Fallon v. Robbins*, 16 Ir. Ch. Rep. 422, R.

3. *Statute of Frauds.*

(a.) *Agreements not to be performed within a year.*

An agreement whereby in consideration of A. not taking certain proceedings against B.'s son, B. agreed to maintain and clothe A., and supply him with the grass of two sheep during his (A.'s) life. *Held* not to come within s. of the Irish Statute of Frauds (st. 7 Wm. 3, c. 12), and therefore not to require a writing. *Murphy v. O'Sullivan*, 11 Ir. Jur. n. s. 111, Exch. Ch.

An agreement with the mother of an illegitimate child, in consideration that she would maintain it, to allow her £20 a year until the child be able to maintain itself, is an agreement within the Statute of Frauds, and requires to be in writing. *Farrington v. Donohoe*, 11 Ir. Jur. n. s. 373, C. P.

*Murphy v. O'Sullivan* (11 Ir. Jur. N. S. 111,) distinguished. *Ib.*

(b.) *Agreements relating to land.*

Where a letter was written in the name of a firm of land-agents by the sub-agent to a tenant stating that a revision of the rents had been made, and that they were desired to make a general change in the rents by raising them 20 per cent., and that leases at the increased rents would be granted, and that a notice to the effect would be sent him; and a few days afterwards the sub-agent sent a bailiff to the tenant with a written agreement to pay the increased rent and to take out a lease, and the tenant signed the agreement, but it was not signed by or on behalf of the landlord. *Held*, that there was no agreement binding on the landlord at law within the Statute of Frauds. *Archbold v. Earl of Howth*, 11 Ir. Jur. N. S. 88, C. P.

Where one count in the plaint sought to recover damages for breach of a contract which turned out to be void under the Statute of Frauds, and another count sought to recover damages for the loss of plaintiff's equitable remedy caused by defendant's wilful and fraudulent concealment of a contract which was by express reference the contract declared on in the former count; and but one traverse was pleaded to both counts: as the former count has failed so must the latter. *Ib.*

Where the damages are assessed in the gross upon two counts, and one of them fails (there being no evidence to support it), the other must fail also. *Ib.*

Where under the above circumstances the tenant remained in possession, and several times paid rent at the increased rate *the Court were of opinion* that this was no part performance sufficient to entitle plaintiff to an equitable remedy, his conduct not being incontrovertibly referable to that object. *Ib.*

Where under the above circumstances the sub-agent laid by the agreement in the office and frequently received rent at the increased rate from the tenant without saying anything about the agreement—*Held*, that this was no wilful or fraudulent concealment to ground an action for deceit. *Ib.*

Evidence of the above facts, and that plaintiff did not read the agreement he signed, nor was it read to him although he was informed of its contents, and that he forgot the particulars (although he admitted never having forgotten that he had signed a paper and been told at the time that it was an agreement for a lease) was held no evidence that plaintiff was ignorant of the existence in fact of the contract to defendant's knowledge. *Ib.*

*Et per* Monahan, C.J. (Christian and O'Hagan, JJ, *dubitantibus*), that a principal, innocent at the time, is not liable in damages for the fraud of his agent though he afterwards obtains the benefit of it; the judgment in *Udell v. Atherton* (7 H. & N. 172) being conclusive upon a Court of concurrent jurisdiction. *Ib.*

4. *Yearly hiring.*

An indefinite hiring is a yearly hiring, but this general rule may be varied by a usage existing in the trade with respect to which the parties are contracting. *Dowling v. Adams*, 11 Ir. Jur. N. S. Exch.

5. *Privity of contract.*

The first count of the summons and plaint stated that under an assignment in bankruptcy, the plaintiffs were the assignees of the estate and effects of E. M., J. M., and P. M., railway contractors; that the defendant was the engineer of the F. V. railway company; that before the arrangement in bankruptcy, and whilst the defendant was acting as such engineer, by an indenture between E. M., J. M., and P. M., and the company, it was agreed that E. M., J. M., and P. M. should make the said railway; that during the progress of the works, not later than fourteen days after the termination of each calendar month, when the engineer for the time being should have certified that any part of the works had been executed to his satisfaction, the company should pay nine-tenths of the value of such works, such value being also certified by the engineer; that E. M., &c., and the plaintiffs as their assignees had fulfilled all the terms of the contract; that the defendant having been appointed engineer, accepted the appointment and did act as engineer, but that he had not given certificates of the amount or value of the works, and had wrongfully, improperly, and without any just cause, refused and neglected to estimate the value of said works, and to certify, &c., by means of which plaintiffs had been unable to obtain payment, &c. The second count complained that the defendant had, with intent to injure the plaintiffs, wrongfully and fraudulently refused to certify, &c. The third count complained that the defendant had wrongfully and injuriously, and without just cause, and in collusion with the railway company, refused, &c. *Held*, upon general demurrer, that the action against the defendant was not maintainable. *Murphy v. Bower*, 11 Ir. Jur. N. S. 392, C. P.

CONVICTION. *See* MAGISTRATES' LAW.

COSTS.

I. EQUITY.

1. *Petition for taxation.*
2. *Costs of trustee under Trustee Relief Act.*
3. *Priority of.*
4. *In Landed Estates Court.* *See* LANDED ESTATES COURT.
5. *In Court of Probate.* *See* PROBATE.

1. *Petition for taxation.*

A petition for taxation (presented more than twelve months after the bill of costs was furnished) by one of two trustees behind the back of his co-trustee—Refused, although the solicitor had commenced an action at law against the petitioner alone. *In re McKay*, 11 Ir. Jur. N. S. 297, R.

2. *Costs of trustee under Trustee Relief Act.*

Costs of appearing at the argument by counsel are not allowed to a trustee who has brought in the fund under the Trustee Relief Act, where all the parties beneficially interested are free from disability, and the case has been fully argued on their parts, although the English practice is contra, but costs of lodgment and of the motion for costs are given. *Lockhart's trust*, 11 Ir. Jur. N. S. 245, R.

3. *Priority of.*

A head landlord cannot obtain costs incurred in ejectment out of a fund in Court standing to the credit of a cause in which his immediate lessee is respondent, his claims being opposed by an unpaid incumbrancer. *Haines v. Purcell*, 11 Ir. Jur. n. s. 250, R.

## II. LAW.

1. *Full costs and half costs.*

2. *Costs where jury discharged without consent from finding on certain issues.*

3. *Costs of arbitrations and references.*4. *Costs of Habeas Corpus.*5. *Furnishing of bill before action.*1. *Full costs and half costs.*

In an action for assault and battery, with a second count for disturbance of a right of way, defendant paid £5 into Court (which was accepted by plaintiff) on the second count, and traversed the first, upon which count plaintiff obtained a verdict with £1 damages, the judge not certifying. The Master gave plaintiff his full costs. *Held*, on motion to send back the case to the Master to review his taxation, that the Master was wrong, and that the taxation must be reviewed. *Walsh v. Walsh*, 11 Ir. Jur. n. s., 378, Exch.

Action for negligence. The summons and plaint alleged retainer of the defendant by plaintiff as her attorney: a duty of the defendant, and the violation thereof. Plaintiff recovered a verdict for £10 and costs. The Taxing Master refused to allow more than half costs, holding the action one "connected with contract." On appeal against this ruling—*Held*, affirming the ruling, that the action was an action of contract. *Quane v. Frazer*, 16 Ir. C. L. R. App. xiii. Q. B.; s. c. 9 Ir. Jur. n. s., 268.

2. *Costs where jury discharged without consent from finding on certain issues.*

Where the judge, without the consent of the plaintiff, discharged the jury from finding upon certain of the issues as immaterial, *Held*, that the plaintiff was entitled to the costs properly and necessarily incurred by him in respect to them. *Smyth v. Galbraith*, 11 Ir. Jur. n. s., 359, C. P.

3. *Costs of arbitrations and references.*

A. brought an action for trespass *qu. cl. fr.* against B. who traversed plaintiff's possession of the close. The case was submitted to arbitration, and it was agreed that "it shall not be necessary for the arbitrators to find specifically on each of the several issues, but that they shall be at liberty to make an award generally either for plaintiff or defendant." It was agreed also that the costs should follow the event of the award. The arbitrators found that the close was plaintiff's, and therefore found for him, but made no mention of damages. Defendant refused to pay the costs, £45 14s. 5d., alleging that the award was not final as it did not give damages, whereupon plaintiff brought an action against defendant for the costs. The jury, by the direction of his Lordship, found for plaintiff. *Held*, (Fitzgerald, B., *dissentiente*) on motion to set aside the verdict, or for a new trial, or to reduce it to £35 13s. 1d., the sum found to be due on

taxation, that the award was good, but that the verdict should be reduced as above. *M'Lees v. M'Curdy*, 11 Ir. Jur. n. s., 290, Exch.

A case was referred to a Master for arbitration. He made his award in favour of A. but gave him no costs, though thinking him entitled to costs, because he did not know if he had jurisdiction to give costs. Upon motion to send back the case to the Master to certify in respect of the costs, *Held* that the matter should be sent back to him for that purpose. *Fitzpatrick v. Moylan*, 11 Ir. Jur. n. s. 292, Exch.

4. *Costs of Habeas Corpus.*

The Court will not give costs in a *Habeas Corpus* motion. *In re Mowlds*, 11 Ir. Jur. n. s. 157, Exch.

5. *Furnishing of bill before action.*

The bill of costs to be served on a defendant by an attorney under 12 & 13 Vic. c. 53, s. 2, must show on the face of it an intention to charge the defendant, or else his intention must appear on a writing served on defendant contemporaneously. *Kernan v. Brereton*, 11 Ir. Jur. n. s. 417, Exch.

## COVENANT TO REPAIR.

*Obligation to rebuild under.*

To an action for breach of a covenant to repair and keep in repair certain premises, the defendant pleaded performance of the covenant. The jury on the trial found, first, that the premises were not in repair at the commencement of the action, and, secondly, that having regard to the state of the premises when demised to the defendant, they could not have been repaired and kept in repair without having been rebuilt. *Held*, that the covenant could not be held to impose an obligation to rebuild upon the defendant, and therefore, that on these finding he was entitled to have a verdict entered for him. *Chaloner v. Broughton*, 11 Ir. Jur. n. s. 84, Q. B.

## CRIMINAL INFORMATION.

Where certain parties were charged with treason felony, and pending the preliminary investigation at the police office, certain publications appeared in a newspaper commenting upon the conduct of the prisoners, and calculated to prejudice the public mind against them—*Held (per totam Curiam)*, that a conditional order for a criminal information against the proprietor of the newspaper should be granted on account of those articles. *The Queen v. Gray*, 11 Ir. Jur. n. s. 1, Q. B.

The same newspaper published a report of the proceedings against the prisoners at the preliminary investigation at the police-office, which investigation terminated in the committal of the prisoners. Part of these proceedings consisted of statements of counsel which were calculated to prejudice the public mind against the prisoners. There was no suggestion that this publication was more than a fair and *bona fide* report of what actually took place. *Held* (Hayes, J. *dissentiente*), that such publication was privileged, and did not form a ground for granting a conditional order for a criminal information. *Id.*

## CRIMINAL LAW.

1. *Bigamy.*



2. *Larceny.*
3. *Uttering forged orders for payment of money.*
4. *Offences committed on boundaries of counties.*
5. *Evidence.*
  - (a.) *Admissions and confessions.*
  - (b.) *Admissibility of depositions.*
  - (c.) *Dublin Gazette as evidence of proclamation.*
6. *Bail.*

### 1. *Bigamy.*

F. a Protestant, was legally married. While his wife was still living he was married by a Roman Catholic clergyman to a Roman Catholic woman. At the time of the second marriage he represented himself to the woman and the officiating clergyman as a Roman Catholic. He was indicted for bigamy. The above facts were proved, and also that F. was a professing Protestant within twelve months prior to the time of the second marriage. The jury convicted him. *Held (dissentientibus, Monahan, C.J., Pigot, C.B., Keogh, J., and O'Hagan, J.)*—that the conviction was wrong, and should be reversed. *The Queen v. Fanning*, 11 Ir. Jur. n. s. 251, Cr. App.

### 2. *Larceny.*

K., the treasurer of a county, drew a cheque in favour of H. S., a road contractor. Another H. S. (the prisoner) also a road contractor, coming to the office to be paid for work done by him, the treasurer said he had a cheque for him, and produced it; and, believing him to be the H. S. who was entitled to it, gave it to him, and he cashed it. H. S. (the prisoner) was indicted for larceny of the cheque. The jury were of opinion that he received the cheque knowing he was not the person entitled to it, and fraudulently intending to appropriate the proceeds to his own use, and they found him guilty of larceny. *Held*, that the offence amounted to larceny. *The Queen v. Stines*, 11 Ir. Jur. n. s. 267, Cr. App.

*Held* also, that the property in the cheque was rightly laid in K. *Ib.*

The prisoner was indicted for the larceny of £2 4s. the property of H. N. Upon the trial H. N. deposed that on the 30th January, 1866, he bought a load of hay at Smithfield through the clerk to a factor there; that the prisoner brought the hay to his place the same day, and delivered it; that he did not demand any money from him, but handed him the weigh-note; that H. N. put his name on it, and being ignorant of the practice of the market, handed the prisoner £2 2s. 8d., and returned the weigh-note to him; that the prisoner shortly afterwards returned, and said that the amount was 1s. 4d. short, and asked for the 1s. 4d., which H. N. gave to him. J. G., to whom the hay had belonged before it was sold, deposed that he gave the prisoner the load to deliver, but did not authorise him to get any money, and that the prisoner paid him no money. The prisoner was convicted. The question of the sufficiency of the evidence to sustain the indictment having been reserved for the Court of Criminal Appeal—*Held*, that the prisoner was not guilty of larceny, either at common law or under 24 & 25 Vict. c. 26, s. 3. (*Lefroy, C.J., dissentiente*). *The Queen v. Wheeler*, 11 Ir. Jur. n. s. 278, Cr. App.

### 3. *Uttering forged orders for payment of money.*

V. was indicted for uttering certain forged orders for the payment of money, and convicted. He had fraudulently obtained certain forms of post-office orders from the office at N., and also some with the N. stamp affixed. These orders being filled up and signed G. J., "pro-postmaster," there being no one of the name of G. J. at N., were uttered by V. in payment for goods at D. No letters of advice were forwarded to D. *Held (dubitante Pigot, C.B.)* that V. was rightly convicted. *The Queen v. Vanderstein*, 16 Ir. C. L. R. 474, Cr. App.; s.c. 10 Ir. Jur. n.s. 314.

H. and S. were joined in the same indictment, and convicted. They had gone to the shop where V. uttered the orders, remaining outside in a cab, so situated that they could not see or be seen by the people in the shop. They had previously accompanied V. to another shop where he failed to get change for the orders, and they assisted V. in taking away the goods obtained at the second shop. *Held*, that though they were not in the cab for the purpose of taking part in aiding or assisting in the actual act of uttering, they were rightly convicted. *Ib.*

### 4. *Offences committed on boundaries of counties.*

Venue. Indictment contained the marginal venue "King's Co." No venue was stated in the body of the indictment. By 14 & 15 Vict. c. 100, s. 23, "the jurisdiction named in the margin was to be taken to be the venue for all the facts stated in the body of the indictment." On the trial, it appeared that the offence was committed in the County of T., but within 500 yards of K.'s Co. The prisoner was convicted. *Held (dissentiente Hayes, J.)* that the conviction was good. *Regina v. Laurence King*, 16 Ir. C. L. R. 50, Cr. App.; s. c. 10 Ir. Jur. n. s. 308.

### 5. *Evidence.*

#### (a.) *Admissions and confessions.*

A police-constable having come to the prisoner's premises, and the prisoner having made to him a statement with reference to the Fenian conspiracy, in which he implicated himself, the policeman asked him if he was willing to state to his superintendent what he had stated to him. The prisoner accompanied the policeman, and made a statement to the superintendent. The superintendent, who knew from the prisoner's statement that he had been implicated in the conspiracy, asked him if he was willing to make that statement to the magistrate. The prisoner agreed to do this, and went before the magistrate, by whom he was sworn, and by whom his information was taken in reply to questions put by the magistrate, the answers to which questions the prisoner, in some instances, followed up with statements of his own. The magistrate did not give him any caution. The magistrate subsequently deposed that on that occasion he did not look on the prisoner as an informer, but treated him as a Crown witness in the ordinary sense, but that a few days afterwards, when the information was re-sworn, he did consider him in the nature of an approver. The prisoner, moreover, on the second occasion, in answer to questions put to him by the counsel for other Fenian prisoners, deposed as follows—"Two of the detectives dragged me here. I swear!

expect nothing—I came to save myself.” The prisoner having subsequently refused to give evidence against the persons implicated in his informations, was himself indicted, and on his trial the two informations, together with the statement of the prisoner to the policeman, were put in evidence against him. The jury convicted the prisoner. The question of the admissibility of the two informations having been reserved for the Court of Criminal Appeal—*Held*, that they were both inadmissible as being given under the influence of hope held out by a person in authority (Monahan, C. J., Keogh, J., and Fitzgerald, B., *dissentientibus*). *The Queen v. Gillis*, 11 Ir. Jur. x. s. 270, Cr. App.

And (*per* Fitzgerald B.) that the first information was admissible, but the second was inadmissible. *Ib.*

#### (b.) Admissibility of depositions.

A., B., C. and D. were brought before a J.P. in custody, and E. being sworn by the Petty Sessions Clerk, was examined by him in the presence of the prisoners, and the presence of the justice, as to certain alleged acts of the said A., B., C., and D. The Petty Sessions Clerk took down the statement of E. in writing; read it over to E. in the presence and hearing of the prisoners, of whom A. and B. cross-examined E. To the written statement so read, E. affixed his mark. E. having died before the trial, this statement was tendered in evidence against the prisoners, under the 14 & 15 Vict. c. 93, s. 14. It began—“The information of E. of, &c. Informant being duly sworn on his oath deposed as follows.” It was signed by the J.P. before whom it was taken. Prisoner’s counsel objected to the admission of the document in evidence; and the point being reserved on the following objections—First, that the deposition ought to be taken by the J.P. himself; secondly, that it had no caption; thirdly, that there was nothing to shew on its face that the prisoner had been made aware of the charge on which he was in custody,—parol evidence was given that the document had been read over to the prisoners previous to the cross-examination. *Held* (*dissentientibus* O’Hagan, J., Hughes, B., Hayes and Christian, JJ.) that the document was not admissible, as it was not preceded by a statement of the charge to which it had reference. *The Queen v. Galvin*, 16 Ir. C. L. R. 452, Cr. App.; s. c. 10 Ir. Jur. x. s. 325.

*Held* (*per* Christian and Hayes, JJ., Hughes, B., and O’Hagan, J.), that all that the statute requires is, that the charge should be made to the magistrate before he proceeds to take the deposition. *Ib.*

*Semble*, that the justice need not take down the deposition himself, but it is sufficient if he is present and attending to the work of the clerk. *Ib.*

#### (c.) Dublin Gazette as evidence of proclamation.

Upon the trial of an indictment for unlawfully carrying arms within a proclaimed district, the Crown, as evidence of the proclamation, and that the district was proclaimed, gave in a printed paper (which contained what purported to be a proclamation), purporting to be “The Dublin Gazette,” and purporting to be “printed and published at the Dublin Gazette office by A. T.” Under the title of the paper were

the words “Published by authority,” but the paper did not in any other way purport to be printed and published by the Queen’s authority, or to be printed by the Queen’s printer. The prisoner having been convicted, it was held that this paper was not sufficient evidence, under st. 11 Vict. c. 2, s. 21, and 28 & 29 Vict. c. 118, s. 3, of the proclamation, and of the district having been proclaimed, and the conviction was quashed. *The Queen v. Wallace*, 11 Ir. Jur. x. s. 68, Cr. Ap.

*Quere*—Might parol evidence have been given to shew that the paper was printed by the Queen’s printer, or printed and published by the Queen’s authority? *Ib.*

#### 6. Bail.

Application to admit to bail a prisoner charged with harbouring a party connected with the Fenian conspiracy, refused, though it was sworn that the prisoner’s health was suffering from confinement, that his affairs were going to ruin, and that he had no sympathy with the conspiracy, and though he offered bail to the amount of £1,000 (O’Brien, J. dissenting). *The Queen v. Nolan*, 11 Ir. Jur. x. s. 372, Q. B.

On a bail motion the Court will look at an information that has been taken in the prisoner’s absence. *Regina v. Cleury*, 16 Ir. C. L. R. App. ii. Q. B.

#### CROWN.

Action against trustees for. *See* ACTION, 1.

Power of, to annex condition against alienation to grant in fee. *See* ALIENATION, 1.

#### CUSTOM.

##### Validity of.

It is a good custom in trade, and one which may be established by parol evidence, that where there is a sale by sample of a particular article, such being generally sold by sample, the parties may introduce into the contract a condition to that effect. *Syers v. Jonas* (2 Ex. 111) followed. *O’Neill v. Bell*, 11 Ir. Jur. x. s. 357.

A custom to cut a sod in a remote part of a churchyard, for the purpose of covering a newly opened grave, is illegal and bad, and a claim under the custom is not such a reasonable claim of title as will oust the jurisdiction of magistrates at Petty Sessions proceeding summarily for trespass on the complaint of the rector of the parish in whom the freehold of the churchyard is vested. *The Queen v. The Justices of Westmeath*, 11 Ir. Jur. x. s. 405, Q. B.

#### DAMAGES.

1. Damages in action by apprentice.
2. Damages in action under Lord Campbell’s Act, 9 & 10 Vict. c. 93.
3. Damages in action for trespass on lands not held excessive.
4. Damages in equity under 25 & 26 Vict. c. 42.

*See* INJUNCTION.

*See* CONTRACT, 3, b.

##### 1. Damages in action by apprentice.

In an action brought by an apprentice against his master for breach of the covenant to instruct and

provide with board and lodging, the jury cannot take into consideration the damage to plaintiff's character resulting from the mode and circumstances of the refusal. *Parker v. Cathcart*, 11 Ir. Jur. n. s. 49, C.P.

But the breach is a continuing one, and successive actions may be brought upon it. But in each action the jury can only take into consideration the damages that have been sustained previously to the commencement of the action. *Ib.*

### 2. Damages in action under Lord Campbell's Act 9 & 10 Vic. c. 93.

In an action under Lord Campbell's Act (9 & 10 Vic. c. 93) by a widow, for damages upon the death of her son, aged fourteen, who had never earned any wages, but whose capabilities were valued at sixpence per day, the probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, is evidence to go to the jury upon the question of damages. The probability is increased by the past filial conduct of the deceased. *Condon v. The Great Southern and Western Railway Company*, 16 Ir. C. L. R. 415, Exch.

There is no analogy between the nature and amount of the services whose loss will sustain an action for reduction, and one under Lord Campbell's Act. *Ib.*

### 3. Damages in action for trespass on lands not held excessive.

In an action for trespass committed by sheep of the defendant upon mountain land belonging to the plaintiff, the judge directed the jury that they should only give damages for the actual amount of injury done. The jury gave £10. The Court, although the sum was greater than the injury done could possibly have amounted to, refused to set aside the verdict on the ground of the damages being excessive. *Chesney v. O'Neill*, 11 Ir. Jur. n. s. 124, Q. B.

## DEED.

1. Construction.
2. Interpolations in, presumption when made.
3. Voluntary deed.

### 1. Construction.

In 1848, defendants, on behalf of the Crown, demised certain premises in D. to plaintiffs for twenty-one years. The lease recited that the plaintiffs were in the actual possession of the said premises, and provided that the plaintiffs were "not to be liable for, or to pay any rates or taxes whatever, charged or chargeable upon the said demised premises, or any part thereof, save and except their legal proportion of the poor-rate." The D. Corporation Waterworks Act, 1861, authorised the corporation of D. to levy in place of certain rates theretofore levied, a rate to be called the "Domestic Water Rate" upon and from the occupiers of all houses within the borough of D. This rate defendants refused to pay. *Held*, that as between the lessor and lessee, the defendants were liable for the rate. *Scovell v. Gardner*, 16 Ir. C. R. 318, Q. B.; s.c. 8 Ir. Jur. n. s. 361.

*Held* (per Lefroy, C. J., and O'Brien, J., that "chargeable" has a future meaning. *Ib.*

*Held* (per O'Brien and Fitzgerald, JJ.) that the

Domestic Water Rate, though not not chargeable on the premises, is chargeable on the occupiers in respect of his occupation, and so within the proviso. *Ib.*

*Held* also (per O'Brien, J., dissentiente Fitzgerald, J.) that the Domestic Water Rate was a continuance of certain rates existing at the time of the lease. *Ib.*

A bill of sale recited an agreement to sell certain goods; in the operative part it omitted to name the articles, but they were set out in a schedule. There was a delivery of the goods. Upon an interpleader issue between the claimant under the deed, and an execution creditor of the grantor, the judge withdrew the question as to the property in the goods from the jury, and directed a verdict for the creditor. *Held*, that this was a misdirection, and that there should be a new trial. *Lennon v. Binks*, 11 Ir. Jur. n. s. 372, Q. B.

Lands held under a lease for lives renewable for ever were conveyed by deed to a trustee. By a subsequent deed the trustee declared that the previous assignment had been accepted by him "to the uses and for the trusts following—upon trust, to permit A. and B., his wife, to hold one-third of the lands during their joint lives, and the survivor, for the life of such survivor; and after the death of the survivor to permit the said one-third to be held by such children or child of A. & B. as should be living at the death of the survivor, in such shares and proportions as A. in his lifetime, or B., if she survived A., should appoint (if only one child, such child to take the entire); and as to one other third of the interest in the said lands, upon trust for C., his heirs and assigns for ever, and as to the remaining third of the interest of the said lands, upon trust for D., his heirs and assigns for ever; and upon trust for D., his heirs and assigns for ever; and to no other use, intent, or purpose whatsoever." *Held* (by both the Lord Chancellor and the Lord Justice of Appeal), that as it was manifestly intended to dispose of the entire interest in the lands by the deed, the absence of words of inheritance in the trust to the children of A. and B. did not prevent A. from appointing to one of the children the quasi fee of the lands. *In re Bayley's estate*, 16 Ir. Ch. Rep. 215, Ch. App.; s.c. 9 Ir. Jur. n. s. 398.

### 2. Interpolations in, presumption when made.

An absolute order, dated 21st November, 1863, being made in the Landed Estates Court for the sale of certain lands in the County Longford, M. R. and J. R. (lessees of a portion of said lands) claimed to hold under a lease of 1st of January, 1802, for lives "renewable every thirty-one years after demise of said lives at three grains of pepper-corn." A notice of motion having been served on said M. R. and J. R., that it was intended to impeach in said Landed Estates Court said leases, which motion was grounded, among others, on the affidavits of two experts, who gave it as their opinions that said above-mentioned clauses of "renewable every thirty-one years," &c. had been interpolated after the execution of said lease; and said motion having been brought on before Judge Hargreave, his Lordship, while declining to grant an issue to try the question, declared that the said lease did not at the time of the execution thereof, contain such clause, which now appears therein in a nonsensi-

cal and ungrammatical form, and that the presumption of law was therefore against the genuineness thereof. *Held*, reversing the order of Judge Hargrave, that the presumption of law was (unless the contrary were proved to the satisfaction of the jury) that the said clause existed in said lease at the time of the execution thereof, and that an issue should therefore have been granted to try the question. *Jones' estate*, 11 Ir. Jur. n. s. 366, Ch. App.

### 3. Voluntary deed.

A. and B., brothers, were entitled as tenants in common, A. to two-thirds, B. to one-third, of certain mill-premises, of the value of £7,000. B. was indebted to A. in many thousand pounds. By a deed dated the 2nd of April, 1853, B. assigned his share of the mill to A.; the consideration expressed being £50 in cash, and a release of a debt of £300. By another deed dated the 4th of May, 1853, A. in consideration of love and affection to B. and his wife and children, assigned the whole of the mill premises to a trustee, in trust, to pay an annuity of £150 a year for the benefit of B. and his wife and children. The trustee, who was the solicitor who prepared the deed, swore that the two deeds were one transaction, and that no part of the consideration of the deed of April (which was not executed until the 2nd of May) was the annuity granted by the deed of May. *Semble*, the evidence was not sufficient to prove a valuable consideration for the deed of May. *Graham v. O'Keefe*, 16 Ir. Ch. Rep. 1, R.

To support a deed, voluntary on the face of it, against creditors, the proof of a valuable consideration must be clear and free from suspicion. *Ib.*

At the date of the deed of the 4th of May, 1853, A. owed £2,584, and had property of the value of £3,000. There was no evidence to shew an intention to defraud subsequent creditors. A. became bankrupt in 1860. *Held*, that the deed, though voluntary, was not void against his creditors under the 13 Eliz. c. 5 (10 Car. 1, sess. 2, c. 3, Ir.) *Ib.*

P. M. a widower, being seised of certain lands in the County Dublin, and being about to marry a second wife, and being desirous of making not alone a provision for her and any children he might thereafter have by her, but also for the children of his former marriage, executed on the 15th November, 1855, immediately prior to his second marriage, two contemporaneous deeds, by the one providing for his future marriage, and by the other granting to a trustee for a term of years an annuity of £75 issuing out of said lands for the benefit of the said children of P. M.'s said first marriage. To this last mentioned deed his then intended second wife was no party whatever. After his said second marriage, viz., on 2nd November, 1865, P. M. made an equitable mortgage to G. and M. to secure a sum of £——. *Held*, affirming an order of the Landed Estates Court, that the deed creating said annuity was a voluntary deed within the meaning of 10 Car. I. chap. 3, s. 2 (Ir.), and that therefore said equitable mortgage to G. and M. for £——, though subsequent in date, should take priority over same. *Moore v. Guinness, Mahon, & Co.*, 11 Ir. Jur. n. s. 381, Ch. App.

## DEPOSITIONS (ADMISSIBILITY OF).

See CRIMINAL LAW, 5, b.

## DIVINE SERVICE.

### Disturbance of.

A. entered a church during the celebration of divine service, and though offered a seat by the churchwarden, went into another seat allocated to a parishioner, and refused to leave it, notwithstanding the remonstrances of the churchwarden; and defendant, who was a J.P. and present at the time, thereupon took him into custody, and kept him in custody until the clergyman and churchwarden should swear informations against him, which they did; and on plaintiff's not getting two sureties, as provided by st. 6 G. 1, c. 5, defendant committed him to gaol. Plaintiff brought an action then against defendant for assault and false imprisonment, and defendant pleaded the above facts. *Held*, on demurrer to the defences, that they must be set aside as not justifying the assault or even the false imprisonment, as defendant had not brought the offence charged against plaintiff within the provisions of the Act. *King v. Poe*, 11 Ir. Jur. n. s. 133, Exch.

DOG. See MAGISTRATES' LAW.

## DOMICILE.

*Quere*—Whether proceedings for service as heir in Scotland, in which the ancestor's domicile is stated, be admissible as evidence of that domicile. *Lockhart's Trust*, 11 Ir. Jur. n. s. 245, R.

Although the change of domicile depends on intention, this intention must be capable of being inferred from the acts of the person at the time of changing her domicile; and an affidavit stating such an intention filed during the trial is not sufficient. *Ib.*

Where a lady whose husband died a domiciled Scotchman, and who retained property in Scotland, but whose family residence passed to another by her husband's death, left Scotland soon after and lived at various places in England with her infant daughter, occasionally visiting relatives in Scotland, and the daughter attained her age and died a few months afterwards abroad. *Held*, that the domicile of the daughter was Scotch. *Ib.*

## EASEMENT.

See INJUNCTION.

## EJECTMENT.

1. *Defence of judgment recovered.*
2. *Security for costs in.*
3. *Civil Bill Process in.* See CIVIL BILL PROCESS.

1. *Defence of judgment recovered.*

A. brought an ejectment for non-payment of rent. Comprised in the bill of particulars was one half year's rent due on the 1st of November, 1863. The defendant pleaded that after said half year's rent became due, plaintiff had brought an action for money due for use and occupation of the said premises, and had indorsed the said item in the writ in that case, and had recovered judgment in said action for the sum of, &c., which included the said first item in the

plaintiff's second writ, that execution had been had thereon, and the sheriff had paid into Court £125 3s. 3d. which the said defendant was entitled to have applied in part satisfaction of the aforesaid judgment. The plaintiff demurred. *Held*, that the defence was bad. *Wakefield v. Smythe*, 16 Ir. C. L. Rep. 173, Q. B., s.c., 9 Ir. Jur. n.s. 391.

*Held* (by Fitzgerald, J.)—That the remedies of a landlord by personal action for non-payment of rent and by ejectment for the same cause, are distinct, and not co-extensive. *Ib.*

*Held* also (by Fitzgerald, J.)—That the principle *transit in rem judicatam*, only affects a merger of the remedy, and does not destroy the right of action. *Ib.*

*Quære*—(by Fitzgerald, J.)—Whether under *Armstrong v. Turquand*, 9 Ir. C. L. Rep. 32, the Court can on demurrer look at a judgment and bill of particulars not set out on the record. *Ib.*

## 2. Security for costs in.

Order made for security for costs in an ejectment on the title, plaintiff being a discharged insolvent, and no new vesting order having been made. *Blake v. Lowry*, 11 Ir. Jur. n.s. 843, Q. B.

See PLEADING, PRACTICE (LAW.)

## ENTRY.

See POWER OF ENTRY.

## EQUITY.

1. *Setting aside and cancelling instruments.*
2. *Reforming instruments.*
3. *Suit in equity.*

### 1. *Setting aside and cancelling instruments.*

A reversionary lease, voluntarily granted, partly for past services, which had also been otherwise remunerated, and partly for an inadequate rent and a small fine, set aside, no confidential relation between the parties being proved. *Wyse v. Lambert*, 16 Ir. Ch. Rep. 378, R.

The Court refused to decree a bond, for which no money passed at the time of its execution, to be cancelled, on the evidence of the petitioner alone, against the affidavit in answer of the respondent that the bond was the free and voluntary act of the petitioner, and given for past services and advances of money. *Ib.*

### 2. *Reforming instruments.*

An instrument which agrees with the intention of one of the parties, although under a mistake as to the other, cannot be reformed. *Fallon v. Robins*, 16 Ir. Ch. Rep. 422, R.

### 3. *Suit in Equity.*

An agreement recited that A. was desirous of purchasing, and B. of selling to A., the half of a schooner, for £200; and that B. had agreed to lend A. £370, on having the repayment thereof and the interest secured by a mortgage of a rent-charge to which A. was entitled, and of the dividends of a sum of stock, and by a policy of insurance, and two houses; and witnessed that B. agreed to dispose of the schooner to A., and to execute the necessary deed for that purpose, the £200 purchase money of

the schooner to be part of the £370 for which the mortgage was to be given by A.; and that A. should execute a mortgage of the schooner to B., as a further security for the £370, which A. was to pay back by annual instalments of £50 until the principal and interest should be paid; and if A. neglected to pay off all or any of the instalments, with interest, B. should have power and authority to call in the £370, or so much thereof as should be then due. The schooner proved unseaworthy, and was by mutual consent returned to B. A. afterwards assigned the other property comprised in the agreement to C., who had notice of the agreement. *Held*, first, that a suit could be maintained against C. for an account of this sum due on foot of the £170 actually advanced, and for a sale, although the agreement *quoad* the schooner had been rescinded. *Murphy v. Moorhead*, 16 Ir. C. L. R. 464, R.

Secondly, that A. was not a necessary party, but might be bound by a notice under the 32nd G. O. of 1851. *Ibid.*

Thirdly, that the return of the schooner to B. was not to be considered as a payment of instalments. *Ibid.*

## ERROR IN FACT.

A. recovered in ejectment against thirteen defendants. Error in fact afterwards was assigned, that two of the defendants were infants and had appeared by attorney. *Held*, on motion to set aside the judgment, that the proceedings in error must be set aside as null and void, the assignment of error not having stated that the other eleven defendants declined to join in the assignment of error, or that they had had an opportunity of electing whether they would join or not. *Green v. Leclerc*, 11 Ir. Jur. n.s. 155, Exch.

## ESTOPPEL.

1. *Effect of statements in decrees in Equity to work estoppel.*
2. *Effect of recitals in deeds.*
3. *Estate created by, assignment of.*

### 1. *Effect of statements in decrees in Equity to work Estoppel.*

A lessee holding under a sub-lease containing a proviso that he would yield up possession of the lands on receiving notice of the lessor's intention to surrender his term, acquired the interest of one of the co-owners of the reversion expectant on his lessor's term. The lessee also acquired the interest of a co-owner. A partition suit was instituted to apportion in severalty the interests of the different co-owners, and the report treated the lessee as tenant from year to year; and the agent of the lessor applied for the rent apportioned for the part of the demised lands allotted to lessor. *Held*.—That the statement in the decree (founded on the report, to which the lessee had objected) did not operate as an estoppel, and that the application did not bind him to a new tenancy.

*Semble*—The question as to his intention in paying rent subsequent to the partition, was properly left to the jury.

*Held*, further, That in order to effectuate a surrender of his lease, the lessor should fulfil every condition in the clause of surrender; when therefore the rent due before the notice was served had not been paid, no surrender was effected. *McGrath v. Shannon*, 11 Ir. Jur. n. s. 332, Exch.

2. *Effect of recitals in deeds.*

A recital in a deed of the absence of incumbrances on an estate, is of the vendor only, and does not bind the vendee. *Drought v. Drought*, 11 Ir. Jur. n. s. 306, Exch.

3. *Estate created by, assignment of.*

A reversion created by estoppel is capable of assignment, and the assignee stands in the same position as the original reversioner as against the party bound by the estoppel. *Sinnott v. Cleary*, 11 Ir. Jur. n. s., 115, Q. B.

EVICTIO BY TITLE PARAMOUNT.

See LANDLORD AND TENANT.

EVIDENCE.

1. *Judicial notice.*

2. *Admissibility of copies of proceedings in Equity.*

3. *Books of account, s. 13 of Chancery Regulation Act (Ireland), 1850.*

4. *Entries against interest.*

5. *Communications between solicitor and client.*

6. *Evidence to shew wilfulness of trespass.*

7. *Evidence on appeals in Equity. See APPEAL (in EQUITY).*

See CRIMINAL LAW, 5; DOMICILE.

1. *Judicial notice.*

The Court will judicially notice who was Minister for Foreign Affairs so long ago as 1803. *Whaley v. Carlisle*, 11 Ir. Jur. n. s. 75, C. P.

2. *Admissibility of copies of proceedings in Equity.*

An attested and compared copy of an affidavit made in a Chancery suit by the since deceased solicitor of a party, and an order in the suit are admissible in evidence against that party and those claiming under him. *Whaley v. Carlisle*, 11 Ir. Jur. n. s. 75, C. P.

3. *Books of account, s. 13 of Chancery Regulation Act (Ireland), 1850.*

The Court has jurisdiction to review a decision of the Master as to what evidence is capable of being received upon the true construction of the Court of Chancery Regulation Act, 1850, 13 & 14 Vict. c. 89, s. 13. *Boag v. Bradford*, 11 Ir. Jur. n. s. 226, R.

The practice in the Master's offices under the above section is irregular. The proper course would be that the Master should make a proper order directing the books of account to be received as *prima facie* evidence, and it is desirable that such items as are capable of being proved independently should be so proved before such order is made. *Ibid.*

4. *Entries against interest.*

The entries on the credit side of an account being in the interest of the accountant, are, consequently, not admissible in evidence against third persons. But the entries on the debit side being against his interest are admissible after his death, and the fact

of a balance having been struck is immaterial. *Whaley v. Carlisle*, 11 Ir. Jur. n. s. 75, C. P.

Where an exception to the admission of such entries is taken on the ground that the accountant does not charge himself with any sum of money, but that on the contrary, the balance on the whole account is struck in his favour—this is a bad reason, but does not vitiate the exception. *Ibid.*

5. *Communications between solicitor and client.*

W. H. B. being seised of an estate in fee in the lands of D., conveyed same in consideration of a sum of £27,800 to P. B. Previous to said sale the petition alleged that said W. H. B. fraudulently induced two of his children, then aged 21 years, to acknowledge, by a certain deed of release, that they had been paid (which was not the fact) a sum of £4,005, same being a portion of £5000 charged upon said lands, and they accordingly, by indenture of 2nd December, 1845, released said lands from said sum of £4,005, without any consideration whatsoever. The solicitor who prepared said deed, seeing that said children had not been paid, and that a gross fraud had been perpetrated upon them, called upon W. H. B. to repair, as petition alleged, the injury he had so done by charging other lands, of which he was seised, with a sum of £4,005. The said W. H. B. soon after died without repairing said injury. On the hearing of the cause petition, disclosing the above facts, the said solicitor was orally examined, and was asked about certain conversations he had with his client, W. H. B., in relation to this deed. On objection being made that the communication was privileged, and that the solicitor was not charged with fraud in the pleadings, it was *Held* that the question was a legal one, and that the witness was bound to answer same. *De Burgh v. Chichester*, 11 Ir. Jur. n. s. 182, Ch.

6. *Evidence to shew wilfulness of trespass.*

Certain sheep of the defendant having trespassed upon lands of the plaintiff, plaintiff's herd was driving them to pound, and on his way met the defendant's son. In a conversation between them, the defendant's son used some expressions tending, if admissible, to shew that the trespass was wilful. A short time subsequently defendant's son drove away the sheep. An action of trespass having been brought, the above conversation was, on the trial, offered in evidence by the plaintiff, and objected to by the defendant. The evidence having been admitted by the judge, the jury found for the defendant with £10 damages. The Court refused to set the verdict aside, on the ground of the reception of illegal evidence. *Cherney v. O'Neill*, 11 Ir. Jur. n. s. 124, Q. B.

EXCEPTION (IN CONVEYANCING).

*Validity of.*

Demise of the whole territory or precinct of land commonly called A., containing in itself by estimation thirty-two poles of land, more or less; the whole territory or precinct of land commonly called B., containing in itself by estimation six poles of land, more or less; the whole territory or precinct of land commonly called C., containing in itself by estimation two poles of land, either more or less; being in all

forty poles of land; save and except two poles of G., situate, lying, and being in the manor of A. *Held*, that the exception of the two poles of G. was good. *Ellis v. The Lord Primate*, 16 Ir. Ch. Rep. 184, Ch. Ap.; s.c. 10 Ir. Jur. n.s. 61.

### EXCEPTION (IN PROCEDURE).

See EVIDENCE, 4.

### EXECUTOR.

See ADMINISTRATOR AND ADMINISTRATION; ASSIGNMENT, 1.

### FISHERY.

1. *Construction of grant of.*
2. *Appeals under st. 26 & 27 Vict. c. 114.*
  - (a.) *Evidence of several fishery.*
  - (b.) *Exclusive right of fishing.*
  - (c.) *Interference with the public right of fishing.*
  - (d.) *Meaning of "land adjoining" in s. 19 of st. 5 & 6 Vict. c. 106.*
  - (e.) *License by Landlord.*
  - (f.) *Powers of definition of commissioners.*
  - (g.) *Sending back case to commissioners for further inquiry.*

#### 1. *Construction of grant of.*

By letters patent of 19 Jac. 1, and 13 Car. 2, the Crown granted a several fishery within certain limits in the River Bann. A channel called the New Cut, divides the river within the limits of the fishery into two branches. It was found by a verdict on an issue directed by the Court, that the New Cut is now part of the River B., but that there was no evidence to show whether it existed at the time of the grant, or whether it was a natural or an artificial channel. *Held*, that letters patent did not give the right to a several fishery in the New Cut, unless it was a branch of the River B. at the time of the grant. *O'Neill v. M'Erlane*, 16 Ir. Ch. Rep. 280, R.

#### 2. *Appeals under st. 26 & 27 Vict. c. 114.*

##### (a.) *Evidence of several fishery.*

Facts found by the Commissioners of Fisheries held not to amount to sufficient evidence of the existence of a several fishery. *Lord Monteagle, appellant, Malcomson, respondent*, 11 Ir. Jur. n.s. 33, Q. B.

##### (b.) *Exclusive right of fishing.*

A person having the exclusive right of fishing in a river and its tributaries, so far as the same are frequented by salmon, is within the provisions in s. 3 of stat. 26 & 27 Vict. c. 114. *Earl of Antrim, appellant*, 11 Ir. Jur. n.s. 146, Q. B.

Therefore, where a person had the exclusive right of fishing in a river up to a fall above which salmon could not get, a bag-net placed by him in the river was not affected by reason of his not having the exclusive right of fishing in the river and its tributaries above the fall. *Ib.*

The provision at the end of s. 3 of st. 26 & 27 Vict. c. 114, for the case of a person having the exclusive right of fishing, does not apply to or render legal a bag-net placed in the estuary of a river. *Ib.*

##### (c.) *Interference with public right of fishing.*

A weir, which is a common nuisance to the public

right of fishing, is illegal; but there cannot be an interference with the public right of fishing, in a place where the public cannot exercise the privilege of fishing. *Lord Monteagle, appellant; Malcomson, respondent*, 11 Ir. Jur. n.s. 80, Q. B.

##### (d.) *Meaning of "land adjoining" in s. 19 of st. 5 & 6 Vict. c. 106.*

It is not necessary that land should be arable or pasture land to meet the requirements of s. 19 of 5 & 6 Vict. c. 106. *Lord Monteagle, appellant; Malcomson, respondent*, 11 Ir. Jur. n.s. 30, Q. B.

##### (e.) *License by landlord.*

A. being seised of lands under a lease for lives, obtained from his landlord in 1843 a license to erect a weir upon said lands. He, being in occupation, erected the weir, which was fished by him and B. as partners down to the period of the inquiry by the commissioners in 1864. In 1852 A. surrendered the lands to his landlord, who in 1857 executed an agreement for the lease of them to B. for 21 years, and a life concurrent, under which agreement B. was in possession of them in 1862. The commissioners having ordered the weir to be abated, and A. and B. having respectively appealed, the decision of the commissioners was reversed upon the appeal of B. *Griffin, appellant; Malcomson, respondent*, 11 Ir. Jur. n.s. 28, Q. B.

##### (f.) *Powers of definition of commissioners.*

The Special Commissioners of Irish Fisheries have not power to define and shew by a map or plan the points of termination of the distance of three miles from the mouth of a river prescribed by s. 3. of stat. 26 & 27 Vict. c. 114. *Hodder, appellant*, 11 Ir. Jur. n.s. 144, Q. B.

##### (g.) *Sending back case to commissioners for further inquiry.*

Case sent back to the commissioners to inquire by further evidence whether any part of a weir was above low-water mark of ordinary spring-tides, or whether it was below low-water mark. *Reeves, appellant; Malcomson, respondent*, 11 Ir. Jur. n.s. 123, Q. B.

### FORGERY.

See CRIMINAL LAW, 3.

### FRANCHISE (PARLIAMENTARY).

1. *Qualification; rated occupation.*
  - (a.) *Destruction of house occupied.*
  - (b.) *Occupation for twelve months before 20th July.*
2. *Notice of objection, form and sufficiency of.*
1. *Qualification; rated occupation.*
  - (a.) *Destruction of house occupied.*

A party rated as occupier of "houses and yard," does not lose his right to appear on the list of voters by reason of the houses being destroyed by fire, he still continuing to hold the site on which they stood. *Whitley, appellant; M'Cleane, respondent*, 11 Ir. Jur. n.s. 59, Reg. Ap.



(b.) *Occupation for twelve months before 20th July.*

The law does not recognize any fraction of a day, *Sullivan, appellant; Lee, respondent*, 11 Ir. Jur. n. s. 385, Reg. App.

A., claiming as a rated occupier, had entered into possession of the rated premises between the hours of twelve o'clock, at noon, and two o'clock in the afternoon, of the 20th July, 1865. B., claiming in the same way, had entered between eleven o'clock, in the forenoon, and twelve o'clock, noon, on the 20th July, 1865. Both had continued to occupy up to and after the 20th July, 1866. *Held*, that both had occupied "for the space of twelve calendar months next before the 20th July," 1866, and were therefore (all other conditions having been fulfilled) entitled to be registered. *Ib.*

(2.) *Notice of objection, form and sufficiency of.*

The date required to be at foot of a notice of objection under s. 36 of statute 13 & 14 Vict. c. 69, Schedule B., Forms 14 and 15, must be the true date of signing the notice. Where, therefore, the notice was not signed until after the date on which it bore date, it was held bad—(*George, J. dissentiente*). *Irvine, appellant; Gregg, respondent*, 11 Ir. Jur. n. s. 386, Reg. App.

*Parkinson, appellant; Brophy, respondent* (15 I. C. L. R. 346; s. c. 10 Ir. Jur. n. s. 158) followed. *Ib.*

*Jones, appellant; Jones, respondent* (1 Eng. L. Rep. C. P. 140) not followed. *Ib.*

#### FRAUD.

*See CONTRACT*, 3 (b).

#### GAME LAWS.

*See MAGISTRATES' LAW*, 2.

#### GARNISHEE ORDER.

*See ASSIGNMENT*, 2; *PRACTICE (LAW)*.

#### GAZETTE.

*See CRIMINAL LAW*, 5 (c).

#### GRAND JURY LAW.

1. *Power of grand jury to present for malicious injuries.*

2. *Compliance with notice provisions in cases of malicious burning.*

3. *Liability of township in the county of Dublin to county works.*

1. *Power of grand jury to present for malicious injuries.*

The grand jury has full power to make a presentment for compensation for malicious injuries, although the presentment for such injuries had been thrown out at the presentment sessions. *In re Jackson*, 11 Ir. Jur. n. s. 120, Assizes.

2. *Compliance with notice provisions in cases of malicious burning.*

The Grand Jury Act made certain notices to certain public bodies and officers a condition precedent to

obtaining compensation for malicious burning. The C. Improvement Act, as far as the city of Q. was concerned, transferred the jurisdiction as to compensation for malicious burning to the town council, and introduced various changes as to the powers and duties of the public bodies and officers mentioned in the former Act, which rendered an exact compliance with its provisions impossible. A., having applied to the town council of C. for compensation, was required to prove the service of these notices; and this decision was affirmed by the Recorder. A. now applied for a *certiorari*. *Held*, that though compliance *modo et forma* with some of the notice provisions had become impossible, yet those provisions had an ulterior object, with respect to which compliance might still be had in substance. *The Queen at prosecution of the Commissioners of Public Works v. The Mayor, Aldermen, and Recorder of Cork*, 16 Ir. C. L. R. 1, Q. B.; s. c. 8 Ir. Jur. n. s. 126.

*Held* also, that though the performance of all the notice provisions might be rendered impracticable by subsequent legislation, the performance of those that were possible was still obligatory. *Ib.*

3. *Liability of township in the county of Dublin to county works.*

A township in the county of Dublin held not exempt from contributing to the cost of repairing a pier situate in the county, and outside the township. *The Grand Jury of the county of Dublin v. The Rathmines and Rathgar Improvement Commissioners*, 11 Ir. Jur. n. s. 300, Q. B.

#### GUARANTEE.

A. verbally promised to guarantee to C. payment for certain goods to be delivered by C. to B. After delivery and default, made by B. A promised a second time to pay C. *Held*—that such second promise would not support an action upon, an account stated, the liability of A. not being a direct debt, but a collateral liability. *Marshall v. Wilson*, 11 Ir. Jur. n. s. 169, Exch. Ch.

#### GUARDIAN AND WARD.

*Guardian purchasing held trustee for children.*

On the marriage of M. I. in 1826 with her husband, C. R., a sum of £1,500 charged on the several lands of C. and F. the property of said M. I.'s father, was vested in trustees for the benefit of the children of said marriage; afterwards on the 8th of March, 1837, said lands of F. and C. charged as aforesaid, and also the lands of T. were upon the marriage of J. I., who was M. I.'s brother, conveyed to trustees upon trust, among others, for the children of the marriage. Said J. I. made his will and died in 1842, having expressly desired that his children were not to be made wards of Court, and having also appointed as his executor and also as the guardian of the fortune and property of his minor children his said brother-in-law, C. R. who thereupon as such guardian entered into the receipt of the rents and profits of these denominations of land which were in 1852 set up for sale in the Incumbered Estates Court. Of one denomination T., C. R. then acting as such guardian and receiver, was declared the purchaser for the

said sum so charged for the benefit of his children, as aforesaid, on said lands of C. and F.; and in consideration thereof said Incumbered Estates Commissioners conveyed the land of T. to the then trustees of said settlement of 1826 upon the trusts thereof. The said lands of T. were in 1865 mortgaged to certain mortgagees. *Held*, that inasmuch as C. R. was guardian of the property of the minor children, the sale, though not to him absolutely but as mere trustee of his wife and children, of said lands could not be sustained, and that therefore he should be held to be a trustee for the said minors, subject however to said mortgage. *Irwin v. Robertson*, 11 Ir. Jur. n. s. 283. See INFANT.

### HABEAS CORPUS.

See ARREST; COSTS; INFANT.

### HUSBAND AND WIFE.

1. *What words sufficient to create separate estate in wife.*
2. *Wife's chose in action; reduction into possession.*
3. *Pin-money.*

1. *What words sufficient to create separate estate in wife.*

J. E., by his will made in 1818, reciting that he was possessed of certain lands, which he held under an agreement for a lease of 999 years, called "Waters' lot," devised same to trustees in trust, "for the sole use of my daughter, H. E. (then unmarried) and her assigns." H. E. after the making of said will, married (said premises not having been put into settlement); her husband, after J. E.'s death, had a lease made to him and his executors, &c., of said Waters' lot for the residue of said term of 999 years; said husband died in 1864, leaving his said wife, him surviving, and having by his will previously devised said premises away from her to other parties in his will mentioned. *Held*—distinguishing the case from *Gilbert v. Lewis* (1 De Gex J. & Sm. 38) that J. E. having interposed trustees in the devise of said Waters' lot, for the sole benefit of his daughter, H. E., such interposition was sufficient to exclude the marital right of H. E.'s husband. *Massy v. Hayes*, 11 Ir. Jur. n. s. 241, Ch.

And *held* therefore, that said husband in taking said lease, was a mere trustee for his said wife, H. E. *Ib.*

2. *Wife's chose in action; reduction into possession.*

A married woman entitled to a share in a legacy payable out of real estate, with the consent of her husband, agreed, together with other parties beneficially interested, to accept the lands in lieu of the money. The lands were accordingly conveyed by the trustee of the will to a trustee; and by a subsequent deed declaring the trusts, a portion of the lands was limited to the husband and wife for their joint lives, and to the survivor for life, with remainder to such of their children as the husband in his lifetime, or the wife, if she survived him, should appoint. *Held* (by the Lord Chancellor) that the assignment of the lands to the trustee did not operate as a reduction into possession of the wife's chose in action, and that the lands

into which the money was thereby converted, were subject to the same uses and trusts as the money. *In re Bailey's estate*, 16 Ir. Ch. Rep. 215, Ch. Ap.; s. c. 9 Ir. Jur. n. s. 398.

*Held* also (by the Lord Chancellor), that the modification of the prior rights and interests of the husband and wife in the lands formed a sufficient consideration in the deed declaring the trusts, to make it a deed for valuable consideration. *Ib.*

### 3. Pin-money.

A receiver was obtained by a married woman over her husband's estate, for the arrears of an annuity settled to her separate use. By an order made with her consent, the receiver was discharged, without prejudice to her proceeding as she might be advised, for the arrear then declared to be due, or the accruing gales, and the husband went into possession. A creditor, subsequent to the consent order, obtained an order for a receiver, and the wife re-appointed the receiver in her cause. *Held*, that the presumption of release, or payment of arrears of pin-money, did not arise, and that the wife was entitled to the arrear due at the date of the consent order and the subsequent gales. *Edgeworth v. Edgeworth*, 16 Ir. Ch. Rep. 348; R.

Principles of the Court as to the arrears of pin-money. *Ib.*

### INDICTMENT.

See CRIMINAL LAW, 4.

### INFANT.

The parties to whom a writ of habeas corpus, sued out by the father of a male infant, was addressed, returned that the infant at the time of the issuing of the writ was over fourteen years of age, and under sixteen. *Held* (*dissentiente* O'Brien, J.) that the father's application must be refused, inasmuch as at the age of fourteen a male infant is at liberty to exercise a discretion as to his own place of abode. *In re Connor, an infant*, 16 Ir. C. L. R. 112, Q. B.; s. c. 8 Ir. Jur. n. s. 323.

*Held*, by O'Brien, J., that the guardianship of the father is more extensive than that of the mother. *Ib.*

That the guardianship by nature is not now limited to the eldest son, but extends to all the children alike, *Ib.*

That though the guardianship by nurture terminates at the age of fourteen in all cases, that of the father by nature continues till twenty-one. *Ib.*

That infants of both sexes may choose their place of residence at the age of discretion. *Ib.*

That the age of discretion for males and females is sixteen years of age. *Ib.*

*Regina v. Howes* discussed. *Ib.*

### INJUNCTION.

#### Ancient lights.

F., the proprietor of a house, No. 67 South George's-street, Dublin, had, during the entire of the years 1856, 1857, and 1858, obstructed the ancient lights of the house No. 68, wherein C. G., though not residing, carried on his business, and of which he, during those years, was seized of an estate in *quasi*

fee. On motion for an injunction by the present tenant in *quasi* fee of said No. 68, it was *held* that, although no written notice of the said obstruction had been served upon C. G., yet that under the circumstances of the case, the Court would presume that he had notice, and that notice, within the meaning of 4th section of the 2 & 3 Wm. 4, c. 71, need not be in writing. *Dockrell v. Findlater*, 11 Ir. Jur. n. s. 161, Ch.

Where certain premises lay upon one side of a street in a town, and where the owner of said premises raised buildings thereupon, which buildings when raised to the eavestone, obstructed an ancient light in a house upon the opposite side of said street, by reason of which obstruction the owner of said last-mentioned house was prevented from using his ancient light in examining colours, &c., for which examination said lights are essential. *Held*, that the Court would issue a mandatory injunction to take down said buildings. *Carson v. M'Kenzie*, 11 Ir. Jur. n. s. 337, Ch.

*Held* also, that the Court would itself assess damages without the aid of a jury. *Id.*

See CEMETERY.

### INSOLVENT.

C. being entitled to an annuity, mortgaged it as surety to E. to secure money advanced to A. and appointed F. irrevocably her attorney to receive the annuity for the purpose of paying the interest and premiums of a policy of insurance, which had also been assigned as a security, and for the purpose of investing a sum to form a fund for payment of the principal and of paying the balance of the annuity to C. C. took the benefit of the Insolvent Act. After the insolvency, there being a half-year's interest and a premium of the policy due, it was agreed by C. that the annuity should be applied in discharge of the premium, interest, and principal, in order to preserve certain lands the property of A., which were included in the mortgage to E. The assignees had required the person liable to pay the annuity to pay it to them; and F. served a notice on them to withdraw their claim for payment of the annuity to them, which they complied with. The assignees afterwards filed a petition against F. for an account of the sums received on foot of the annuity. *Held*, that F. was not bound to pay to the assignees the sums received by him subsequently to the insolvency. *M'Dowell v. Reede*, 16 Ir. Ch. Rep. 430, R.

### INSPECTION OF DOCUMENTS

See PRACTICE (LAW).

### INTERPLEADER.

Claimant under bill of sale must give the execution creditor an opportunity of examining his claim before requiring the execution creditor to say if he will accept an issue. *Smith v. Craig*, 16 Ir. C. L. R. App. v., Cons. Ch.

### INTERPOLATIONS IN DEEDS.

See DEED, 2.

### INTERROGATORIES.

See PRACTICE (LAW).

### JOINT TENANCY.

What words will create. See WILL, 3.

### JUDGMENT.

1. *Revivor and stay of execution.*
2. *Effect and priority of judgments as charges on land.*

1. *Revivor and stay of execution.*

A writ of revivor of a judgment obtained for a penal sum given to secure a smaller sum, should claim execution only for the sum intended to be secured and interest due, and not for the penal sum for which the judgment was originally marked. *Barrett v. Driscoll*, 11 Ir. Jur. n. s. 119, Q. B.

On motion at the suit of one of the conuzors of a judgment of Michaelmas Term, 1847, that the *ex parte* order for liberty to revive the judgment should be varied, the Court, upon its appearing that, by the condition of the bond and warrant by virtue of which the judgment was entered, he was only to become liable in the event of the death of his brother (the other conuzor), and of his succession to his brother's estate, directed that stay of execution, until the death of the brother, and further order of the Court, should be marked upon the margin of the revived judgment, although no stay of execution appeared upon the original one. *Willis v. Gildea*, 16 Ir. C. L. R. App. xxiii. C. P.

2. *Effect and priority of judgments as charges on land.*

Judgments were obtained in 1849 against A. In 1851, A. became tenant from year to year of X., either by virtue of a parol agreement, or by act and operation of law. In 1855, affidavits were registered, in professed pursuance of the sixth section of the Judgment Mortgage Act, in respect of the judgments of 1849, against A.'s interest in X. In 1858, that interest was enlarged by A.'s accepting a lease for a term of years, with a covenant for perpetual renewal. This lease, immediately upon its execution, was deposited with B., to secure a previous loan made to A. by C. on the faith of this security. B. acted throughout this transaction as solicitor both for A. and C.; there was no investigation of the title, and B. had actual notice of the previous tenancy from year to year. A.'s enlarged interest in X. having been sold, a question of priority, in reference to the proceeds of the sale, arose between the judgment creditors of 1849 and C. *Held*, with some difficulty, that the tenancy from year to year not having become vested in A., under an "instrument," was not withdrawn by the second section of the Judgment Mortgage Act from the operation of the judgments of 1849, under Pigot's Act. *In re Tottenham's Estate*, 16 Ir. Ch. Rep. 115, L. E. C., s. c., 10 Ir. Jur., n. s.

*Held*, further, that the enlarged interest of 1858, being a graft on the tenancy from year to year, became vested in A. as a trustee for the judgment creditors of 1849, to the extent of their equitable charges; and that C., although a purchaser for value, took, subject to those incumbrances, on the assumption of

their having been kept duly registered as judgments, the circumstances being such as to fix him with notice of their existence. *Ib.*

### JUDGMENT MORTGAGE.

1. *Sufficiency of affidavit to register.*
2. *Not a voluntary alienation so as to amount to breach of condition. See ALIENATION.*

#### 1. *Sufficiency of affidavit to register.*

An affidavit to register a judgment as a mortgage, which stated "that the amount recovered by said judgment is £258 11s. 10s. besides costs . . . and that the sum of £258 11s. 10d. sterling, secured by the said judgment, together with the costs of obtaining said judgment, still remains justly due, and owing to the N. B." was *Held* defective in not stating what was the amount of the costs recovered. *In re Flood's Estate*, 11 Ir. Jur. n. s. 61, Ch. App.

A judgment was obtained against M. F. on a promissory note signed by M. F., and was registered as a mortgage, under the 13th and 14th Vic. c. 29, against M. F. The real name of the defendant was M. B., and she was so named in a Crown grant, and in certain Chancery proceedings; but she had passed by the surname of F., having cohabited with a man of that name. *Held*, that the judgment was duly registered as a mortgage. *Fowler v. Fowler*, 16 Ir. Ch. Rep. 507, R.

A., a judgment mortgagee low down upon the schedule of incumbrances, became aware, after the day for filing objections to said schedule in the Landed Estates Court had passed, that there were defects in the affidavit of S. to register his judgment as a mortgage, which mortgage was prior, in said schedule, to that of A., said defects being an omission in the said affidavit of the sixpence costs found by the jury as appearing on the record of the judgment, and also that two several streets wherein were the premises which said judgment mortgage sought to affect, were alleged in said affidavit to be in the parish of St. Mary, wherein no such two streets did exist, though they did in that of St. Mark. The Judge, after the said day for filing objections had elapsed, ordered that A. *nunc pro tunc* be at liberty to file objections to said prior incumbrance, and he declared said premises to be well charged with such judgment mortgage of S. *Held*, that said order should be discharged, so far as it declared that A. be at liberty *nunc pro tunc* to file objections to said prior incumbrance vested in S.; and that the premises in said two streets, if same were to be found in said parish of St. Mary, were well charged with said judgment mortgage; and as to the omission of the sixpence in the said affidavit, the Court would not disturb the said judgment mortgage so vested as aforesaid in S., inasmuch as the time for objecting thereto had passed. But the Court intimated that had the objection been taken within the proper time, it would have been a fatal one. *Rooney, app.; Sakam, resp.*, 11 Ir. Jur. n. s. 43, Ch. App.

The affidavit for registration of a judgment under the 13th and 14th Vic. c. 29, described the defendant as "formerly of B., in the county of W., but now of the city of Dublin, Esq." *Held*, following *In*

*re Fitzgerald's Estate*, (11 Ir. Ch. Rep. 278) that the judgment was not duly registered.

But, *semble*, the object of the statute was the identification of the parties to the judgment; and therefore if the affidavit describes them in a manner not calculated to mislead, the judgment is duly registered. *Thorpe v. Browne*, 15 Ir. Ch. Rep. 355, R.

Observations on the decisions on the Judgment Mortgage Act (13 & 14 Vic. c. 29). *Ib.*

The supplemental affidavit, filed under the 21st and 22nd Vic. c. 105, can only supply a defect in the original affidavit, by stating positively that which was stated by way of recital. It cannot supply a defect in the recital itself. *Ib.*

If a defendant in a judgment is abroad, and has no residence at the time in Ireland, it is sufficient in an affidavit to register the judgment as a mortgage under the 13th and 14th Vic. c. 29, s. 6, to state as his usual place of abode a property or estate to which he is entitled, as his usual place of abode, although his last known residence in Ireland was not there. *Slator v. Slator*, 16 Ir. C. L. R. 488, R.

A mere verbal error, e.g. "Whitehall" for "Whitehill," or "Marshalsea" for "the Marshalsea," in the description of the residence of the defendant in an affidavit to register a judgment as a mortgage, will not vitiate the registration. *Ib.*

### JURY AND JURY PROCESS.

1. *Jury, how summoned in case of criminal information.*

2. *Striking Jury under old system.*

1. *Jury, how summoned in case of criminal information.*

A defendant in a criminal information challenged the array of jurors, on the following grounds:—First; that the jurors were summoned in virtue of a writ of *fieri facias* and *distingas*, and not according to the statute. Secondly; without a precept of the Judge of Assize. Thirdly; without six days' previous summons. Eighthly; that the sheriff did not make out his special jury list properly, and that various officers of the county had violated their duties with regard to the jurors' list. A demurrer taken *ex tenuis* to the challenge was allowed. *Held*, that the demurrer was rightly allowed.

*Held* also, that the 3rd and 4th Wm. IV. c. 91, s. 18, is directory and not mandatory.

*Semble* (per Hayes, J.), that when the challenger relies upon specific facts, as the omission of particular names from the jury panel, his pleading ought to give the names.

*Semble* also (per Hayes, J.), that the process of *venire* and *distingas* is not abolished by the Common Law Procedure Act, 1853, for criminal proceedings. *Fogarty v. The Queen*, reviewed. *The Queen v. Rea*, 16 Ir. C. L. R. 428, Q. B. s. c. 9 Ir. Jur. n. s. 221.

2. *Striking Jury under old system.*

An affidavit that it would be unsatisfactory to one party to have his case tried by a jury struck under the present system, if not met by a counter-affidavit, is ground for granting a motion to strike the jury under the old system. *Semble*, the Court will not

be bound by authorities in motions depending on their discretion. *Hempton v. Humphreys*, 11 Ir. Jur. n. s. 416, Exch.

See PRACTICE (LAW), PROBATE.

### LANDED ESTATES COURT.

1. *Effect of Conveyance.*
2. *Right of solicitor to sell for costs charged by decree.*
3. *Costs of puisne incumbrancer petitioning.*

#### 1. *Effect of Conveyance.*

In 1817, A. executed a settlement purporting to comprise X. In 1852, A.'s title to X. for the first time accrued by virtue of a conveyance from the Incumbered Estates Court. A. subsequently devised X. to B. C., the tenant in tail under the settlement of 1817, and D., who claimed as the mortgagee of C., sought to have X. held bound by the limitations in that settlement, as against B. *Held*, that A., and consequently B., took X. discharged from those limitations. *In re Burke's Estate*, 16 Ir. Ch. Rep. 129, L. E. C.

#### 2. *Right of solicitor to sell for costs charged by decree.*

Where an administrator has recovered a chattel interest in lands, by a decree declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs. *In re M'Allister's Estate*, 16 Ir. Ch. Rep. 134, L. E. C., s. c., 10 Ir. Jur. n. s. 419.

#### 3. *Costs of puisne incumbrancer petitioning.*

A puisne incumbrancer who presents a petition for a sale with a reasonable expectation of being paid, will be entitled to his costs, even though the proceeds of sale fail to reach his demand; but the rule will not be applied if, owing to negligence or delay in proceeding to a sale, prior incumbrancers have sustained damage. *In re Hutchins's Estate*, 11 Ir. Jur. n. s. 400, L. E. C.

### LANDLORD AND TENANT.

1. *Terms and incidents of tenancy.*
2. *Eviction by title paramount.*
3. *Notice of surrender.*
4. *Landlord and Tenant Law Amendment Act, 23 & 24 Vict. c. 154.*

#### (a.) *Retrospective operation of the Act.*

(b.) *Assignment without landlord's assent, where lease contains a clause against assignment; s. 10.*

(c.) *Emblements: meaning of "last gale day of the current year in which such tenancy shall determine;" s. 34.*

(d.) *Apportionment of rent between devisees and executor; s. 49.*

(e.) *Costs and practice in applications for restitution after ejectment for non-payment of rent; s. 70.*

(f.) *Security for costs and mesne rates in ejectment; s. 75.*

See EJECTMENT; ESTOPPEL.

#### 1. *Terms and incidents of tenancy.*

An agreement that a house should be held for a

term of thirty-one years, with liberty to have same determined at the end of the 3rd, 6th, 9th, 12th, 15th, 18th, 21st, 24th, or 27th year, should it be so desired, in which case six months' notice to be given; and should the tenant be desirous to have a lease executed for the remainder of the term, he was to be at liberty to require same, subject to the conditions as therein, and the usual covenants, *held*, not to give the landlord the option of determining the tenancy. *Fallon v. Robins*, 16 Ir. Ch. Rep. 422, R.

A., the tenant, made the following agreement with B., the landlord:—"I agree to be bound by the following conditions, viz., to give up the land when you require it; and should you so require it, the incoming tenant to pay me for such crops as shall not at that time have come to maturity; also for manure unused, and land manured by me, gates, &c., the amount to be decided by two arbitrators; one to be appointed by me, the other by the incoming tenant; and if the land be disposed of in this way, the Earl of Courtown (the landlord) to pay me for the drainage." The tenant was not paid for either the crops, &c., nor the drainage; he then refused to give up possession, and the landlord brought an ejectment against him; and the jury, by the direction of the judge, found for plaintiff. *Held*, on motion for a new trial, that the verdict was right, and that the payment for the crops, &c., was not a condition precedent to the determination of the tenancy, but that the tenancy was expressly made determinable on a demand of possession which had been given and refused. *Lord Courtown v. Butler*, 11 Ir. Jur. n. s. 239, Exch.

#### 2. *Eviction by Title Paramount.*

The plaintiffs demised by indenture a large tract of waste land to D. and R., whose assignee the defendant was. Subsequently to the date of the lease, it was discovered that the lessees had never got possession of certain portions of the premises professed to be demised, and that those portions were in the possession of third parties, who claimed to be owners thereof in fee. One and a half year's rent having become in arrear, an ejectment for non-payment of rent was brought, to which the defendant pleaded that at the time of the making of the lease, certain persons (named in the plea) were, and thence hitherto have been, seised in fee, and in the lawful possession, occupation, and enjoyment of divers, to wit, 100,000 acres, parcel of the demised premises, whereby the lessees or the defendant, or any one claiming under the demise, did not or could not enter into possession of the said parcel, &c., but were kept excluded therefrom; and although the defendant and those claiming under the demise, were ready and willing and desirous of entering, &c., yet that from the time of the demise they were kept out of the possession, &c., by the persons aforesaid. Replication, that, the lease being by indenture, the defendant was estopped from pleading the defence. *Held*, on demurrer, *per* Monahan, C. J., and Keogh, J. (*dissentiente* Christian, J.)—That the replication was good. *The Irish Society v. Tyrrell*, 16 Ir. C. L. R. 249, C. P.; s. c. 10 Ir. Jur. n. s. 367.

That the defence was equivalent to a plea of evic-

tion by title paramount; and therefore that the rent was apportionable. *Ib.*

That the case came within the operation of the 44th section of the Landlord and Tenant Act; and therefore that the plaintiffs could recover in the present action the possession of the portion of the demised premises which the defendant actually got possession of. *Ib.*

And that (following the case of *Mercer v. O'Reilly*, 13 Ir. C. L. R. 153) the plaintiffs were entitled to have judgment for the apportioned rent. *Ib.*

*Per Christian, J.*—That the replication was bad; for that, to constitute an estoppel between landlord and tenant, the possession by the tenant of the thing demised is essential. *Neale v. McKensie* (2 Cr. M. & N. 84; s. c. 1 M. & W. 742) observed on. *Ib.*

That the defence was not equivalent to a plea of eviction by title paramount; but that the case came within the authority of *Neale v. McKensie*, and that the rent was suspended. *Ib.*

And that, assuming the case came within the 44th section of the Landlord and Tenant Act, the plaintiffs should have pursued the terms of that section, and claimed only the portion of the demised premises which the defendant actually got possession of. *Ib.*

To a plaint in ejectment for non-payment of rent, alleging that one year's rent was due under a lease, the defendant pleaded that, by indenture, the father of the plaintiff demised the premises in the plaint mentioned to A., at a rent of £61 15s. a year; and that the said lease was duly assigned to the defendant, and that before the making of the said lease, a portion of the said premises, amounting to two roods and twenty-six perches, was, and thence hitherto, hath remained, the absolute property in fee of B. The defence then averred that neither the lessor nor the plaintiff had at the time of making the lease, or since, any right or interest in the said portion of the premises, and that neither the lessee nor the defendant, nor any other person holding under the said demise, ever obtained any possession or enjoyment of the said portion, but that the same had always remained in the exclusive possession of B., and that the value of the said portion was £1 14s. a year: and the defence then averred tender of the residue of the rent. *Held*, on demurrer, that this was a good defence, as it amounted to a plea of eviction by title paramount. *Donville v. Ward*, 16 Ir. C. L. R. 381, C. P., s. c. 10 Ir. Jur. n. s. 367.

### 3. Notice of surrender.

A lease contained a clause that it should be lawful for the tenant at the expiration of the three first years of the term, "to surrender and deliver to the landlord possession" of the premises demised, he, the tenant, first giving to the landlord "six calendar months' previous notice in writing of his intention so to surrender the said premises." The tenant sent to the landlord a notice, directed to him "and all whom it may concern" of intention on a day named to surrender and deliver up "to you the quiet and peaceable possession of All That and Those the house and lands of A. which I hold from ——— as tenant." This notice was not signed by the tenant, nor did it in any part contain his name, but when it was delivered the land-

lord was told what it was, and from whom it came. On the day named, the tenant attended on the lands to give up possession, but no one attended on behalf of the landlord, and the tenant then put a caretaker into possession, and left the place. *Held* (Fitzgerald, J. dissenting), that the notice of surrender, though unsigned by the tenant, and not containing his name, was sufficient. *Carleton v. Herbert*, 11 Ir. Jur. n. s. 326, Exch. Ch.

*Held* also (Fitzgerald, J. offering no opinion on the point), that the tenant did all that in him lay by attending on the day named to deliver up possession, and by subsequently leaving the place, and that no formal deed of surrender was necessary. *Ib.*

And therefore, that the term had been determined, and the landlord could not bring an action to recover rent which, but for that, would have accrued after the day named in the notice. *Ib.*

### 4. Landlord and Tenant Law Amendment Act, 23 and 24 Vict. c. 154.

#### (a.) Retrospective operation of the Act.

"The Landlord and Tenant Law Amendment Act, Ireland, 1860," 23 and 24 Vict. c. 154, is not retrospective; consequently covenants contained in fee farm grants made before it came into force, viz., the 1st day of January, 1859, are not affected by it. *Chute v. Busted*, 16 Ir. C. L. R. 222, Exch. Ch. s. c. 10 Ir. Jur. n. s. 363.

*Chute v. Busted* (15 Ir. C. L. R. 115), overruled. *Ib.*

#### (b.) Assignment without landlord's assent, when lease contains a clause against assignment, s. 10.

The 10th section of the Landlord and Tenant Act renders null and void an assignment of lands held under a lease containing a clause prohibiting assignment, where the assent of the landlord is not testified in the mode prescribed by that section.

A., a lessee of lands held under the Court of Chancery, by an agreement containing a clause prohibiting assignment without the consent of the Master in Chancery or the receiver, assigned the lands to B. without having obtained such consent testified in the mode prescribed by the 10th section, and the lands were afterwards taken in execution against A. *Held*, that no interest passed under the assignment to B., and therefore that the lands were liable to be taken under an execution against A. *Butler v. Smith*, 16 Ir. C. L. R. 213, C. P.

*Semble*—That whatever may be the effect as between landlord and tenant of the landlord testifying his consent to the assignment in the prescribed form, at a period subsequent to the date of the assignment, it cannot divest the intervening rights of third parties. *Ib.*

#### (c.) Emblements: meaning of "last gale day of the current year in which such tenancy shall determine," s. 34.

The expression—"Last gale day of the current year in which such tenancy shall determine," in section 34 of the Landlord and Tenant Act, means "last gale day of the current year of the tenancy," not of the calendar year. *Lord Derby v. Sadlier*, 11 Ir. Jur. n. s. 171, Q. B.

*Quære*—Has the tenant under this section the option of exercising his common-law right to emble-

ments instead of continuing to hold on under the section. *Ib.*

(d.) *Apportionment of rent between devisee and executor, s. 49.*

Where a testator, being a landlord, dies between two gale-days, the rents payable by his tenants are by the Landlord and Tenant Act, 23 & 24 Vict. c. 154, made apportionable as between the executor and devisee, and the prior apportioned part is personal estate. *Hall v. Hall*, 11 Ir. Jur. n. s. 244, R.

*Semble*, the prior apportioned part could not be made to pass to the devisee except as personal estate, and liable accordingly. *Ib.*

(e.) *Costs and practice in applications for restitution after ejectment for non-payment of rent, s. 70.*

Where a landlord ejects his tenant for non-payment of rent, and the tenant redeems under the 23 & 24 Vict. c. 154, s. 70, the landlord, not being guilty of fraud in the progress of the cause through the Master's office, is entitled to the costs of taking the account, not including the costs of such portions of his affidavit as relate exclusively to the subject-matter of the objections taken by him to the report, and commented on in Court. *Brinkley v. Donohoe*, 11 Ir. Jur. n. s. 96, C. P.

Where there is evidence of what the landlord has actually received, he may be charged with it. *Ib.*

Where there is no such evidence, the amount he ought to be charged with is a fair occupation rent, having regard to the circumstances, especially to the fact that he may be turned out at any moment. *Ib.*

(f.) *Security for costs and mesne rates in ejectment, s. 75.*

Under the 75th section of the Landlord and Tenant Act, defendant will not be required to give security for costs unless there is an "instrument in writing" binding upon both parties. *Downie v. Brack*, 16 Ir. C. L. R. 167, Q. B.; s. c. 9 Ir. Jur. n. s. 266.

*Semble* (per Hayes, J.), that the power to compel security for costs, &c. being discretionary, will not be exercised by the Court, where the terms of the alleged instrument are oppressive. *Ib.*

The 75th section of the Landlord and Tenant Amendment Act, 1860, applies only where the tenant's interest has absolutely determined. *King v. Williams*, 16 Ir. C. L. R. App. vi. Exch.

The provision in the 23 & 24 Vict. c. 154, s. 75, that the notice addressed to the defendant (in ejectment for overholding) calling upon him to give security for costs, may be at the foot of the writ of summons and plaint, is not sufficiently complied with by pinning a piece of paper containing the notice to the end thereof. *Meehan v. Duane*, 11 Ir. Jur. n. s. 35, C. P.; s. c. 16 Ir. C. L. R. App. viii.

## LARCENY, *see* CRIMINAL LAW, 2.

### LEASE (CONSTRUCTION).

A lease demise a "mill, together with the dwelling house, sheds, out-offices, and care-taker's lodge belonging thereto.....to hold the said demise premises, with the rights, members, and appurtenances thereunto belonging or in anywise appertaining." *Held*, that a piece of ground, which had been always occupied by the former tenants of the mill and dwell-

ing-house, but which was not necessary to the enjoyment of either, did not pass. *Jones v. Whelan*, 16 Ir. C. L. R. 495, C. P.

*See* LANDLORD AND TENANT.

### LEGACY.

#### Interest on.

Although a gift or bequest of a sum of money charged upon lands by deed or will, be vested, it will not in general bear interest until it be raiseable, unless there is something on the face of the deed or will to shew a contrary intention. *Gillman v. Gillman*, 16 Ir. C. L. R. 461, R.

If a gift or bequest of a sum of money charged on land be contingent, and there is no express gift or bequest of interest, interest will not accrue or be payable before the contingency on which the principal is payable takes place. *Ib.*

A testator, by will executed in 1853, after a gift of an annuity charged on his real and freehold estates to his wife for life, bequeathed to his nephew £2,000, and charged the same on his real and freehold estates, with interest thereon at the rate of £5 per cent. from the death of the testator's mother; expressing his intention to be, that the same should not be raised or carry interest during the testator's mother's life, but that the same should be a vested interest in his nephew on his attaining twenty-one, and not before; but in case he attained that age in testator's mother's lifetime, payment of the principal was to be postponed till her death; and if he died under twenty-one, the said sum was not to be raised or payable. *Held*, that such legacy was contingent on the event of the nephew attaining twenty-one, and that interest was not payable on the £2,000 until the nephew attained that age. *Ib.*

*See* WILL, 3.

### LEGACY DUTY.

#### Effect of secret trust for charity.

A revenue statute exempted from legacy duty legacies given for a charitable purpose in Ireland. F. gave a legacy to C. which on the face of the will was absolute, but by reason of certain letters contemporaneously delivered a trust was created which was binding in a court of equity. *Held* (affirming the judgment of the Irish Court of Exchequer), that such legacy was not exempt from duty, inasmuch as the trust arose by reason of matters *dehors* the will. *Cullen v. Attorney-General*, 11 Ir. Jur. n. s. 281, H. L.

### LIBEL.

1. *What amounts to a publication.*
2. *Publication of records of court of justice.*
3. *Plea of privileged communication.*
4. *Fair comment.*
5. *Question whether words complained of are capable of sense imputed, by whom to be decided.*

*See* SLANDER.

1. *What amounts to a publication.*

A. wrote a letter to the Poor Law Commissioners containing charges against B., a poor-rate collector. B. resigned the collectorship. At a meeting of Poor



Law Guardians to elect collectors for the ensuing year, B. was appointed collector in his former district. The commissioners refused to sanction his election, and by letter informed the guardians of the charges made against him by A. The clerk of the union read this letter at the next meeting of the guardians, and B. recovered damages from A. for thus publishing a libel upon him. At a subsequent meeting of the guardians, relative to the election of a collector in place of B. at the request of a guardian who had not been present at the preceding meeting, the clerk read again the letter from the commissioners. *Held*, reversing the decision of the Court of Exchequer, that the second reading of the letter containing the charges by A. against B. was not a publication of the libel by A. *Pope v. Coates*, 16 Ir. C. L. R. 156, Exch. Ch.; s. c. 10 Ir. Jur. n. s. 304.

### 2. Publication of records of courts of justice.

The rule that the publication of a fair and correct report of proceedings taking place in a court of justice is privileged, extends to the record of a judgment entered up on a warrant of attorney. But the publication must be correct, and without inference or comment. *M'Nally v. Oldham*, 16 Ir. C. L. R. 298, Q. B.; s. c. 8 Ir. Jur. n. s. 86.

A publication called "The Black List," professing to contain extracts from the Register of Judgments, set out the particulars of the judgments in separate columns. The columns containing the names of the persons against whom, and by whom, the judgments had been entered up, were headed respectively "debtors' names" and "creditor." A plaint contained a count for libel, stating that A. had recovered a judgment against the plaintiff, and that on the 19th of May, 1860, the plaintiff had paid off the judgment: the count then set out the libel, which consisted of an extract of that judgment, published in "The Black List" of the 24th of May, 1860, and added the following innuendo—"Meaning thereby that the said judgment had been recovered against the plaintiff, and was then an existing liability against his estate and effects, and that the said A. was then a creditor of the plaintiff." Defence—That, before the publication complained of, the said A. duly obtained a judgment against the plaintiff (stating the particulars of the judgment, and that said judgment was duly enrolled and of record in said Court, and duly registered, and was not annulled, or vacated, or satisfied on record at the time of the publication; and that said publication was a matter so appearing of record, and registered as aforesaid. This defence was held bad on demurrer. *Ib.*

### 3. Plea of privileged communication.

The plaintiff, an attorney, solicitor, and proctor, declared on a libel contained in a letter addressed to the Incorporated Society of Attorneys and Solicitors, of which plaintiff was a member, which letter charged the plaintiff with having accepted a retainer from the defendant in a suit then pending, and having afterwards taken up the opposite side of the same case. The defendant pleaded that he had engaged the plaintiff as solicitor in a certain matter, and the plaintiff afterwards, without notice to the defendant, took up the other side; that the defendant then named one R.

to accept service of the writ for him, yet the plaintiff had him, the defendant, served by a common bailiff, and that the defendant felt aggrieved by that conduct, and *bona fide* believed that the same was unprofessional and improper, and calculated to affect injuriously the character of the profession to which plaintiff belonged; and that it was the duty of the defendant as a member of society, and as such interested in the good conduct of the members of said profession, to bring the said conduct of the plaintiff under the notice of those who were also interested in the good conduct of said members, and had the power and duty of inquiring into the conduct of the said members, and of preventing the repetition of improper or unprofessional conduct; and that defendant, *bona fide* believing that the said Society had full power, and that it was the duty of the said Society to make such inquiry as aforesaid of and into the conduct of the members of the said profession, and to prevent the repetition, &c., wrote the said letters with the *bona fide* object of procuring such inquiry, and of preventing the repetition of such conduct. To this the plaintiff demurred. *Held* (*dissentiente Fitzgerald, J.*) that the demurrer should be overruled. *Hamerton v. Green*, 16 Ir. C. L. R. 77, Q. B.; s. c. 8 Ir. Jur. n. s. 293.

*Held*, by Fitzgerald, J. (*dissentientibus O'Brien and Hayes, JJ.*) that this plea did not show any personal interest in the defendant, nor any duty incumbent on him. *Ib.*

*Held* also, by Fitzgerald, J., that an attorney is not justified in accepting an undertaking to accept service of a writ. *Ib.*

*Held*, by Hayes, J. (*dubitante Lefroy, C. J.*) that the Courts have recognised the authority of the Law Society as to the supervision of the profession of attorneys. *Ib.*

*Held* also, by Hayes, J. (*dissentiente Fitzgerald, J.*) that an attorney being, in the practice of his profession, a public man, every individual discharges a duty in doing his utmost to maintain the profession in its purity and integrity. *Ib.*

*Held*, by O'Brien J. (*dissentiente Fitzgerald J.*), that apart from social duty, the defendant had sufficient interest in the matter of the complaint to sustain his plea. *Ib.*

*Held* also, by O'Brien, J., that where the plea shews ground of privilege, though they are not the grounds of privilege the defendant has relied on in the plea, the plea is good. *Ib.*

*Held* also, by O'Brien, J., that the Incorporated Society had such concern in the matters of the complaint, in respect of interest or duty, as rendered the communication privileged. *Ib.*

*Held* also, by O'Brien, J., that *bona fides* and the absence of malice are necessary to sustain a plea of privilege. *Ib.*

*Held* also, by O'Brien, J., that the conduct alleged in the plaintiff was unprofessional and improper. *Ib.*

*Held*, by Lefroy, C. J., that on the whole record the plaintiff was disentitled to the judgment of the Court, because inasmuch as he had demurred simply, instead of asking leave to reply and demur, and so admitted the charge which was the sting of the libel, he lost his right to recover damages in the action. *Ib.*

*Semble*, by Lefroy, C. J., that the plea should have

shown that the Law Society had power to investigate the charge. *Ib.*

*Semble*, by Fitzgerald, J., that if the averments in the plea had corresponded with the statements in the letter, the plea would have been embarrassing. *Ib.*

Where a plea of privileged communication to an action for libel contained an averment that the defendant had just and reasonable grounds for believing the charges against the plaintiff contained in the libel to be true, the Court, upon motion by the plaintiff, directed that the plea should be amended by either omitting the averment altogether, or setting forth what were the grounds of belief. *Fitzgerald v. Campbell*, 11 Ir. Jur. n. s. 153, C. P.

#### 4. Fair comment.

To an action for libel, in which the plaintiff, in the first count of the summons and plaint complained that the defendant published of and concerning the plaintiff in the form of a written document, purporting to be a report of a speech addressed to a committee of the House of Lords, by the counsel for the promoters of a certain railway bill, statements imputing to the plaintiff that in procuring himself to be called as a witness, before the said committee, by the promoters of the said bill, and in the evidence he gave, he had practised an imposition upon the said promoters of the said bill; the defendants pleaded that the proceedings before the said committee and the evidence of the plaintiff were matters of public notoriety and discussion; and that the alleged defamatory matters were fair and *bona fide* comments by the defendant on the conduct and evidence of the plaintiff. *Held*—upon demurrer, a good plea. *Kane v. Mulvany*, 11 Ir. Jur. n. s. 189.

The third count of the same summons and plaint complained that the defendant published of and concerning the plaintiff in the form of a printed document, purporting to be a copy of a petition to the House of Lords, statements that the plaintiff procured himself to be called as a witness by the promoters of the said bill, and on cross-examination gave evidence that the existing station of the D. & D. R. could be enlarged; and that the proposed line would not be remunerative; that subsequently the promoters of the said bill ascertained that the plaintiff had been in communication with the agent for the opponents of the said bill, who had taken down his evidence on paper at an earlier part of the day, and had furnished it to the counsel for the opponents of the said bill, who afterwards made use of the said paper in cross-examining the plaintiff; and that at the time the plaintiff volunteered to give evidence in favour of the promoters' case, he concealed from them his opinion upon these matters, as embodied in the paper so drawn up by the said agent, or that he had made any statement to him injurious to the promoter's case. To this count the defendant pleaded the same plea. *Held*—upon demurrer, a good plea. *Ib.*

To the first count the defendant pleaded that the said select committee was a public court of justice, and that the alleged defamatory matter was a true, fair, just, and accurate account and report of the proceedings so laid before the said committee in the said public court,\* with reference to the said bill. *Held*,

upon demurrer, a bad plea, inasmuch as the publication set out the speech of a counsel, made after the case had terminated and without the evidence which justified the speech. *Ib.*

To the fourth count (which was the same as the third, with the exception of an innuendo) the defendant pleaded as a plea of justification, that the plaintiff procured himself to be called as a witness by the promoters of said bill, and did on cross-examination give evidence that the D. & D. Railway Station could be enlarged, and that the proposed line would not be remunerative; that the promoters of the said bill ascertained that the plaintiff had been in communication with the agent for the opponents of the said bill, who had taken down on paper the evidence of the plaintiff, and had furnished the same to the counsel for the said opponents of the said bill, who afterwards made use of it in cross-examining the plaintiff; and that the plaintiff, at the time he volunteered to give evidence, concealed from said promoters an opinion which he then entertained as to the possibility of enlarging the said D. and D. Station, and the remunerative character of the said proposed line, and had made statements to the said agent of the said opponents injurious to the cause of the said promoters. *Held*, upon demurrer, a bad plea, inasmuch as it purported to be pleaded to the entire count, and did not justify the entire. *Ib.*

#### 5. Question whether words complained of are capable of sense imputed, by whom to be decided.

The question whether words complained of are capable of bearing the sense put on them by an innuendo, is since the Common Law Procedure Act (Ireland), 1853, s. 65, altogether for the jury, and cannot be decided by the Court on demurrer. *Curriegan v. Ryan*, 11 Ir. Jur. n. s. 406, Q. B.

The decision of the Court of Queen's Bench in the case of *Lavelle v. Orammore* (7 Ir. Jur. n. s. 55) has been reversed by the Court of Exchequer Chamber. *Ib.*

### LICENSES.

See MAGISTRATES' LAW, 4.

### LIEN.

Defendants contracted with plaintiff that they would carry 44 pigs for him. Plaintiff engaged a waggon and a half for the pigs, putting 26 in the waggon and 18 in the half waggon. There was a bye law of defendants that no more than 15 pigs shall be at any time put in a half waggon, or if more were put, that the excess should be charged for at the rate of 2s. 3d. per head. On the arrival of the train at its destination, defendants demanded 6s. 9d. for the three pigs in excess; plaintiff refused to pay it—whereupon defendants kept the whole of the pigs, conceiving they had a lien on all for the 6s. 9d. Plaintiff then brought an action against the company for not delivering the pigs in time, and for trover, and the jury found for him with £11 damages. *Held*, on motion for a new trial, that defendants had no lien on the 44 pigs for the 6s. 9d., the Court giving no opinion as to whether they might have had a right of lien as against three

of the pigs. *Prently v. Midland Railway Company*, 11 Ir. Jur. n. s. 57, Exch.

### LIMITATIONS (STATUTE OF).

1. *Stat. 3 & 4 Wm. 4, c. 27, s. 25.*
2. *Acknowledgement to save bar of statute.*

1. *Stat. 3 & 4 Wm. 4, c. 27, s. 25.*

J. S. in pursuance of a covenant contained in his marriage settlement, by his will made just previous to his death in 1826, devised all his interest in the lands of S. of which lands he was seised of one undivided one-seventh, to trustees, to pay his widow two annuities of £100 and £40 a year for her life, and subject thereto to permit W. T. S. to receive the rents, &c. during his life, with remainder to his heirs for ever, first paying the head rents and the aforesaid annuities. Afterwards said W. T. S. (and not said trustees) in 1839 made a lease to certain tenants then in possession of 42 acres of said lands at a nominal rent of £9 a year. On a sale being ordered by the Landed Estates Court of said lands, said tenants were stated to be merely tenants from year to year: to this statement said tenants objected, and insisted that the lands should be sold subject to said lease, and relied upon the Statute of Limitations, sec. 25. Said objection having been argued, the judge of the Landed Estates Court allowed said objection, and ordered the lands to be sold subject to said lease. *Held*, reversing said order, that the lands should be sold discharged from said lease. *Short's estate*, 11 Ir. Jur. n. s. 552, Ch. App.

2. *Acknowledgment to save bar of statute.*

In 1854, H., a solicitor, who had also acted as land agent to S., furnished his bill of costs. Both died. In 1862 the solicitor for S.'s executors, in answer to an application for payment, wrote that the executors had handed him the costs and account on foot of rents which had been furnished; that the bill of costs at the time it was furnished, save a small sum, was barred by the Statute of Limitations; but "the instructions I have received were to look at the matter fairly, and if anything appeared due, to settle it, notwithstanding Mrs. H. not being legally entitled to recover. I have accordingly done so; and, without entering into any particulars of the costs, but merely looking at the matter of the rents, it seems to me that Mrs. H. is indebted to Mr. S.'s executors." The letter then made a claim in respect of rents of another property, alleged to have been lost by the agent's default, and concluded—"Therefore, the executors are not in any way called on to pay, unless you can within a week show me, in any reasonable way, that Mr. H. did not act over these properties as Mr. S.'s agent, or that he used due diligence to collect the rents." The Master in a suit to administer the assets of S., found that H. was not agent over the latter property. *Held*, that the letter contained a sufficient acknowledgment to save the bar of the Statute of Limitations. *Leland v. Murphy*, 16 Ir. Ch. Rep. 500, R.

An acknowledgment in writing by an agent, after the Mercantile Law Amendment Act, is sufficient to

save from the bar of the Statute of Limitations a debt contracted before that Act. *Id.*

*See WILL, 3.*

### LOAN COMMISSIONERS, *see* STATUTE, 2.

### LORD LIEUTENANT.

#### *Action against.*

The premises of the plaintiff, proprietor of a newspaper—suspected of being concerned in treasonable practices—were entered by the police, and a quantity of private papers, printing presses, and various matters connected with the publication of the paper, were taken and detained in Dublin Castle, some of the papers so taken being wholly unconnected with treasonable practices. The plaintiff brought an action of trespass against the Lord Lieutenant for the breaking, entering, and carrying away the papers, &c. Upon motion by the Attorney-General to have the summons and plaint removed from the file, and it appearing upon affidavits made by the plaintiff, that the acts complained of were done by the Lord Lieutenant for the purpose of suppressing an alleged treasonable conspiracy, the Court directed the writ of summons and plaint be taken off the file, holding that no action was maintainable against the Lord Lieutenant for an act done by him in his capacity of Lord Lieutenant. *Luby v. Lord Wodehouse*, 11 Ir. Jur. n. s. 8; C. P.

### MAGISTRATES' LAW.

1. *Authority of magistrates to arrest.*
2. *Summary jurisdiction under st. 10 Wm. 3, c. 8; 27 G. 3, c. 33 (Ir.)*
3. *Conviction under Summary Jurisdiction Act, 14 & 15 Vict. c. 92.*
4. *Licenses.*
5. *Attachment against magistrate for not making return to certiorari.*
6. *Actions against magistrates.*
7. *Claim of title to oust jurisdiction of. See CUSTOM.*

1. *Authority of magistrate to arrest.*

*Quere*, if a magistrate has a right to arrest a person guilty of a misdemeanor before his eyes, when there has not been any breach of the peace, actual or apprehended. *King v. Poe*, 11 Ir. Jur. n. s. 133, Exch.

2. *Summary jurisdiction under st. 10 Wm. 3, c. 8; 27 G. 3, c. 33 (Ir.)*

Magistrates have no jurisdiction under statutes 10 W. 3, c. 8; 27 G. 3, c. 33 (Ir.), to convict summarily for keeping a "setting dog." *The Queen a prosecution of Mc'Carthy v. The Justices of Cork*, 11 Ir. Jur. n. s. 298, Q. B.; s. c. 16 Ir. C. L. R. 423.

3. *Convictions under Summary Jurisdiction Act, 14 & 15 Vict. c. 92.*

The Summary Jurisdiction Act (14 & 15 Vict. c. 92, s. 9, clause 7) makes a party convicted thereunder liable to fine or imprisonment. D. being convicted under this clause, was sentenced to a fine of £5, or

to be imprisoned for three months. *Held*, bad, as it was the duty of the justices to make the selection of the penalties. *The Queen v. The Justices of Wicklow*, 16 Ir. C. L. R. 23, Q. B.

*Held* also, that though bad in part and good in part, the sentence could not be amended by omitting the part bad, inasmuch as the adjudication was not an order, but a conviction. *Ib.*

#### 4. Licenses.

Where A. got a license to sell beer, &c. in premises described as "4 & 5 Gregg's-lane," and wishing to enlarge his establishment, took down the partition wall, and added another house to the above, without taking out a fresh license. *Held*, on appeal from a conviction by a magistrate for having beer on sale in his house, that the conviction must be quashed. *Molloy, appellant; Cunningham, respondent*, 11 Ir. Jur. n. s. 37, Exch.

On the argument of special cases stated by magistrates, junior counsel for the appellant begins. *Ib.*

#### 5. Attachment against magistrate for not making return to certiorari.

Conditional order for an attachment granted against a magistrate, who had been personally served with an order to make return to a writ of certiorari, the order not having been obeyed. *The Queen v. The Justices of Tipperary*, 11 Ir. Jur. n. s. 48, Q. B.

#### 6. Actions against magistrates.

On a motion to set aside a summons and plaint for false imprisonment issued against a justice of the peace on the following grounds—1. Want of notice. 2. That more than six months had elapsed between the said false imprisonment and the bringing of the action. 3. That plaintiff had recovered judgment against a co-trespasser. The Court refused to interfere, there being a question to be tried, and the case not being clear. *Malone v. Kirkpatrick*, 11 Ir. Jur. n. s. 15, Exch.

Where a man was arrested by a constable under the direction of a county inspector of constabulary, and taken before a magistrate, before whom an information was sworn, asking for the further detention of the prisoner, and the prisoner was accordingly detained, *Held*, that the fact of taking the information with the knowledge that the prisoner would be detained, did not render the magistrate acting without malice liable to an action for false imprisonment. *Donohoe v. Thompson*, 11 Ir. Jur. n. s. 52, C. P.

*Semble*, if the taking of the information were the *causa causans* of the intention, or if it had been taken for the purpose of the detention being continued, the magistrate would have been liable. *Ib.*

Plaintiff was summoned before a J.P. for an alleged trespass on another person. Defendant, on the evidence submitted to him, committed plaintiff to prison, whereupon plaintiff brought an action for false imprisonment against defendant (the Queen's Bench having quashed the conviction), but did not give the proper notice of action under 12 Vict. c. 16, s. 9. At the trial the judge told the jury the question for them was, "Did defendant really, on the evidence before him, believe in the existence of a state of facts from which, exercising reasonable care and discretion, a lawful authority to do the act might have been infer-

red by him," and that if he did, he was within the protection of the statute. A conditional order for a new trial having been obtained on the ground of misdirection, *Held*, that the judge at the trial was right, and that the *bona fide* belief must have a foundation in reason. *Malone v. Kirkpatrick*, 11 Ir. Jur. n. s. 376, Exch.

*See* DIVINE SERVICE.

### MALICIOUS PROSECUTION.

1. *Where action for, will not lie.*
2. *Questions to be left to the jury in action for.*

#### 1. *Where action for, will not lie.*

The plaint alleged that the defendant, W., having made demand of a certain sum of money on the plaintiff, L., according to the form in the Schedule to the Irish Bankruptcy and Insolvency Act, falsely and maliciously, and without reasonable or probable cause, had a summons issued out of the Bankrupt Court for the personal appearance of L.; that the bankruptcy proceedings were determined in favour of L., and that L. had suffered much in his credit and reputation by having had to appear at the said Court. To this defendant demurred. *Held* (*dissentiente* Hayes, J.), allowing the demurrer, that the plaint disclosed no cause of action. *Lunham v. Wakefield*, 16 Ir. C. L. R. 507, Q. B.; s. e. 9 Ir. Jur. n. s. 105.

*Held* also, that the suing out a commission of bankruptcy is not analogous to the proceeding by trader debtor summons. *Ib.*

*Held* (*per* Hayes, J.) that special damage was sufficiently averred. *Ib.*

#### 2. *Questions to be left to the jury in action for.*

Some stones of a peculiar nature, and capable of being identified, were stolen from A. His steward, after watching for some time, wrote to him that he knew who had stolen them, and that it was B., and that they were at B.'s house, whereupon A. directed him to go before a magistrate with this information. The magistrate then granted a search warrant to search B.'s house for the stones. Some stones were found there, which the steward swore to as being those belonging to A., upon which B. was taken into custody, and after being brought up several times before the magistrates, he was at last committed for trial at Quarter Sessions. The grand jury then ignored the bill. B. brought an action for malicious prosecution against A. The judge left these questions to the jury—1. Did A. believe that the stones found with B. were his property, and illegally taken from him? 2. If he did so believe, then had he reasonable grounds for such belief? 3. Did A. act from malicious motives in instituting proceedings against B.? *Held*, on motion for a new trial, that the judge was right in leaving these questions to the jury. *Ryan v. Parry*, 11 Ir. Jur. n. s. 136, Exch.

### MALICIOUS TRESPASSES ACT.

*See* CUSTOM.

MANDAMUS, *see* RAILWAY COMPANY, 2; SHIPPING.

## MARSHALLING.

*Judgment mortgages not entitled to have securities marshalled.*

By indentures of mortgage of the 23rd September, 1853, P. C. L. conveyed all his life estate in certain townlands, 18 in number, to the trustees of the Palladium Life Assurance Society. On the 19th December, 1856, J. Q. caused a certain judgment which he had obtained on the 16th of said December, for a sum of £1,600, to be duly registered as a mortgage against 13 out of the said 18 townlands. On the 21st January, 1857, the said P. C. L. conveyed his life estate in all his lands to trustees upon certain trusts, among which was to pay an annuity of £300 to Marcella, the wife of P. C. L. The said 18 denominations were set up and sold in the Landed Estates Court, and the said Palladium Society was fully paid out of the produce of the 13 denominations, over which J. Q. had his statutable mortgage, and which payment, while it exhausted the produce of said 13 denominations, left the produce of the remaining five in the Landed Estates Court to be otherwise disposed of. Thereupon the assignee of J. Q. insisted that he was entitled to marshal the securities so as to stand on the remaining denominations in the same priority he did upon the 13 so exhausted as aforesaid. *Held*, reversing the order of Judge Hargreave, that J. Q., being a judgment mortgagee, merely took such beneficial interest as P. C. L. could convey at the time of registering said mortgage, and that J. Q. was not entitled as such judgment mortgagee to marshal said securities, and could not, therefore, have his judgment mortgage declared to be a charge on the said remaining five denominations. *Lynch, appellant; Cooke, respondent*, 11 Ir. Jur. n. s. 102, Ch. App.

## MERCHANT SHIPPING ACT.

The 68th section of the Merchant Shipping Act, 1862, requires a ship-owner, in order to preserve his lien for freight on goods after they have been discharged from a ship, to serve a notice of his claim on the wharfinger at the time when the goods are landed; and the subsequent sections prescribe a course of procedure which the wharfinger is to adopt, after such notice shall have been given, in order to liberate the goods from the lien and the claim for freight. A cargo of timber consigned to A. was discharged at the wharf of B., and the landing of the goods was completed on the 12th of October. On the 13th of October following, C., who claimed to be owner of the ship, served a notice on B. of his claim for freight, and required him to hold the goods until his claim was discharged. B. having retained the goods in pursuance of that notice, an action of detainee was brought against him by A. On an application by B. for an interpleader order under the 9 and 10 Vic. c. 64, on the ground that he could not proceed under the Merchant Shipping Act, 1862, as the notice of the 15th of October was not served in time—*Held*, per Christian, J.—That as the Merchant Shipping Act, 1862, had imposed on the wharfinger the duty of resorting to a prescribed course of procedure in all cases coming within that statute, the question whether any particular case comes within the statute must be

decided by the wharfinger on his own responsibility, and is not the proper subject for an interpleader between the consignee of the goods and the shipowners.

*Held*, per Monahan, C. J.—That unless the case was one so clearly within the statute that the Court would on motion stay the action by A. against B., the latter was entitled to an interpleader order; and that as the Court were not prepared to do so in the present instance, the order should be granted. *Lowther v. The Belfast Harbour Commissioners*, 16 Ir. C. L. R. 182, C. P.

## MERCHANT SHIPPING ACT AMENDMENT ACT.

L., the agent at B. for the owner of a ship chartered to that port, had acquired equitable charges on the freight and cargo, and was also agent for the charterers and consignees. On the arrival of the vessel at B., possession was taken by L., and the cargo was landed and stored with the B. Harbour Commissioners' wharfingers, in L.'s name. After the landing of the cargo, the M. I. Company, who claimed to be assignees of the ship, under a bill of sale, served a notice on the B. Harbour Commissioners (purporting to be a notice under the 68th section of the Merchant Shipping Act Amendment Act, 1862), cautioning them against allowing the cargo to be removed from their wharves or warehouses, until the lien for freight claimed by the M. I. Company was discharged. The B. Harbour Commissioners having thereupon refused to deliver any portion of the cargo to L., an action of trover and detainee for the recovery of the cargo was brought against them by L., in the Court of Common Pleas. An application for an order of interpleader was made to this Court by the B. Harbour Commissioners, and a summoning order granted; but on a motion to shew cause, the Court differing in opinion, no rule was made on the motion. An interpleader suit in Chancery was then commenced, and a motion made for an injunction to stay the proceedings at law. *Held*, that the case was properly the subject for an interpleader suit, notwithstanding the provisions of the Merchant Shipping Act Amendment Act, 1862, and that the jurisdiction of the Court of Chancery was not affected by the decision of the Court of Common Pleas. *The Belfast Harbour Commissioners v. Lowther*, 16 Ir. Ch. Rep. 34, Ch. s. c. 10 Ir. Jur. n. s. 203.

## MONEY HAD AND RECEIVED.

An action for money had and received will lie for a balance of rents in the hands of an agent appointed by a power of attorney. *Dunbar v. O'Brien*, 11 Ir. Jur. n. s. 56, Exch.

## NEGLECTANCE.

The summons and plaint, after stating that defendants were the owners of a railway on which M.K. was employed as a guard, proceeded to aver that it was the duty of the defendants to keep the said railway, and the engines and carriages thereon, in proper and sufficient order and repair for the safe conveyance of the said M.K. as such guard; but defendants not regarding their duty, did not keep the said railway, &c., in such proper and sufficient order, &c., but per-

mitted said railway, &c., to get out of such proper order, &c., whereby an accident happened, and the said M.K. was killed. On demurrer this summons and plaint was held bad (*dissentiente O'Brien, J.*), as not showing facts from which the duty averred could flow, and as not showing that the defendants were aware of the state of the railway engines and carriages. *M'Kinney v. The Irish North Western Railway Company*, 11 Ir. Jur. n. s. 228, Q. B.

See DAMAGES, 3.

### NEW TRIAL.

1. *Where verdict against the weight of evidence.*
2. *On the ground of surprise and absence of witnesses.*
3. *Where verdict under £20.*
4. *Practice and costs.*
5. *On the ground of excessive damages.* See DAMAGES, 3; DEED, 1.

#### 1. *Where verdict against the weight of evidence.*

In an action on a bill of exchange, and for money paid to defendant's use where the question on the acceptance was whether it was a forgery, and depended on the credit of the witnesses, and where there was no evidence except that of the parties as to whether the other moneys were paid in discharge of a prior debt or advanced, and where the jury made a clear mistake on a special defence of estoppel, the Court granted a new trial on the ground that the verdict was against the weight of evidence, although the judge who had tried the case reported that he saw no reason to be dissatisfied with the verdict. *O'Flaherty v. Cooke*, 11 Ir. Jur. n. s. 51, C. P.

A. brought an ejectment on the title against B. for the recovery of the lands of Kilgare, or Kilgariff. B. took defence to all except 64A., which he admitted had been demised by lease in 1770: the term in the lease had expired, and plaintiff was the assignee of the reversion. The question was, whether the whole denomination of Kilgariff, containing 283A. Or. 18r. or only 64A., passed by the lease of 1770. There was conflicting evidence at the trial, and the jury found for plaintiff by direction of the Judge. *Held* on motion to enter verdict for defendant, or for a new trial, that there must be a new trial, but that no costs should be given. *Gunning v. Skerrett*, 11 Ir. Jur. n. s. 200, Exch.

#### 2. *On the ground of surprise and absence of witnesses.*

The defendant in an ejectment on the title having directed a subpoena to be served on the plaintiff requiring him to attend at the trial, which subpoena was not personally served on the latter, but left at his house, and kept back from him by the members of his family, the Court, upon the defendant's affidavit that she had so caused the subpoena to be served, and that she relied upon his evidence to prove the existence of an equitable agreement which would be a bar to the ejectment, made absolute a conditional order for a new trial, although the plaintiff made an affidavit denying the existence of the agreement.

*Semble*—The rule that a new trial will not be granted on account of the absence of a witness, when there appears no reasonable probability that his

attendance would lead to a different verdict, does not apply to a case in which the absent witness is not a third person, but one of the parties in the action. *The Earl of Mayo v. Beniley*, 11 Ir. Jur. n. s. 321, C. P.

#### 3. *Where verdict under £20.*

*Quare*—Has the rule that the Court will not grant a new trial on the ground of the verdict being against evidence, where the verdict is under £20, been altered by the Common Law Procedure Acts of 1853 and 1856? *Chesney v. O'Neill*, 14 Ir. Jur. n. s. 124, Q. B.

#### 4. *Practice and costs.*

Upon the argument to make absolute a conditional order for a new trial, the Court will not go into a question of the improper rejection of evidence unless at the time of the trial the judge before whom the action was tried was asked to take a note of such rejection. *Walshe v. Browne*, 11 Ir. Jur. n. s. 49, C. P.

Where a new trial is granted on the ground of misdirection, each party abides his own costs of the former trial as well as of the motion. *Parker v. Cathcart*, 11 Ir. Jur. n. s. 49, C. P.

### PARTIES, *see* EQUITY, 3.

### PARTNERSHIP.

By agreement between J. and W. Wallace of the first part, and G. of the second part, G. bound himself, "in consideration of salary and others," to do certain services for the parties of the first part, for the period of three years; and in consideration of the said services, the said J. and W. Wallace, "as co-partners and as individuals, and their company firm," agreed to pay the said G. a salary of £500, and also that he should be entitled to a sum equivalent to one-third part of the free profits for the said period, of the business of the first party; the said profits to be ascertained "by balance sheets, to be prepared by the said first party, on the principle hitherto adopted by them," and at such periods as they should think proper. Before ascertaining the free profits, J. W. and W. W. to have £500 a year each; the other sums payable to G., besides his salary not to be demandable by him during the period of his engagement, but to be payable by three equal instalments, as follows, &c., with interest on the two last. The plaintiff was the drawer of certain bills accepted by J. and W. W., and sued the defendant as a partner in the firm. *Held*—That the defendant was not a partner. *Shaw v. Galt*, 16 Ir. C. L. R. 357, Q. B. s. c., 9 Ir. Jur. n. s. 165.

*Semble*—That "free profits" are equivalent to net profits. *Id.*

### PATENT.

The prior publication of a patent in England does not render void an Irish patent afterwards granted for the same invention in Ireland. Where, therefore, one H. B. had on the 1st May, 1852, obtained letters patent in England for a certain invention, and afterward on the 4th of January, 1853, obtained letters patent for the same invention in Ireland, it was held that the Irish patent was not rendered invalid by

reason of the prior publication of the said invention in England. *Magill v. Gibson*, 11 Ir. Jur. n. s. 164, Ch.

### PENALTIES (ACTION FOR.)

See STATUTE, 3.

### PETTY SESSIONS.

See CUSTOM, 1.

### PETTY SESSIONS (CLERK OF.)

See QUO WARRANTO.

### PLEADING (EQUITY).

#### Bill of review.

A petition in the nature of a bill of review must be, and state that it is, filed with the leave of the Court, or it will be dismissed at the hearing. *Connor v. Reeves*, 16 Ir. Ch. Rep. 398, R.

*Quere*—Whether the Court, at the hearing of the cause, would give leave to amend by stating that the petition was filed with the leave of the Court? *Ib.*

An order for leave to file a petition of review and supplement will not be made on a motion *ex parte*. *Ib.*

### PLEADING (LAW).

1. *Pleading in ejectment for non payment of rent*
2. *Pleading in action for wrongful distress.*
3. *Requisites of plea of privilege in action for libel.*
4. *Effect of traverse of goods sold and delivered, &c.*
5. *Embarrassing pleadings generally.*

#### 1. *Pleading in ejectment for non-payment of rent.*

To a summons and plaint in ejectment for non-payment of rent, directed to "James M'Blain and others, defendants," defendant (James M'Blain) pleaded, "Defendant does not hold the premises in the plaint mentioned as tenant to plaintiff, as alleged." *Held*, on motion to set aside this plea as embarrassing, that it was the proper plea. *Keene v. M'Blain*, 11 Ir. Jur. n. s. 410, Exch.

#### 2. *Pleading in action for wrongful distress.*

A plea to an action for a wrongful distress must aver that defendant in making the distress duly complied with the provisions of 9 and 10 Vict. c. 3. *Shea v. Plunkett*, 11 Ir. Jur. n. s. 397, Exch.

#### 3. *Requisites of plea of privilege in action for libel.*

Although it be no ground of general demurrer to a plea of privileged communication to an action for libel that it does not disclose the grounds of the defendant's belief, yet if the plea state that the defendant acted upon information which he had received, the Court will grant a motion to have it amended by setting forth the nature of the defendant's information or the grounds of his belief. *Godfrey v. Cross* (12 Ir. C. L. 333) followed. *Armstrong v. Fortescue*, 11 Ir. Jur. n. s. 129, C. P.

#### 4. *Effect of traverse of goods sold and delivered, &c.*

To an action for goods sold and delivered, and bargained and sold, the defendant pleaded that no goods were sold and delivered, or bargained and sold as alleged. At the trial he proved that the goods were sold and delivered on the terms of the defendant being at liberty within five weeks to accept a bill at

three months for the invoice price. *Held*, on motion to turn verdict for the plaintiff into one for the defendant, that under the plea pleaded the defendant could not rely on the unexpired credit. *Boate v. M'Cracken* (6 Ir. C. L. R. 259) distinguished. *Leach v. Palmer*, 11 Ir. Jur. n. s. 395, C. P.

#### 5. *Embarrassing pleadings generally.*

A count in a summons and plaint against an attorney by a client for negligence in conducting a case for him where he was defendant, averred (*inter alia*) "Though he knew that, except as to £15 lodged in Court by the said H. Hall, the said H. Hall, the now plaintiff, had a good defence, he neglected," &c. Another count averred that defendant "for a long time" neglected to pay and apply certain monies which he had received from plaintiff. *Held*, on motion to set aside or amend the count, that the first paragraph must be struck out, and in the second that the word "long" be changed to "unreasonable," but that the defendant should not have his costs. *Hall v. Clay*, 11 Ir. Jur. n. s. 288, Exch.

Plaintiff was a churchwarden. Defendant sought to bury a corpse in part of a churchyard where he was not authorized. Plaintiff quietly tried to prevent him, whereupon defendant assaulted him. Plaintiff replied to defendant's pleas, alleging the above facts *in extenso*, and this replication was (after argument on a motion to have it set aside) ordered, on consent, to be amended, on the grounds that it did not sufficiently appear on the face of the replication whether plaintiff relied on his character of churchwarden for preventing defendant from burying the corpse where he was not authorized, or on authority given to him so to do by the incumbent. *Welsh v. Cooke*, 11 Ir. Jur. n. s. 36, Exch.

In an action against a railway company for not delivering plaintiff's cattle in reasonable time, defendants pleaded *inter alia* "that the reasonable time in plaint was such that defendants should not contract to be in time for any fair in the conveyance of the cattle." *Held*, that this plea should be amended as embarrassing. *Matthews v. Dublin and Drogheda Railway Company*, 11 Ir. Jur. n. s., 56, Exch.

To an action brought by the plaintiff to recover the amount of a dividend upon certain preference shares in the defendants' railway, the defendants pleaded, that "pursuant to the powers in that behalf given them by the said Act of 1858 they issued the said E preference shares, upon the terms that no dividend thereon should be declared by the defendants, or paid by them out of the profits of said railway, unless where said profits exceeded the pmount sufficient to pay all dividends and arrears of dividends for the time being on said A, B, and C preference shares; and that the profits never exceeded the amount sufficient," &c. The Court refused an application by the plaintiff that this plea should be set aside or amended. *Coey v. The Belfast and Co. Down Railway Company*, 11 Ir. Jur. n. s. 127, C. P.

In an action against an attorney for investing the money of his client on insufficient security, whereby it was lost, the defendant pleaded, with others, the following defences:—1. "That the plaintiff did not retain the defendant to invest any money on good and



sufficient security," 2. "That the plaintiff did not retain the defendant to invest or lay out any sum of money on mortgage." 3. "That before the retainer and contract alleged, the plaintiff and one W. B. informed the defendant that the plaintiff had agreed to lend the sum of £500 to the said W. B., and to act as book-keeper, &c. to the said W. B. in consideration of receiving eight pounds per cent. per annum upon said sum of £500, and a salary of £100 a year, and the said W. B. has agreed to give as a counter security for the said sum of £500 the lease of certain houses in Abbey-street, and that the plaintiff and the said W. B. then requested the defendant to have a proper deed prepared to carry out the said agreement, and that accordingly the defendant did cause a proper deed to carry out said agreement to be prepared by counsel, and that the draft of said deed was afterwards fully explained by the defendant to the plaintiff, and was read over and approved of by the plaintiff, and was afterwards engrossed and executed by the plaintiff and the said W. B., and was acted upon by the plaintiff and the said W. B., and that the said deed was prepared and executed with the blanks that now appear thereon at the special instance and request of the plaintiff, and contrary to the advice of the defendant given to the plaintiff. That the said sum of £500 was paid by the plaintiff to the said W. B. previously to the execution of the said deed, and that such payment was made without the knowledge or consent of the defendant, contrary to the advice given by the defendant to the plaintiff, and that save as aforesaid the defendant did not enter into any contract with the plaintiff to invest any money upon any security whatever, or that any security should be procured by the defendant for the repayment of any money, or that any conveyance or grant whatsoever, should be obtained for the plaintiff." The plaintiff having applied to set aside these defences, the Court refused the motion. *Murphy v. Neilson*, 11 Ir. Jur. n. s., 213, O. P.

In an action for goods sold and delivered, a plea "that no money was payable by defendant to plaintiff for goods sold and delivered by plaintiff to defendant as alleged," will be set aside as embarrassing and too large. *Kennedy v. Kelly*, 11 Ir. Jur. n. s. 379, Exch.

A brought an action against B. for false imprisonment. B. pleaded that he did the acts alleged solely as governor of a military prison, to which plaintiff was committed. *Held*, on motion to set aside this plea, that it must be amended by adding the words, "in pursuance of the Mutiny Act, and any Acts incorporated with it." *Murphy v. Fielding*, 11 Ir. Jur. n. s. 415, Exch.

#### POOR LAW; *See* CEMETERY.

*Liability of Poor Law Guardians to action for damages. See* ACTION, 5.

#### POSSESSORY SUIT.

In a possessory suit the petitioner is entitled to an injunction on proof of interrupted possession (save by the act complained of) for three years preceding the date of the filing of the petition. *O'Neill v. McErlaine*, 16 Ir. Ch. Rep. 280.

A possessory petition should not rely on any title other than the triennial possession. *Ib.*

A possessory petition cannot be amended. *Ib.*

Issues may be directed in a possessory suit. *Ib.*

#### POWER OF ENTRY.

By a bill of sale of furniture in a dwelling-house, power was given to the grantees and their agent or agents, in a certain event, at any time or times thereafter to enter in and upon the dwelling-house and seize and sell the furniture. The event having happened, the grantee's agent came to the dwelling-house and demanded admittance by the hall-door, and this having been refused, he effected an entrance by opening a window, and then made a seizure. *Held*, that this entry was illegal and not justified by the power of entry contained in the bill of sale, the agent not having disclosed his authority or stated the purpose for which he demanded admittance. *Arkins v. Brunton*, 11 Ir. Jur. n. s. 149, Q. B.

A bill of sale gave a power of entry on a dwelling-house to two grantees, A. and B. "or their agent or agents." *Quære*, would this authorize an entry by an agent appointed by A. alone "on behalf of himself and B." *Ib.*

#### PRACTICE (EQUITY).

1. *Amendment.*
  2. *Revivor.*
  3. *Re-instating cause petition.*
  4. *Substitution of service.*
  5. *Oral examination.*
  6. *Production of documents.*
  7. *Copies.*
  8. *Jurisdiction of, and appeals from orders of, masters.*
  9. *Practice as to declaration of future rights.*
  10. *Practice on Petty Bag Side.*
- See* EVIDENCE.

#### 1. *Amendment.*

Where petitioner filed his cause petition praying that a sum of money secured by the promissory notes of a married woman should be paid out of her separate estate, and where the Court made a decree for said petitioner on the 26th of April, but where after the making of said decree, viz., on the 22nd June, it was discovered that the petition was defective for want of parties in this, that the trustee of said settlement was omitted as a party respondent, *Held*, that the petitioner should at that late stage of the case have liberty to amend. *Dunlop v. Dunlop*, 11 Ir. Jur. n. s. 384, Ch.

#### 2. *Revivor.*

The final decree in an administration suit ascertained the rights of the parties entitled to the assets, in five shares, subject to them, and directed the petitioner's costs to be paid by the respondents, the two executors, and the respondent's costs to be paid in certain proportions out of the several shares. The assets had been paid into Court, except a small sum which one of the respondents was ordered by the decree to pay. After the final decree, and before his costs were taxed, the sole petitioner died. *Held*,

that the suit might be revived against both the respondents. *Fortuna v. Walsh*, 16 Ir. C. L. Rep. 482, R.

### 3. Re-instating cause petition.

A cause petition which stood dismissed under the 27th General Order of 1861, was re-instated upon the sole ground (although some proceedings had been had upon it, and there had been some delay on the part of a respondent) that the petitioners were minors, and only on the terms that the respondent's costs of the motion should be paid by the petitioners within ten days after taxation, and otherwise the motion to stand refused with costs without further order. *Thompson v. Thomas*, 11 Ir. Jur. n. s. 143, R.

### 4. Substitution of service.

T. R., living in Rio de Janeiro, instructed his London solicitors, De Jersey and Micklem, of London, to appear for him in certain administration suits pending in the Irish Court of Chancery. Said London solicitors employed an Irish solicitor to appear in said suits; and with said London solicitor, and never with said T. R., whose exact address they then, as now, were ignorant of, did said Irish solicitor entirely correspond in said matters. Another and a different cause petition in relation to certain claims of said T. R. in said suits having been filed by one B., a motion was thereupon made to the late Master of the Rolls to substitute service on said Irish solicitor for said T. R., whereupon his Honor made an order making no rule on said motion. *Held*, reversing the order of the Master of the Rolls, that the motion ought to have been granted, and service should have been substituted. *Barry v. McCarthy*, 11 Ir. Jur. n. s. 361, Ch. App.

A. B., who resided in London, appeared as respondent in said administration suits by her Irish solicitor, G. O'B. K., but said A. B. had not instructed her said solicitor to appear in said other suit filed by said B. *Held* also, that service should be substituted on said G. O'B. K. for said A. B. *Ib.*

### 5. Oral examination.

A party who had filed no affidavit (other than her discharge) in the Master's office, and who has not presented herself for cross-examination, may nevertheless be examined *viva voce* at the hearing of the cause on exceptions, and on the merits. *O'Sullivan v. Edgeworth*, 11 Ir. Jur. n. s. 168, R.

### 6. Production of documents.

The petitioners, after some proceedings in the Master's office, filed an affidavit stating that the matters in issue would appear from the documents mentioned in schedule thereto; and on the case being referred again to the Master for re-consideration on this affidavit, he ordered them to produce all the documents in their power relating to the matter, and referred to the affidavit in his order. They never appealed from that order. Afterwards they refused to produce certain of the documents, and filed an affidavit denying that these related to the matter in issue. The Master ordered them produce these documents, and they appealed from that order. *Held*, that they were concluded by the order not appealed from, and by the

affidavit, and were bound to produce the documents. *Reilly v. Reilly*, 11 Ir. Jur. n. s. 166, R.

### 7. Copies.

On special motion the Master of the Rolls, will permit an attested copy of amendments to a cause petition to be taken out by a respondent who has already had to take out an attested copy of a common copy deposited in the Master's office, notwithstanding *Birch v. Hutchinson* (1 L. & G. temp. Sugd. 363), because the practice of depositing a common copy of the petition in the Master's office is irregular, and to save expense to the respondent. *Bennett v. Wolfe*, 11 Ir. Jur. n. s. 189, R.

### 8. Jurisdiction of, and appeals from orders of, Masters.

The Masters have not jurisdiction to rehear causes referred to them under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850. *Cooke v. Franklin*, 16 Ir. Ch. Rep. 69.

*Nason v. Peard* (12 Ir. Ch. Rep. 30) is overruled by *Sloan v. McAllen* (8 Ir. Jur. n. s. 201). *Ib.*

The time for appealing from a Master's order is to be reckoned from the date of the signature of the order. *Ib.*

### 9. Practice as to declaration of future rights.

The Court will not declare future rights which may never arise, but will leave them to be determined when they come into possession. 16 Ir. Ch. Rep. 520, R.

### 10. Practice on Petty Bag side.

A recognizance having been put in suit against A., one of the conuzors resident out of the jurisdiction service of a writ of *scire facias*, by serving it on the solicitor of A. in an independent suit, and by transmitting a copy of it through the post by a registered letter addressed to A., was deemed good service. *The Queen v. Swan*, 16 Ir. Ch. Rep. 21, R.

*Semble*—Motions on the Petty Bag side of the Court must be made in Term. *Ib.*

## PRACTICE (LAW).

1. Indorsement of service.
2. Venue.
3. Security for costs.
4. Extension of time for pleading and trial.
5. Rule to proceed to trial under s. 106 of Common Law Procedure Act.
6. Striking jury under old system.
7. Inspection of documents.
8. Interrogatories.
9. Particulars.
10. Staying proceedings under s. 22 of Chancery Regulation Act.
11. Payment behind back of attorney; effect of.
12. Reference to arbitration.
13. Garnishee proceedings.
14. Order obtained by uncertificated attorney.

### 1. Indorsement of service.

Where in an action of trespass against several defendants, judgment was allowed to go by default, and the indorsement of the service of the writ on one of

the defendants, omitted to state the day of the week of such service, the Court, upon the defendants' application, set the judgment aside, the plaintiff being at liberty to take the writ off the file, and serve it again. *Mulholland v. M'Court*, 11 Ir. Jur. n. s. 13, C. P.

## 2. Venue.

When defendant has undertaken to accept short notice of trial, the Court will not grant a motion to change the venue. *M'Laughlin v. Crawford*, 11 Ir. Jur. n. s. 58, Exch.

## 3. Security for costs.

On an application by defendant that plaintiff, a horse-dealer, having no fixed place of residence in Ireland, but merely temporary lodgings in Dublin, be obliged to give security for costs in an action on a warranty of a horse—*Held*, that the motion must be refused, but without costs. *Jones v. Haalem*, 11 Ir. Jur. n. s. 38, Exch.

Obtaining an extension of time to plead is no waiver of the right to obtain security for costs. *Griffiths v. Blator*, 16 Ir. C. L. R. app. i. Q. B.

The fact that the Court of Chancery has directed that an action shall be brought, is no ground for not obliging a plaintiff to give security for costs. *Swan v. Reade*, 11 Ir. Jur. n. s. 58, Exch.

See EJECTMENT; LANDLORD AND TENANT.

## 4. Extension of time for pleading and trial.

Defence filed after time for pleading expired. The Court will allow the defence to stand, if a case be made such as on an original application would induce the Court to let defendant in to plead. *M'Morogh v. Kearney*, 16 Ir. C. L. R. app. iii. Q. B.

Plaintiff applied to the Court that they should extend the time for his going to trial to the next Michaelmas after-sittings, on the ground that a material witness was in America, and would not be here till then. *Held*, that the application must be refused with costs, plaintiff not giving any reason why the witness should not be here before the time stated. *Magrath v. Fletcher*, 11 Ir. Jur. n. s. 40, Exch.

A reasonable time will be given to a defendant to prepare his defence, and procure the attendance of his witnesses. *Murphy v. Fielding*, 11 Ir. Jur. n. s. 415, Exch.

## 5. Rule to proceed to trial under s. 106 of Common Law Procedure Act.

A writ of summons and plaint was issued on the 7th of December, 1864. Defences were filed on the 20th of December, 1864. The plaintiff not having proceeded to trial for three terms, defendant, in Michaelmas Term, 1866, entered and served the rule under sec. 106 of the Common Law Procedure Act, 1853, to proceed to trial at the sittings next after twenty days from service. On the 20th of January, 1866, plaintiff served notice of trial, and with it notice of a demurrer that day filed to one of the defences. On the 27th of January he withdrew notice of trial. *Held*, that the demurrer was an "other subsequent pleading" within the section of the Act, that the plaintiff had three whole terms from its filing to proceed to trial, and therefore that the defendant was not

entitled on the above state of facts to enter a peremptory order for the payment of his costs under the above section. *Symes v. Mahon*, 11 Ir. Jur. n. s. 173, Q. B.

## 6. Striking jury under old system.

The Court will not order a jury to be struck under the old system, unless it is shown that such jury will be likely to be more fair and impartial than one struck in the ordinary way. *Hughes v. Shirley*, 16 Ir. C. L. R. app. vi. Cons. Ch.

See JURY AND JURY PROCESS.

## 7. Inspection of documents.

The plaintiff in this action was for breach of agreement relating to the sale of sheep for ready money. The defendant filed an affidavit denying that there was any agreement whatever, but stating that he had on one occasion written a letter to the plaintiff relating to a sale on credit; that he had no copy thereof, and had seen none since the writing, and that it was necessary for his defence to see said letter, and applied for an order to inspect and take a copy thereof. *Held*, that he was entitled to such an order notwithstanding his denial of the contract. *Cuffe v. Wilson*, 16 Ir. C. L. R. app. iv. Q. B.

In an action for breach of promise of marriage, to which the defence is a simple denial of the promise, the Court will, on motion of the plaintiff, direct an inspection of, and interchange of, copies of the letters which have passed between the parties. *Chute v. Blennerhasset*, 9 Ir. C. L. R. app. ix. C. P.

## 8. Interrogatories.

In an action for libel, the plaintiff having applied for leave to furnish interrogatories to the defendant, the Court refused to allow the following interrogatories to be exhibited. 1. Whether the defendant ever saw or read the writing complained of, or ever corresponded, communicated or conversed with any person in relation to it? 2. Whether any person to the knowledge or belief of the defendant ever read said writing? 3. Whether the defendant composed or caused to be composed and transmitted or delivered said writing to any person? 4. Whether the defendant caused lithographed copies of said writing to be made, and if yes, what became of said copies. *Armstrong v. Fortescue*, 11 Ir. Jur. n. s. 302, C. P.

On a motion for liberty to exhibit certain interrogatories to defendant, a police magistrate, with respect to plaintiff's arrest by order of defendant, the following was held to be too general—"Was any information sworn before you on that evening? If so, by whom; where is such information, and at whose instance was such information sworn?" And it was ordered to be amended as follows—"Was any information sworn before you on that evening relative to the subject-matter of this suit, and upon which any action was taken by you or by your authority or concurrence relative to the property of the plaintiff?" *Luby v. Strong*, 11 Ir. Jur. n. s. 14, Exch.

## 9. Particulars.

Particulars of the occasions on which slanderous words were spoken, refused, it not appearing that the information was necessary to the defendant in order

to enable him to defend the action. *Ardrey v. Gardner*, 11 Ir. Jur. n. s. 47, Q. B.

10. *Staying proceedings under s. 22 of Chancery Regulation Act.*

Where upon an application under 13 and 14 Vic. c. 89, s. 22, to stay proceedings at law commenced against an administratrix, it appeared that considerable delay in proceeding with the order of reference made by the Court of Chancery in an administration suit had taken place, the Court made the order to stay proceedings, but put the administratrix under terms to proceed before the Master within one week. *The Wexford Harbour Embankment Company v. Redmond*, 11 Ir. Jur. n. s. 215, Cons. Ch.

11. *Payment behind back of attorney, effect of.*

Defendant paid the amount of his debt to plaintiff without informing plaintiff's attorney, and without paying the costs. The attorney, knowing nothing of the payment, marked judgment, and levied an execution. *Held*, on motion to set aside the judgment, that the motion must be refused with costs, but that the judgment should be reduced by the amount paid. *Render v. Deacon*, 11 Ir. Jur. n. s. 414, Exch.

12. *Reference to arbitration.*

A contract contained a stipulation for referring disputes arising under it to the arbitration of parties residing in England. Upon an action being brought upon the contract in this country, a motion to refer the matter to the arbitrators named was refused, there being no provision in the stipulation for compelling the attendance of witnesses belonging to this country before the arbitrators, and the question likely to arise being one as to facts existing in this country. *Macken v. Alexander*, 11 Ir. Jur. n. s. 372, Q. B.

13. *Garnishee proceedings.*

A conditional order under the Common Law Procedure Act, 1856, s. 63, will be made against garnishees, although some of the debts which have been attached do not exceed £4. *Doherty v. M'Daid*, 11 Ir. Jur. n. s. 60, Cons. Ch.; s. c. 16 Ir. C. L. Rep. App.

14. *Order obtained by uncertificated attorney.*

On an application to discharge a conditional order obtained by an uncertificated attorney—*Held*, that the motion must be refused, but without costs, as there was a case reported where a similar motion was granted. *Dowling v. Adams*, 11 Ir. Jur. n. 289, Exch.

But *semble*, the Court will refuse such a motion, with costs, for the future. *Id.*

15. *Effect of order to amend to keep action in existence.*

A plaint was issued on October 14th, 1865; filed November 6th, ordered to be amended, November 13th, and no time was fixed within which the amendment was to be made. A second plaint for the same cause of action was issued May 14th, 1866. Defendant pleaded action pending to this; but the judge was of opinion that no action was pending, and the jury found for plaintiff, with £50 damages. *Held*,

on motion for a new trial that the order of amendment, specifying no time within which the amendment was to be made, and, therefore, allowing it to be made at any time within a year, had the effect of keeping the action in being for a year; and, therefore, that the former action was pending at the time the second was brought, and, consequently, that the verdict must be entered for defendant. *Doran v. Chancellor*, 11 Ir. Jur. n. s., 412, Exch.

16. *Whether documents referred to, but not set out in pleadings, can be looked at on demurrer.* See EJECTMENT, 1.

PREROGATIVE.

See ALIENATION.

PRESCRIPTION.

See WAY, 1.

PRESUMPTION.

Of date of interpolation in deed. See DEED, 2.

PRINCIPAL AND AGENT.

See CONTRACT, 3, (b.)

PRISONER.

Action by for being discharged against his will. See ACTION, 3.

PROBATE.

1. *Grants of probate and administration.*
2. *Pleading and practice.*
3. *Issues, trial, and evidence.*
4. *Costs.*
5. *Confirmation and re-sealing.*
6. *Curators and minors.*
7. *Attachment for non-payment of rent to receiver.*

1. *Grants of probate and administration.*

A will did not name any executor, but the testator named A. and B. "trustees to carry out his will as named, with full power to take full charge of any property he left." *Held*—that they were executors according to the tenor. *Hasler v. Salmon*, 11 Ir. Jur. n. s. 140, Pr.

The Court will not grant administration to the goods of a deceased person who left surviving several children and next of kin, supposed to be dead, but will require the party applying to take out in the first instance a grant to one of such children. *In the goods of Galkigan*, 11 Ir. Jur. n. s. 312, Pr.

A. B. a captain in the Bombay Staff Corps, who was in England on leave of absence, left his lodging in London on the 4th February, 1866, in a cab, with his luggage, consisting of several articles, stating to his landlady that he was going by the Irish mail train to Ireland (where his relations resided). He had never since been heard of, nor could anything be heard of his luggage, though advertisements and inquiries had been made in every quarter. *Held*, under the circumstances, that a grant of administration with his will annexed might be granted to his brother on giving security, and on the renunciation of the executor named in the will, as the Court could not

dispense with justifying security. *In the goods of Mccredy*, 11 Ir. Jur. n. s. 311, Pr.

Where M. L. a sole next of kin of A. and B., her deceased brother and sister, had been of weak mind and of advanced age, and a commission in Chancery had been granted to inquire into her state of mind, but same had been directed not to issue until further order, and had never been acted on, and by the order in Chancery she was expressly authorised to manage and receive the income of the property belonging to her said deceased brother and sister, the Court of Probate refused to give letters of administration to the goods of the said brother and sister to a nominee of M. L., the sole next of kin, limited to the income thereof only, and during her life, under the 78th sec. of the Probate Act of 1855—one of the persons who would be next of kin of M. L., such sole next of kin, if dead, opposing the motion, but directed an application to be made to the Court of Chancery to appoint a person to be named to apply for administration. *Lawler v. Metcalf*, 11 Ir. Jur. n. s. 380, Pr.

The mutual will of a domiciled Hanoverian subject and his wife not attested, having been, on the husband's death, duly decreed for in the proper Court in Hanover, the Court here gave administration of his goods with a certified translation of the same to the nominee under a power of attorney from the widow (no executor being named, and there being no issue save a minor under 21), who was by the Hanoverian law the party entitled in her own right, and as guardian to the minor. *In the goods of Von Reitzenstein*, 11 Ir. Jur. n. s. 60, Pr.

It is no ground for the Court passing over the surviving executor that he is old, and in embarrassed circumstances, and without interest, but the grant was ordered to be impounded for fourteen days. *Watson v. Watson*, 11 Ir. Jur. n. s. 310, Pr.

Where a son who was entitled under a settlement, made when he was in this country, to a part of a trust fund, afterwards went to America, and had not been heard of for sixteen years, save that it was sworn, on information and belief, that he had been killed in Savannah in 1851; and his father, who was a clerk in an American house in Cork, by his will, in 1859, treated him as dead, and disposed by his will of such trust fund in favor of the plaintiff, who was his second wife, and whom he named his executrix. On proof of advertisements duly issued in America, and of no answer, the Court gave to the plaintiff, as legatee in her husband's will, administration of the goods of the son, but required justifying security. *Murphy v. Hayes*, 11 Ir. Jur. n. s. 399, Pr.

A joint grant of letters of administration, with the will annexed of the deceased, was given to two residuary legatees, who each applied for it, but justifying security was required. *Mulvany v. Mulvany*, 11 Ir. Jur. n. s. 399, Pr.

A will apparently duly executed, lodged, but not propounded, passed by, on affidavits of undue execution, and administration given as in case of intestacy. *In the goods of Neale*, 11 Ir. Jur. n. s. 420, P.

A solicitor drew from instructions a draft will settling in strict settlement on testator's sons and daughters his real estates, with powers of jointuring, charg-

ing portions, and giving maintenance; but in these latter the sums were all in blank, and also the names of trustees. The testator had also an epitome of the draft, also in blanks in these respects, in his possession for a considerable time, and approved of it. On his taking suddenly ill, the solicitor, of his own motion, filled up the blanks, and did not communicate at all to the testator how they had been filled up, and the will was so executed. *Held*, that the matters so filled in, could not form part of the probate, but that the rest of the will was valid. *O'Reilly v. O'Reilly*, 11 Ir. Jur. n. s. 216, Pr.

A will prepared by a solicitor from instructions of the testator, and the contents deposed to by him, allowed to be proved, though the original was lost, and supposed to have been thrown out by the widow of the testator in a bed in which she had concealed it. The Court, however, required evidence of the provisions made by settlement for next of kin not substantially provided for by said will, to show that the will was, in fact, an equitable one. *M'Cracken v. M'Cracken*, 11 Ir. Jur. n. s. 380, Pr.

## 2. Pleading and practice.

The defendant propounded in the declaration a will which named him sole executor, and also a legatee. A previous will was alleged in the plea by the plaintiff, who was a co-executor in it with the defendant; but that will did not contain a legacy, which the last will did, for the defendant. The defendant had appeared as executor in the last will, but was in fact also a next of kin. *Held first*—that the earlier will might be alleged in the suit; and *secondly*, that the plaintiff was entitled, if he pleased, to reply to the plea; and in his replication impeaching the first will to state his interest as next of kin. *Tierney v. Byrne*, 11 Ir. Jur. n. s. 218, Pr.

To a declaration alleging a will, a plea alleging undue execution of that will, as well as incapacity and undue influence, and also averring that such will was not the last will of the said deceased, for that the said deceased made his last will, &c. (alleging a former will), is a good plea, provided the former will is alleged with the same formalities as are required in a declaration. *Berry v. Hillas*, 11 Ir. Jur. n. s. 119, Pr.

In cases in which the defendant has duly appeared to the warning, but omits to plead to the declaration, the party propounding the will is entitled, on motion, to set aside the caveat and appearance and get probate in common form, and will get the costs of the motion but not of the cause. *Byrne v. Reddy*, 11 Ir. Jur. n. s. 398, Pr.

When the interest of an alleged next of kin is disputed on the ground of the illegitimacy of his ancestor, the objecting party may require the party whose kindred is objected to to file a pleading setting out his kindred, and the Court will direct him to do so. *Eastwood v. Eastwood*, 11 Ir. Jur. n. s. 310, Pr.

Notice of motion is requisite for leave to file a suggestion of the death of a plaintiff who was named sole executor of the deceased in the will which was in dispute, and to whose goods letters of administration had been granted to the applicant. *M'Carthy v. Mathews*, 11 Ir. Jur. n. s. 120, Pr.

An affidavit made by one of the parties in the

cause, stating that an intended witness was suffering from rheumatic pains, and had lost the use of his limbs, and had refused to see a doctor, alleging that he could be of no use to him, and averring that there was no chance of his being able to attend at the trial. *Held*, insufficient to get a commission. *Tierney v. Byrne*, 11 Ir. Jur. n. s. 179, Pr.

### 3. Issues, trial and evidence.

The plaintiff's testator had propounded a will in which he was the executor and principal legatee. The intervenient propounded a former will, which appointed the same executor, who was also named a principal legatee, and the intervenient was named a legatee also. Both of these wills were impeached by the defendant on the grounds of forgery, and undue execution, and the last also for want of capacity and undue influence. The witnesses to them were different persons. *Held*, that an issue as to both wills should be sent to the jury. *Mullarkey v. Mathews*, 11 Ir. Jur. n. s. 220, Pr.

The Court will not order a special jury to be struck according to the old system, unless an affidavit be filed to shew the necessity for doing so. *Woods v. Murphy*, 11 Ir. Jur. n. s. 61, Pr.

The Court will not send a case for trial to the assizes merely on the ground that the great majority of the witnesses on both sides and the parties reside in the country; or on the ground that the characters of the parties are known to the jurors at the proposed assizes; and that the result will probably depend on the credit to be given to the parties. *Caswell v. Doyle*, 11 Ir. Jur. n. s. 219, Pr.

The declarations of a testator made after the act of revocation of a will of the fact of his having revoked the will by burning it, *held* at Nisi Prius inadmissible to prove revocation. *Mullarkey v. Mathews*, 11 Ir. Jur. n. s. 218, Pr.

### 4. Costs.

Where a defendant, as next of kin, has pleaded undue influence with other pleas, and promptly withdraws them, on finding that they could not be sustained, the Court will not impose costs on him. *Irwin v. Blakeley*, 11 Ir. Jur. n. s. Pr.

Where the landlord, on a motion for leave to bring an ejectment, agrees to accept less rent than is due to him, he is entitled to the costs of the motion. *O'Reardon v. The Attorney General*, 11 Ir. Jur. n. s. 399.

### 5. Confirmation and re-sealing.

Where by mistake a confirmation omitted to state that the inventory included in it, as it did, property in Ireland, the Court refused to permit it to be re-sealed in Ireland. *Goods of Murray*, 11 Ir. Jur. n. s. 140, Pr.

### 6. Curators and minors.

By a decree made in the cause, by consent, a sum of £500 was ordered to be paid to A. B., the father, and C. D., the curator, of a minor, to be invested, for the benefit of the minor. The Court refused to pay said money to A. B. and C. D., considering that it should be lodged in the Court of Chancery. *Kelly v. Dunbar*, 11 Ir. Jur. n. s. 410, Pr.

Where minors, above seven years old, were inmates of a convent, and the superioress refused to allow them to sign an election of their mother as curator, the Court dispensed with it and ratified the Registrar's order appointing such curator. *Doran v. Kenny*, 11 Ir. Jur. n. s. 410, Pr.

### 7. Attachment for non-payment of rent to receiver.

An attachment will not be granted against tenants for non-payment of rent to a receiver, where only a half year's rent is in arrear, nor any order made for proceeding by civil bill process or otherwise. *McCarthy v. Mathews*, 11 Ir. Jur. n. s. 97, R.

## PROCLAMATION.

See CRIMINAL LAW, 5 (c.)

## PRODUCTION OF DOCUMENTS.

See PRACTICE (LAW); (EQUITY.)

## PROHIBITION.

A soldier was charged before a Court Martial under s. 15 of the Mutiny Act with having come to the knowledge of an intended mutiny, and not having communicated it to his commanding officer. The evidence in support of the charge amounted to evidence of overt acts of treason or treason-felony. The prisoner applied for a prohibition, but the Court of Queen's Bench held that the military offence did not merge in the treason, and that the prohibition should not be granted. *The Queen v. McCarthy*, 11 Ir. Jur. n. s. 343, Q. B.

## PROMISSORY NOTE.

### Defence to action on.

To an action on a promissory note by indorsee against indorser, defendant pleaded that one J. W. D. being a trader within the bankrupt laws, was indebted to plaintiff in £5,194 4s. 2., and being unable to meet his engagements, presented a petition for arrangement, that his proposal was assented to by three-fifths of his creditors, and was confirmed and entered of record by the Court of Bankruptcy, which afterwards gave the trader his statutory certificate: that by virtue of the certificate J. W. D. was discharged from the debt of £5,194 4s. 2d.; that after the time when the proposal was entered of record, and before the granting of the certificate the defendant at the request and for the accommodation of said J. W. D. and without consideration, indorsed the promissory note to the plaintiff as a security for £250 part of said debt of £5,194 4s. 2d.; and plaintiff always held said note without any consideration save said sum of £250 parcel of said debt of £5,194 4s. 2d. from which said J. W. D. had been discharged as aforesaid. On demurrer this defence was held bad. *Cornwall v. Delany*, 11 Ir. Jur. n. s. 71, Q. B.

## QUO WARRANTO.

1. For what office an information in the nature of a writ of quo warranto will lie.

2. Practice and pleading in quo warranto proceedings.

1. *For what office an information in the nature of a writ of quo warranto will lie.*

The office of clerk of petty sessions is one for which the Court will grant a writ of *quo warranto*, calling upon the party holding the office to show by what right he holds it. *The Queen v. Gilmor*, 11 Ir. Jur. n. s. 73, Q. B.

2. *Practice and pleading in quo warranto proceedings.*

Upon an information in the nature of *quo warranto* to try the right to an office not corporate, the defendant obtained a rule to plead several pleas, and filed two pleas, one stating that the office was not one for which a *quo warranto* would lie, the other setting out his title to the office. Upon motion, the Court discharged the rule, and, defendant electing to abide by his first plea, ordered the second to be struck out. *The Queen v. Gilmor*, 11 Ir. Jur. n. s. 841, Q. B.

### RAILWAY COMPANY.

1. *Action against; construction of bye-law.*
2. *Proceedings on taking land by.*
3. *Liability to costs under s. 80 of the Lands Clauses Consolidation Act, 1845.*

1. *Action against; construction of bye-law.*

A. was a third class passenger by the train from Crossdoney on the Cavan line, to Dublin. On the arrival of the train at Mullingar it joined a train which came from Ballinasloe, which was proved to be the main train. Plaintiff refused to give up his ticket on the arrival from the train in Dublin, whereupon the fare from Ballinasloe was demanded from him in accordance with the bye-law—"Every passenger not producing his ticket will be required to pay the fare from the place whence the train originally started." On plaintiff's refusal to pay the fare or give his ticket, he was brought to the police office. He then brought an action for false imprisonment against the company. The material issue at the trial was, where did the train start from? and the jury, by the direction of the judge, found that it started from Ballinasloe. *Held*, on motion for a new trial in pursuance of leave reserved on the grounds of misdirection that the conditional order must be discharged, and that the judge was right in so directing the jury. *Barry v. The Midland Railway Company*, 11 Ir. Jur. n. s. 38, Exch.

2. *Proceedings on taking land by.*

*Mandamus*: A. was owner of land on the seashore, adjoining the land between high and low-water mark. A railway company proposed constructing their line between A.'s land and the sea, and deposited plans, including a perch of A.'s land, but not naming him as owner; and they subsequently disclaimed all intention to take any portion of A.'s land. The arbitrator refused to deal with A.'s land, or to allot any compensation for consequential damage arising from the works of the company. *Held*, that though no part of A.'s land was taken for the purposes of the company, he was entitled to have his claim for compensation considered by the arbitrator.

*The Queen v. Rynd*, 16 Ir. C. L. R. 29, Q. B.; s. c. 8 Ir. Jur. n. s. 202.

*Semble*, that A. was entitled to compensation for the interruption of his right of access to the sea. *Id.*

*Semble*, per Hayes, J., that with regard to the loss of A.'s light and prospect, the company being the grantees of the Crown, stood in a different position from that of the grantees of private individuals. *Id.*

Order made absolute for a mandamus directing a railway company to give a certificate of the amount awarded as compensation for lands of the prosecutor required by the company, of which possession had not been taken. *The Queen v. The Newry and Greenore Railway Company*, 11 Ir. Jur. n. s. 72, Q. B.

The final award ascertaining the price of lands taken by a railway company was made in July, 1859. The company did not go into possession, and their powers to take lands expired in July, 1863. The Court refused on a summary petition presented in 1865, under the Railways Act (Ireland), 1851, to compel the company to lodge the purchase-money. *Cork and Youghal Railway, ex parte Harnett*, 16 Ir. Ch. Rep. 268, R.

*Semble*—The Court would not, even in a suit for specific performance, compel a company who have not been in possession of the lands, and whose compulsory powers have expired, to pay the purchase-money, though the final award was made before their powers expired. The Court in such a case will leave the seller to his remedy at law. *Id.*

3. *Costs under s. 80 of the Lands Clauses Consolidation Act, 1845.*

Under the Lands Clauses Consolidation Act, 1845, s. 80, railway companies are liable to the costs of orders obtained by successive tenants for life for payment to them of the dividends accruing on stock purchased with the price of land taken by the company, and by them paid into Court, but not to any costs incurred consequent on the order. *Ex parte Gordon*, 11 Ir. Jur. n. s. 1, R.

### RATES AND TAXES.

*Exemption from future.* See DEED, 1.

### RATING.

A., the owner of a house in the city of Dublin, furnished it and advertised it to be let or sold. He succeeded in letting it to tenants for portions of the year, but during the other portions the premises were not otherwise occupied than by his furniture. *Held*—(dissentiente Fitzgerald, J.) that he was only liable to rates on said house and premises for the periods during which same was actually set to and occupied by his under-tenant. *Staunton v. Powell*, 11 Ir. Jur. n. s. 355, Q. B.

### RECEIVER.

*Purchase by receiver.* See VENDOR AND PURCHASER.

*Directions on appointment of:*

Although the petitioner does not dispute the respondent's right to one moiety of the rents of the property the subject of the suit, yet the Court in directing the appointment of a receiver pending the



suit, will not direct that any part of them be paid over to the respondent. *Sweetman v. Sweetman*, 11 Ir. Jur. n. s. 143, R.

### RECITALS.

See *ESTOPPEL*, 2.

### REFORMING INSTRUMENTS.

See *EQUITY*, 2.

### REGISTRY OF DEEDS.

The decision of the Court of Exchequer (10 Ir. Jur. n. s. p. 317) affirmed. *Wrenfordale v. O'Connell*, 11 Ir. Jur. n. s. 325, Exch. Ch.

### RENEWABLE LEASEHOLD.

*Whether words of limitation necessary to pass absolute estate in.*

By a marriage settlement, the equitable interest in lands held under a lease of lives renewable for ever was conveyed to trustees, upon trust, that after the death of A. (the settlor) the said lands should be divided into equal moiety, and that the trustees should stand seised of one moiety thereof in trust for B. (a daughter of A.) the intended wife, for life, and after the death of B, in case there should be issue of the marriage, upon trust to pay and apply all and singular said full moiety, or one-half of said estates and properties, amongst said children, share and share alike, the yearly rents, issues, and profits, and the interest and produce thereof, to be paid to and amongst them until the youngest of said children should attain the age of twenty-one years, and then to divide all and singular the said moiety, or one-half of said estate and property, and principal sum and sums of money equally between and amongst them; and in case B. should die without issue living at her death, then to apply the said moiety to the use of the intended husband for his life, and after his death to the use of C. (a sister of B.) her heirs and assigns; and if she died without issue living at her death, to the use of A., his heirs, executors, administrators and assigns. *Held*, that an only child of B., by this marriage, took the absolute interest in a moiety of the lease of lives renewable for ever. *Brenan v. Boyne*, 16 Ir. Ch. Rep. 87, Ch. App.; s. c. 10 Ir. Jur. n. s. 63.

*Held* (by the Lord Chancellor), that in a deed, words of limitation are not necessary to pass the entire interest in a lease of lives renewable for ever, if other words are used or declarations made, conveying the whole estate of the lessee, or declaring the trusts of the whole estate vested in trustees. *Ib.*

Cases on this subject reviewed. Doctrines of law with respect to estates *pur autre vie* and occupancy considered and discussed. *Ib.*

Words of limitation are not necessary to pass by deed the entire estate in a lease of lives renewable for ever. *Betty v. Elliott*, 16 Ir. Ch. Rep. 110, M. O.

### RENEWAL.

By indenture made in 1683, the owner in fee of the manor of H. demised to A. for three lives renewable for ever, a mill, together with certain lands adjoining, and also the right of quarrying stones in all

the freestone quarries then within the manor, or which should thereafter be found within the same. In 1744, a conveyance in fee of part of the manor was made to B., a purchaser, which granted the right of quarrying on the lands thereby conveyed, without any reservation, and without reference to the indenture of 1683. The indenture of 1683 was prior to the Irish Registry Act, and the conveyance of 1744 was defectively registered. There was no evidence as to whether any quarries were open on these lands at the date of the conveyance of 1744, but it appeared that, for fifty or sixty years previous to the institution of the present suit, the right of quarrying in this portion of the manor had been exercised without interruption by those representing the interest of A. Neither A. nor his representatives were ever in privity with B., but renewals of the lease of 1683 were executed from time to time by the owners in fee of the unsold portion of the manor. *Held*, in a suit for a renewal, that as there had been an uninterrupted enjoyment of the right of quarrying on the lands conveyed to B. as far as living memory extended, which would be justified under the indenture of 1683, there was a presumption that in 1744 there was such an user of this right as would give B. notice of the indenture of 1683. *Kyle v. O'Connor*, 16 Ir. Ch. Rep. 46 Ch.

*Held* also, that a renewal of the lease of 1683 should only comprise such of the quarries on the lands conveyed by the deed of 1744 as were already open and worked. *Ib.*

X. who held the lands of G., together with other denominations, under a church lease, demised the lands of G. to Y. for twenty-one years, with a *toties quoties* covenant for renewal. X. subsequently took a renewal of his lease, in which, by a mistake of the conveyancer, the lands of G. were included, contrary to the wishes and intentions of the parties to the renewal, who acted from that time as if the lands of G. had been omitted. *Held*, that Y. could not maintain a suit against X. for the specific performance of the covenant for renewal. *Ellis v. The Lord Primate*, 16 Ir. Ch. Rep. 184, Ch. App.; s. c. 10 Ir. Jur. n. s. 61.

The tenant of an intermediate interest in lands, the property of a see, there having been no renewal of his lease, or payment of rent to his immediate landlord for more than twenty years, presented a petition to the Landed Estates Court, for a sale of the fee, but afterwards served a notice on his immediate landlord, offering to take out a perpetuity grant of the lands. The latter replied by a notice, stating that on being paid all rent, fines, and interest, and the costs of establishing his title in the Landed Estates Court, he would execute the grant. *Held*, first, that by the proceedings in the Landed Estates Court, the tenant, by disclaiming his landlord's notice, had forfeited his right to a renewal. *Courtenay v. Parker*, 16 Ir. Ch. Rep. 320, R.

Secondly, that his forfeiture had been waived by the landlord's notice. *Ib.*

A tenant coming to the Court for a fee-farm grant must pay all rent due, although the landlord could not at law recover more than six years, by reason of the Statute of Limitations. *Ib.*

A tenant who has claimed the fee against his landlord cannot afterwards rely on the presumption that

the rent accrued more than twenty years before an application for a fee-farm grant was made. *Ib.*

A tenant applying for a fee-farm grant or renewal is bound to pay rent and fines due before the title to the reversion accrued to his landlord, who is a trustee, as to them, for those entitled. *Ib.*

#### RENT (APPORTIONMENT OF).

See LANDLORD AND TENANT.

#### REPRESENTATION.

To a count in contract in pursuance of an agreement, averring readiness and willingness on the part of the plaintiff to perform the contract, the defendant pleaded that the plaintiff was not always ready and willing to perform the contract on his part. The plaintiff contained other counts for false representation and fraudulent concealment by the defendant, of the existence of the said agreement, by reason whereof the plaintiff had permitted judgment to go by default in an action of ejectment brought to recover the possession of the lands, the subject of the agreement, of which the plaintiff was tenant from year to year to the defendant. Replication—That the defendant ought not to be permitted to plead the defence, because the plaintiff says, that his not being ready and willing in that behalf arose from and was occasioned by the circumstances of false and fraudulent representation and concealment on the defendant's part, and of ignorance of the said agreement and his rights thereunder on the plaintiff's part, as particularly set forth in the second, third, and fourth counts of the said plaint. *Held*, on demurrer, that the replication was bad, both as a replication by way of estoppel and as a departure. *Archbold v. The Earl of Howth*, 16 Ir. C. L. R. 395, C. P.

*Held* also, that the averment of readiness and willingness in the first count was a traversable averment; and therefore that the plea was good. *Ib.*

#### REVERSION.

See ESTOPPEL.

#### REVIVOR.

See JUDGMENT.

#### ROMAN CATHOLICS.

See CHARITY.

#### ROAD.

A certain road was vested in the Commissioners of Inland Navigation, up to the passing of the 11 and 12 Geo. III. (Ir.), c. 31. That Act constituted the Grand Canal Company, and transferred the property in said road to the said Co.; said road never was the subject of a grand jury presentment. The Grand Canal Company levied tolls from the public using the road. *Held*, by O'Brien and Hayes, J.J. (*dissentientibus* Lefroy, C.J. and Fitzgerald, J.), that, since the passing of the Rathmines Improvement Act, incorporating the Towns Improvement Act, the liability to repair this road lay upon the Rathmines Commissioners. *The Queen v. The Rathmines Commissioners*, 16 Ir. C. L. R. 532, Q. B. s. c. 9 1r. Jur. n. s. 301.

*Held* also, by O'Brien and Hayes, J.J. (*dubitante*

Lefroy, C.J., *dissentiente* Fitzgerald, J.) that the proper remedy to compel repair was by *mandamus*. *Ib.*

#### SCOTCH LAW.

Where a minor having made a Scotch "matrimonial contract" on her marriage, the validity of which was doubtful, afterwards became a widow and entered into the enjoyment of her jointure under it, the Court preferred holding it to be confirmed as there was no evidence of the Scotch law on that subject. *Lockhart's Trust*, 11 Ir. Jur. n. s. 245, R.

The Court was of opinion that a Scotch deed containing apt words may operate as a marriage, so that an interest limited to vest on marriage may pass by the marriage according to the Scotch law, although it could not pass unless vested. "Presently" *held* to mean "immediately," or "soon after." *Ib.*

*Semble*—The opinion of a Scotch advocate on a question of Scotch law is not to be received in evidence unless expressed in the form of an affidavit and in general terms, not pointed at the circumstances of the particular case. *Ib.*

#### SEAMAN.

*Discharge of Seaman in actual service from arrest.*  
See ARREST.

#### SECURITY FOR COSTS.

See EJECTMENT; LANDLORD AND TENANT; PRACTICE (LAW.)

#### SERVICE (SUBSTITUTION OF.)

See PRACTICE (EQUITY.)

#### SETTLEMENT.

By executory articles for valuable consideration made between A. and his wife and sons, it was agreed that after the death of A. his estates should be limited to and settled upon B. (his eldest son) and his issue, with remainder, in the event of B. dying in the lifetime of A. without lawful issue, to each of the other sons of A. in succession, according to their seniority, with an ultimate remainder to the right heirs of A. B. survived A. and had issue. *Held*, in a suit to carry these articles into execution, that B. was entitled to an estate tail in possession, with remainder to him in fee. *Dillon v. Blake*, 16 Ir. Ch. Rep. 24, Ch.

A sum of stock was, by articles of agreement, vested in trustees on trust for several parties, in different portions, for their absolute use and benefit; provided that no payment or transfer should be made to any of them until he or she should have completed his twenty-fifth year, unless he or she should be previously settling in life, with the sanction and approbation of the trustees, or of the major part of them; and in case any of them should marry, or act otherwise in opposition to the wishes of the trustees, it should be optional with them to deprive the party so marrying or acting of all benefit or advantage under the articles; and the portion to which such person would be otherwise entitled should go to, and be equally distributed amongst the others; and provided that in case any of them should happen to die before the share to which he or she was entitled under the articles should have been transferred to him or her,

the share of the person so dying should be distributed equally amongst the survivors; and that the trustees should apply the dividends of the fund for the maintenance and education of the parties, in the several proportions to which they should be respectively entitled to the principal. *Held*, that the original portions were vested, though not transferable until the respective parties attained twenty-five. *Bardon v. Bardon*, 16 Ir. Ch. Rep. 415, R.

*Held* also, that shares accrued under the survivorship clause did not go over on the parties entitled to them dying under the age of twenty-five, but belonged to their next of kin. *Ib.*

### SHIPPING.

*Mandamus to have ship re-measured.*

A vessel duly registered at D., in Ireland, pursuant to the Merchant Shipping Act, 1854, was in 1862 altered at L., in England, at which port a surveyor, appointed under the said Act, re-measured the ship, and certified his measurement to the registrar at that port. The owners objected to the mode of measurement, and now sought a *mandamus*, directed to the registrar at D., to have the vessel re-measured. *Held*, that the Court had no jurisdiction, inasmuch as it is the registrar at the port of alteration, not that at the port of registry, who is required by the Act to measure the alterations. *The Queen v. Gardner*, 16 Ir. C. L. R. 349.

*Quære*, by Fitzgerald, J.—Whether the owners could get a *mandamus* to have the vessel registered as a new one? *Ib.*

### SLANDER.

1. *Sufficiency of words to support action for.*
2. *Privileged occasions.*
3. *Particulars in action for slander. See PRACTICE (LAW), 9.*

#### 1. *Sufficiency of words to support action for.*

The summons and plaint was for libel, alleging that defendant published a report of a meeting, when plaintiff was fined £1 for using slanderous language to defendant. *Plea*—justification on the ground of truth. *Demurrer*—that language of plaintiff to defendant alleged to be slanderous, was not actionable. *Held*, that demurrer could not be sustained, for that the word "slanderous" does not necessarily mean actionable, but is to be taken in its popular sense as meaning what is calculated to be an insult to one, and is not true. *Levinge v. McDowell*, 14 Ir. Jur. n. s. 15, Exch.

In an action for slander one of the counts in the summons and plaint complained that the plaintiff being a jeweller, &c., and the defendant being a jeweller, &c., the defendant spoke of the plaintiff in relation to his trade and business the words following—"These (meaning thereby certain clocks, watches, articles of jewellery, and gold and silver plate of the defendant then exhibited by him for sale in the way of his said trade and business) are genuine good goods, not like them over there (meaning thereby certain clocks, watches, articles of jewellery, and gold and

silver plate of the plaintiff then exhibited by him for sale in the way of his said trade and business), they (meaning thereby the said clocks, watches, articles of jewellery, and gold and silver plate of the plaintiff) are only composition, and no good." No special damage was alleged. *Held*, upon demurrer by the defendant, that these words were actionable *per se*. *Schriber v. Brunker*, 11 Ir. Jur. n. s. 152, C. P.

To say of a person that he drew a river at night, thereby imputing an offence against the Fishery Acts, 5 & 6 Vict., c. 106, and 26 & 27 Vict., c. 114, is not an imputation of such an offence as is sufficient to make the words actionable *per se*. *McCabe v. Foot*, 11 Ir. Jur. n. s. 287, Q. B.

In order to make words not actionable *per se*, actionable by reason of being spoken of the plaintiff in his character of holder of a particular office, the office must be one of profit, the loss of which would entail some pecuniary or temporal damage. *Curran v. Ryan*, 11 Ir. Jur. n. s. 406, Q. B.

#### 2. *Privileged occasions.*

Defendant was member of a parochial relief committee, the object of which was to collect funds from the inhabitants of the parish of P. and from the public generally for the relief of the distressed inhabitants of the parish. Plaintiff was secretary and treasurer of the committee. Defendant, upon information which he had received, spoke, believing them to be true, in the presence of certain of the parishioners, words imputing fraudulent and dishonest conduct to the plaintiff in his office of treasurer and secretary, for the purpose of preventing further subscriptions being received by the plaintiff. *Held*, that the occasion was not privileged, and that an action of slander having been brought by plaintiff, a defence setting up these circumstances was bad. *Curran v. Ryan*, 11 Ir. Jur. n. s., 406, Q. B.

*See LIBEL.*

### SOLICITOR AND CLIENT.

The solicitor for the plaintiffs in a mortgage suit was a co-plaintiff, as executor of the mortgagee. *Held*, that he was only entitled to costs out of pocket. *Macartney v. Dickey*, 16 Ir. Ch. Rep. 403, R.

*See COSTS; EVIDENCE, 5; PRACTICE (LAW), 1, 14.*

### SPECIFIC PERFORMANCE.

*See BANKRUPTCY AND INSOLVENCY, 14.*

### STATUTE.

1. *Action for penalties under st. 10 Car. I. (Ir.), sess. 2, c. 3.*

2. *Loan Fund Acts.*

1. *Action for penalties under st. 10 Car. I. (Ir.), sess. 2, c. 3.*

C. who held a farm of lands under D. his landlord, being in arrear for a half year's rent, D. with the knowledge that a judgment had been obtained against C. by a creditor, accepted from C. a surrender of the farm. *Held*—That D. was not liable to penalties under 10 Chas. I. (Ir.), sess. 2, cap. 3. *Lynch v. Goppinger*, 11 Ir. Jur. n. s. 303, C. P.

## 2. Loan Fund Acts.

By a mortgage deed, dated the 17th of October, 1863, a Railway Company conveyed to the Secretary of the Public Works Loan Commissioners the line, "and also all the works, messuages, and tenements, lands and hereditaments, property and estate, chattels and effects, of or belonging to the said company, or which they are in any wise seised, possessed of, or entitled to, or of or to which the said Company may at any time hereafter during the continuance of the security intended to be hereby made, be seised, possessed or entitled." The 6 Vict., sess. 2, c. 9, s. 15, under which the loan to the Company was made, enacts that all mortgages taken by the Secretary of the Loan Commissioners shall be valid in law to pass all the estate or interest of such mortgagors, and for all other objects intended to be effected by such conveyances, except where otherwise expressly provided by such mortgages. *Held*, that the mortgage to the Loan Commissioners did not include or affect property acquired by the Company subsequent to its execution. *Willink v. Andrews*, 16 Ir. C. L. R. 201, Exch.

## STAY OF EXECUTION.

*See* JUDGMENT.

## SURRENDER.

*See* ESTOPPEL, 1; LANDLORD AND TENANT.

## TAXES.

*Exemption from future. See* DEED, 1.

## TENANT FOR LIFE AND REMAINDERMAN.

A testator bequeathed all debts which should be due to him, and all chattels which should be in his possession, and all other personal property to which he should be entitled at his decease, to his wife and her assigns absolutely; and he devised all his real property and estates to her for life, with remainder over in fee; and appointed his wife executrix, who proved the will, and went into possession of the real estate. The testator was lessee for years of a house, which he had underlet at a rent lower than that reserved by the lease. The personal estate being insufficient to pay the rent, *Held*, that the wife was bound to keep down the rent of the house out of the rents of the real estate in exoneration of the inheritance. *Fairlough v. Johnstone*, 16 Ir. Ch. Rep. 442, R.

*Talbot v. The Earl of Radnor*, (3 M. & K. 254) examined and considered. *Id.*

## TOWNS IMPROVEMENT ACTS.

*See* GRAND JURY LAW.

## TRADE MARK.

By indenture of 1st April, 1858, entered into between the partners of a partnership concern, under the name of "Dickson, M'Master, & Co." and "Dunbar, Dickson, & Co.," for the manufacture of linens, &c., it was witnessed that the lands, mills, and machinery, which before that time were the exclusive property of M'Master, should still remain and thence-

forward continue to be his sole property, but subject to the use and enjoyment during the partnership for all partnership purposes, and it was provided that at the end of the partnership "the retiring partners .....shall be paid the value of their respective shares [the deed making no mention of the good will, name of the firm, or trade-marks] in the said stock and capital of the said partnership by the promissory notes of said M'Master." The partnership having been dissolved at the end of eight years, it was thereupon insisted that M'Master should pay for the good will, name, and trade-marks at a valuation to the outgoing partners. *Held*, upon the true construction of the said deed, that M'Master was entitled, as continuing partner, to the good will, name, and trade-marks, upon payment therefor to the outgoing partners, as provided by said deed, without being subject to any separate valuation therefor. *Dickson v. M'Master*, 11 Ir. Jur. n. s. 202, Ch.

*Held*, also, that the petition which prayed for an injunction to restrain said M'Master from using the name and trade-marks, should be dismissed with costs. *Id.*

## TRANSIT IN REM JUDICATAM.

*Principle of. See* EJECTMENT, 1.

## TRESPASS.

*See* CUSTOM; EVIDENCE, 6; POWER OF ENTRY.

## TROVER.

The defendant for the sum of £35 agreed to sell to the plaintiff a quantity of peas then fit for gathering, and to give him the right to plant cabbage plants in the ground between the drills of peas, £20 to be paid at once, and the balance before the removal of the cabbages, which were to be taken off the ground and paid for before a particular day. The plaintiff paid the £20, planted the cabbages and removed the peas, and before the day agreed on tendered to the defendant a sum less than the balance, which the latter refused. Subsequently the defendant sold the cabbages. The plaintiff having brought trover for the value of the cabbages, *Held*, that the action was not maintainable. *M'Cormick v. Bailly*, 11 Ir. Jur. n. s. 396, C. P.

## TRUSTEE AND CESTUI QUE TRUST.

1. *Breaches of trust.*
2. *Costs of trustees. See* COSTS, I. 2.

1. *Breaches of trust.*

A marriage settlement recited the title of M. the intended husband, to various properties, and then recited an agreement to settle all the said several properties upon the trusts of said settlement. The operative part, however, omitted two of said properties from the grant to the trustees. The intended husband was a solicitor, and he it was who had prepared the said settlement. C., one of the said trustees and the brother of the lady, was a practising barrister, and it was in the petition alleged, but not proved, that he had acted professionally for his solicitor in the approval of the draft of the settlement. After the

marriage, M., the husband, mortgaged the very lands omitted from the operative part of the settlement, and they were lost. It was not proved that the trustee C. was aware of the omission of the lands from the settlement before the loss occurred after M.'s death. In a suit against C. as surviving trustee by the eldest son of M. to make him liable for the loss resulting from the omission of the lands from the settlement. *Held*—That C. was not liable for the loss. *Macnamara v. Carey*, 11 Ir. Jur. n. s. 293, Ch.

A trustee is not liable for the non-registration in the registry office of a deed conveying lands to him, when his attention has not been called to the fact of the non-registry thereof. *Ib.*

Where moneys clothed with trusts were lodged by a trustee in his bankers' hands, and where such bankers were fully aware that said moneys were trust moneys, and where trustee afterwards withdrew said moneys from said bankers' hands for the purpose of applying same to purposes foreign from the trusts, and in breach thereof—*Held*, that the bankers, by paying out same, (they having knowledge of the breach), became participants in the breach of the trust, and were decreed in a suit against them by the *cestui que trusts* to replace the funds so paid away by them. *Johnson v. Gray*, 11 Ir. Jur. n. s. 81, Ch.

#### VENDOR AND PURCHASER.

In 1820 R. I. being seised in fee of certain lands demised same to A. O'B. for three lives and thirty-one years. In 1834 said R. I. died, having devised his reversion in said lands to said A. O'B. for life, with remainder to his first and other sons in tail male. In 1854 a receiver was appointed over the said lands, which in 1858 were let by the Master to receiver's father for seven years pending the cause. In 1859 receiver's father died, and thereupon receiver entered into possession thereof, with the said Master's approval. In 1863 said A. O'B. conveyed to said receiver his (the said A. O'B.'s) interest in the lease of 1820. In 1865 A. O'B. died, and petitioner was discharged as such receiver, the suit having abated. Thereupon the Master of the Rolls made an order on said receiver to deliver up said lands to A. O'B.'s eldest son, same having been assigned without the leave of the Court. *Held*, that a receiver over the estate of a reversioner is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right. *King v. O'Brien*, 11 Ir. Jur., n. s. 141; Ch. App.

#### VISITATION.

See ARREST, 1.

#### VISITOR.

See CHARTER.

#### VOLUNTARY DEED.

See DEED, 3.

#### WARRANTY.

The plaintiff purchased, from the defendant, a seed merchant, a quantity of rape seed. The defendant's

salesman, who sold the seed to the plaintiff, knew at the time of the sale that it was for the purpose of being sown, and producing a crop. The only express warranty proved was contained in the following evidence of the defendant's salesman, as to what passed between him and the plaintiff at the time of the sale:—"The plaintiff asked me if we had Dutch rape-seed; I said we we had, but of last years importation; he asked me if it was good; I said I said I believed it to be so." The seed was in the defendant's store at the time; but the plaintiff did not examine it. In an action to recover damages resulting from the failure of the crop, declaring on a warranty that, at the time of the sale, the seed was reasonably good growing seed, and fit and proper to be used for the purpose of sowing, and of producing a reasonably good and productive crop. *Held* (*dissentiente* Christian J.) that, whether the representations made by the defendant's salesman amounted to an express warranty or not, they did not exclude an implied warranty of the effect declared on. *Sheils v. Cannon*, 16 Ir. C. L. R. 589, C. P.; s. c. 10 Ir. Jur. n. s. 359.

*Held* also (*dissentiente* Christian, J.) that the rule that "where a buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose," applies as well to natural products as to manufactured articles. *Ib.*

Upon the trial of an action to recover damages for the breach of a warranty of seed sold by the defendant to the plaintiff, the correspondence between the parties put in evidence negatived the existence of a warranty. The judge refused to direct the jury that there was an implied warranty, and left to them the question of the existence of the warranty. *Held*, that the judge was right. *Sheils v. Cannon* (10 Ir. Jur. n. s. 274) distinguished. *Smyth v. Galbraith*, 11 Ir. Jur. n. s. 359, C. P.

#### WASTE.

Lessor, by indenture bearing date the 28th day of February, 1863, demised certain premises, "together with the right of digging, lowering, levelling, and removing" any portion of the said premises, so as to make same suitable for building or ornamental purposes, to hold to said lessee for 9999 years, and said indenture contained a covenant that said lessee "would not commit any wilful or voluntary waste, spoil, or destruction upon said premises." Lessee commenced to build upon and improve the surface of the grounds, but to aid him in doing so he "removed" sand therefrom, and sold same for profit. Master Brooke, to whom the case was referred, reported that the sand was removed *bona fide*. *Held*, allowing exceptions to said Master's report, that although the lessee might remove the sand *bona fide*, yet that he was not empowered to sell any portion thereof, and that his doing so was waste; and that, too, though the monies realized by the sale thereof were expended on the improvements of the said demised premises. *Clelland v. Ritchie*, 11 Ir. Jur. n. s. 64, Ch.

See CEMETERY.

## WAY.

1. *Acquiring right of way by prescription.*
2. *Way of necessity.*

1. *Acquiring right of way by prescription.*

The enjoyment of a right of way in an underground passage for twenty years, so as to give a title, must be as open and notorious as the nature of the case will permit, not a stealthy enjoyment, but one as of right. *Donnelly v. Murray*, 11 Ir. Jur. n. s. 159, Exch.

2. *Way of necessity.*

A. brought an action against B. for disturbance of a right of way. B. traversed plaintiff's right to the way. Plaintiff swore at the trial that he had had no other way by which to bring his cars, and that it was a way of necessity. The jury found for plaintiff. *Held* (Fitzgerald, B. *dissentiente*), on motion for a new trial or to enter a verdict for defendant, that it was more satisfactory to direct a new trial though plaintiff had proved a *prima facie* case. *Reynolds v. Kinsella*, 11 Ir. Jur. n. s. 308, Exch.

## WILFUL DEFAULT.

If the decree in the original suit merely direct a common account against an agent, a decree charging him with what he might without wilful default have received, cannot be made in a supplemental suit. *Connor v. Reeves*, 16 Ir. Ch. Rep. 398, R.

## WILL.

1. *Revocation by codicil.*
2. *Cases of election.*
3. *Construction generally.*

1. *Revocation by codicil.*

A testator, after describing his property, and making certain devises and bequests, bequeathed the residue of said several sums of money and securities, after payment of said several legacies and bequests, and the residue of all chattel and other property, of what nature or kind soever he might die possessed of, and which was not thereby, or should not be by any codicil thereto, specifically bequeathed, subject to his debts and to any deficiency which might possibly occur in the funds appropriated to the payment of his legacies, to trustees, upon trust to invest the same, and pay the interest to his wife for life, and after her death to distribute it among certain persons. By a codicil of the same date as the will, after stating that certain stock was not correctly described in his will, he left it to his wife, and appointed her sole residuary legatee, and confirmed his will in other respects. *Held*, that the codicil did not revoke the residuary clause in the will. *Cooke v. Franklin*, 16 Ir. Ch. Rep. 469, R.

2. *Cases of election.*

By indenture bearing date 12th May, 1791, made previous to, and in contemplation of the then intended marriage of T. D., the fee of the lands of G. was conveyed to trustees, in trust for said T. D., for life,

with remainder to the children, in fee, of the said marriage, in such shares as T. D. should limit or appoint, and in default of appointment share and share alike. There were five children of the marriage. T. D. by will dated 1827, having recited his power of appointment amongst his children, did thereby devise said lands of G. to trustees in trust, for his second son for life, with remainder to his grandson in tail male; and in default of such issue to his third son for life, with remainder to his son, in tail male, and so on to the fourth and fifth sons, he having otherwise provided for his eldest son, &c. T. D. then devised several other estates to and amongst his said sons; and he also bequeathed a sum of £10,000 amongst them; but he directed each of his said sons to execute to the trustees of his marriage settlement of 1791, a release of every claim and demand he or they might have under the provisions of his said marriage settlement; "and if they refused so to do, to such of them as shall neglect or refuse so to do," he revoked the bequests made in favour of such son. All the said younger sons elected to take life estates in G. under the will, and to forego their right to the fee under the said settlement; one of the sons after making his election, after the death of T. D., had a judgment recovered against him. The conuise of this judgment presents a petition for the sale of the estate of said son, in the said lands of G. which estates Judge Hargreave held were, by the application of the *cy pres* doctrine, estates tail. *Held*—reversing the order of Judge Hargreave—that the *cy pres* doctrine did not apply, and that the estates which the younger sons had in the lands of G., were merely estates for life, and not estates tail, they having elected so to take under the terms of said will. *Dennehy's estate*, 11 Ir. Jur. n. s. 21, Ch. App.

W. S. in 1804 conveyed certain premises in two several streets in the city of Dublin of which he was seised, to the Commissioners of Wide Streets, for a sum of £10,579, they paying said W. S. interest at £5 per cent. equal to £528 per annum; and it was covenanted by them, that they, when the said premises should be of the value of £528 a year, would convey so much thereof back to said W. S. his heirs, &c. After said conveyance of 1804, viz., in 1818, W. S. made his will, whereby he devised "all the rest, residue, and remainder of my property, real, freehold, and personal," [the personal amounted to £100,000] "which I shall die possessed of or entitled to, I give and bequeath the same unto my two sons, W. and J. their heirs, &c. in equal shares and proportions." In 1823, the said commissioners conveyed, in pursuance of said covenant, certain premises amounting to £528 per annum to said W. S. his heirs, &c. W. S. died in 1826, leaving two sons him surviving, namely, W. the elder, and J. the younger. *Held*, that this will being made before the Wills Act of 1837, the real estates in said premises conveyed by said deed of 1823 were not operated upon by said will, and that therefore said W. S. died intestate as to same, and that the heir-at-law was bound to elect whether he would take under the said will or against same. *Sweetman v. Sweetman*, 11 Ir. Jur. n. s. 313, Ch.

R. M., seised in fee of certain estates, on his inter-

marriage with his wife R., executed a marriage settlement dated 23rd of August, 1837, whereby a sum of £5,254 was assigned to trustees upon trust for the children of the marriage in such manner as said R. M. and R. should during their joint lives appoint, and in default of such appointment then as the survivor of them should appoint, and in default of such appointment in trust for the children in equal shares, and if there should be no children, then in trust for R. M., his executors, &c. R. M., by his will just previous to his death in 1854, devised his said fee-simple estates, after providing for his wife's jointure, to his eldest son and his heirs, &c., he acting in excess of his power, bequeathed the said sum to his second son and his executors, &c. Said R. M. and R. never executed the said power of joint appointment over said sum. R., having survived R. M., died in 1861, having previously by deed appointed £1,000, portion of said sum, to her said eldest son. Said younger son now contended that his elder brother was bound when accepting the estates devised to him by his father's will, to elect between the estates so devised to him, and the appointment of the £1,000, and to give effect to the bequest made by said will to his younger brother. *Held* (affirming the order of Master Brooke) that this was not a case for election, and that it was competent for the elder brother to take (the estate devised to him by his father's will, and also the £1,000 appointed to him by his mother. *Meredith v. Meredith*, 11 Ir. Jur. n. s., 321, Ch.

Two judgments and a policy of insurance amounting together to £3,084 12s. 4d. were assigned to trustees, in trust for the wife of A. A received the amount of the policy, £1,384 12s. 4d. By his will he confirmed the settlement, and bequeathed certain funds and sums of money which he specified, upon trust, to pay to his wife the principal sum of £3,084 12s. 4d., to which she was entitled under the provisions of the marriage settlement, "same being the amount secured by certain judgments in said settlement mentioned, viz., a judgment against W. H. G., for the principal sum of £1,200, and two other judgments against the said W. H. G. and W. S., for the principal sum of £500; and the amount of a policy of insurance for the sum of £1,500 late Irish currency (equivalent to the sum of £1,384 12s. 4d. of the present currency), said sums making together the sum of £3,084 12s. 4d., which has been received by me." *Held*, that the wife was not entitled both to the legacy and the sums secured by the judgments and policy of insurance, but was bound to elect. *Cooke v. Franklin*, 16 Ir. Ch. R. 469, R.

### 3. Construction, generally.

Direction in a will, that the testator's wife and brother should be his residuary legatees, and enjoy all the benefits arising from that appointment. *Held*, to create a joint tenancy in the residue. *M'Donnell v. Jebb*, 16 Ir. Ch. Rep. 359, R.

R. C., by his will made 6th February, 1849, willed that his wife should have during her life £1,000 a year, and that his brother Andrew should have £500 a year during his life: and the testator then expressed a hope that they would "continue to live together in

kindness and love as heretofore, which cannot, in consequence of my brother's health, be long..... After the death of my wife and brother, my executors will dispose of all my property in the most advantageous manner." By codicil to the above will, the testator desired "my wife and brother shall be my residuary legatees, and enjoy all the benefits arising from this appointment." *Held*, that under the terms of said will and codicil the testator's widow and brother took the residuary gift bequeathed to them as joint tenants, and not as tenants in common. *M'Donnell v. Jebb*, 11 Ir. Jur. n. s. Ch. App.

In 1825 testator left "all his property" to his executor, and he did thereby nominate — as his executor, "for the purpose of paying the following bequests, first paying debts and funeral expenses." He then bequeathed the mill of Knocknarea for ever to his illegitimate son Thomas, giving him full power to will and dispose of same if he have a family, "but if he shall die without issue," then to go to the use of his (illegitimate) daughter, Jane, without further words of limitation. At the close of his will testator appointed W. his executor. *Held*, that the executor took the fee in the lands of Knocknarea, and that Thomas took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation to the executors conferred the fee upon Jane on indefinite failure of Thomas, Jane taking the entire estate remaining in the executor. *Ormsby v. Anderson*, 11 Ir. Jur. n. s., 66, Ch.

*Held* also, that W., who was appointed executor at the close of the will was the executor and trustee whose name the testator had intended to fill in the said blank with. *Ib.*

Testator being seised of considerable estates in several counties in Ireland, by his will made in 1830, gave and devised to trustees "all and singular, my capital and other messuages, lands, tenements, rents, and hereditaments.....situate in the counties of Mayo, Cork, Lowth, Westmeath, Sligo," (this last county testator drew a pen across, and initialed, yet leaving the word quite legible) "Kerry and elsewhere in Ireland; nevertheless, subject to the several charges thereon," upon trust for his widow, for her life, and to convey to his second son in fee on her decease. "In witness whereof, I have set my hand and seal, this 2nd of August, 1820, the word *Sligo* being struck out before the execution, and initialed by me." It was contended by the petitioner, that the trustees were under the phrase "elsewhere in Ireland," seised of the legal estates of the testator in every county in Ireland, including Sligo; and that an adverse possession by a third party, of these lands, of over twenty years, running, during the lifetime of the said widow, the equitable tenant for life, who died in 1864, was not a bar to the equitable tenant in fee in remainder, expectant on the death of said equitable tenant for life, the legal estate being in the trustees. *Held*, that the testator had excepted out of his devise, his estate in the county of Sligo, and that the expression *elsewhere in Ireland*, must mean elsewhere in Ireland, *except in Sligo*, and that therefore there was no devise of the Sligo estate to trustees. *Cooper v. Warra*, 11 Ir. Jur. n. s. 25, Ch.

The Lord Chancellor (while not deciding the point)



felt strongly convinced that the adverse possession of those estates by a third party, for over 200 years, would bar all rights of the trustees, and of the equitable tenants in fee in remainder. *Ib.*

A testator being seised of lands under leases for lives renewable for ever, in 1824, devised all his freehold leases and interest whatsoever, to trustees, and the heirs of the survivor of them, in trust, after payment of the head rents, to apply the clear yearly rents to and amongst his three daughters during their respective lives, in equal shares and proportions, for their sole and separate use; and in case any or either of his said daughters should happen to die leaving lawful issue, then in trust as to the share and proportion of such daughter so dying, to and for the use of such issue, as she should by deed or will appoint, and in default of such appointment to the use of such issue, equally, share and share alike; and if any of his daughters died without issue, he directed that her share of the rents should go to and be paid to the survivors or survivor of them, for the increase of her and their respective shares, to their separate use, and to go to their lawful issue, subject to the like power of appointment among such issue; and in case of the death of all his daughters without leaving lawful issue, then in trust to pay the rents to his nephew during his life, and after the death of his nephew, in case he should happen to die leaving lawful issue, in trust as to one-half of his freehold and leasehold interests, for the use of such issue as he should appoint; and in default of appointment equally; and as to the remaining half of his freehold and leasehold interests, to the use of the children of his sister in equal shares, and to their lawful issue; and in case his nephew should happen to die without issue, then as to the whole of his freehold and leasehold interests to the use of the said children of his sister, in equal shares, and to their lawful issue; and in case they should be then dead, then as to the whole, in trust for the issue of his nephew; and in case of the deaths of his nephew and the children of his sister without issue, in trust to assign over the said freehold and leasehold interests to his own right heirs; and a power was given to the trustees to lease from time to time as they should remain seised and possessed by virtue of the trusts in the will contained, with the consent of the person or persons then entitled. *Held*, first, that the legal estate was devised to the trustees during the existence of the entire series of limitations.

*Secondly*—That the daughters of the testator took equitable estate in *quasi* tail in their respective shares. *Sherwin v. Kenny*, 16 Ir. Ch. Rep. 138, R.

A, owner in fee of several denominations of land, devised different portions of the same to several of his sons respectively; such portions being devised to each individual devisee "and his heirs for ever." One of the devises was in these words: "I leave my third son, M. T., the lands of G. for ever; but in case he should die unmarried, or without lawful issue, in that case he may will one-half of it as he pleases, and the other half to go, share and share alike, between my surviving sons and their families." The concluding paragraph of the will ran thus:—"All the bequests given to my son R. T., my son J. P., and my other three sons, M. T., C. T., and H. T., of my property,

no part of it shall or will be liable to pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs." *Held*, that M. T. took an estate tail under A.'s will. *In re Thompson's Estate*, 16 Ir. Ch. Rep. 228, Ch. App. s. c., 10 Ir. Jur. n. s. 47.

Testator by codicil dated 1821 to his will dated 1812, devised certain lands of which he was seised in fee to A. C. (a woman by whom he had the hereafter mentioned five illegitimate children) "and to her five children, A., S., AL., J. and M., share and share alike during their lives, or the life of the survivor or longest lives of them the said A. S., AL., J. and M.; and if it happen that any of the said persons should die unmarried and without any lawful issue, it is my will that the portion of such person should go to and amongst the survivor of them. And it is my will that the said A. D. and her said children should have, hold, and enjoy the said lands and premises as before mentioned for the natural life or lives of them, or the survivor or longest liver of them." *Held*, affirming the order of Judge Dobbs, that the said A. D. and her said five children took merely a life estate with cross remainders among them, and not an estate tail. *Nesbitt's Estate*, 11 Ir. Jur. n. s. 349, Ch. App.

A testatrix bequeathed all his property to his four daughters, share and share alike, the share of each to be given to each on their days of marriage, with consent; and if his said daughters should happen to die unmarried, then the share of said child to go, share and share alike, among his said surviving daughters or daughter so surviving. *Held*, that "surviving daughters" meant other daughters; and therefore that the children of a deceased daughter were entitled to a share of the legacy of a daughter who died unmarried. *In re Connellan's Trusts*, 16 Ir. Ch. Rep. 524.

A testatrix bequeathed the residue of her money, after payment of one legacy, to her sisters J. and E. so long as they continued unmarried, "but when they married or died unmarried to each of their five sisters or their families, £200 each." Two of the sisters died without issue before the period of distribution, and the death of a third (who had not been married) constituted that period. The other two died before the period of distribution, but left issue who survived it. One sister was married and had issue at the death of the testatrix, and as it seems at the date of the will. *Held*, that the bequests over vested in each of the sisters severally at the death of the testatrix, subject to be divested as to the legacy of each sister respectively by her death before the period of distribution leaving issue in favor of such of those issue as should be alive at that period, and that the legacies to those who died without issue before or at that period did not divest in the events which happened. *Mulloy v. Armstrong*, 11 Ir. Jur. n. s. 186, R.

A testator bequeathed a sum of money to his two daughters, share and share alike, to be paid to them by his executors in twelve months after their respective marriages with the consent of his executors; and he directed that his daughters should be paid a yearly sum, less than the interest of their shares, until their respective marriages as aforesaid; and that from their respective marriages each of them should be paid the full legal interest; the remainder of the interest on

their fortunes to go to his son until their respective marriages; and in case his daughters, or either of them, should die before the age of twenty-one years, or day of marriage, her share of the sum bequeathed to her should go to his son; and in case both should die, the entire of said sum to go to his son. *Semble*, the legacies to the daughters did not vest until marriage. *In re Cantillon, minors*, 16 Ir. Ch. Rep. 301, R.

*Held*, that "or" should be read "and," and therefore that the legacies did not go over to the son on the death of the daughters unmarried, but were undisposed of by the will, and divisible among the testator's next of kin. *Ib.*

A testator by a codicil, after reciting that she had in the Bank of Ireland money not theretofore disposed of, bequeathed the said sum to trustees upon trust to pay certain legacies. She had no money in the Bank of Ireland, but she had Government stock sufficient to pay the legacies. *Held*, first; that the legacies were payable out of the general assets.

Secondly, that they were payable in equal priority with other legacies bequeathed by the will and prior codicils. *Reilly v. Stoney*, 16 Ir. Ch. Rep. 295, R.

Testator by his will made shortly previous to his death, in 1838, gave and devised his messuages, farms, tenements, &c. situate in the county of Cork, to trustees, for 500 years, upon trust amongst others "to levy and raise a sum of £11,000 for the portions of any younger children I may have by my wife .....to be paid to such younger children, in equal shares, and to become payable when and as soon as each and every of my younger sons shall severally and respectively attain his age of 21 years, and unto each and every of my daughters when and as soon as each and every of such daughters shall severally and respectively attain the said age of 21 years or marriage.....said portions hereby given to my younger children shall not be considered or vested in any such younger child, if a son, until he shall attain 21, or, if a daughter, until she shall attain said age or marry .....although such portions shall bear interest." Testator having then added a maintenance and advancement clause thus proceeded, "If any of my said younger sons shall become an eldest son, and take a life estate in the lands and premises hereby devised, before he shall be entitled to take his proportion of said £11,000, then such younger son taking a life estate in said lands shall not take any part of said £11,000, but that the same shall be divided amongst his brother and sisters in equal shares." Testator having then devised his said lands, &c., to J. B., his eldest son, for life, with remainder to J. B.'s first and other sons in tail male, closed his will. Testator left 15 children, him surviving, of whom two daughters, died unmarried and under 21 years of age. Petitioner, one of the surviving younger children, now claimed to be entitled to a distributive share of the portions of his said two deceased sisters in said £11,000. *Held*, that said portions sank in the inheritance and did not become divisible amongst the surviving sisters. *Carroll v. Barry*, 11 Ir. Jur. n. s. 401, Ch.

A testator bequeathed an annuity of £100 a year to his daughter A., and to four other daughters annuities of £50 each, which were not to be paid to

them unless they got married, or their mother had some particular reason for making them such payments, until after their mother's decease, when, if his daughter A. was unmarried, he left her after her mother's death, an annuity of £500 in addition to the £100 per annum before bequeathed; and if A. married, she was not to have more than £100 per annum, which she might leave as she pleased, and the £500 a year was to merge on the real estate, on which the other annuities were charged; and if his other daughters were unmarried at their mother's decease, and his daughter A. was married or not living, each was to have £100 a year in addition to the £50 a year as a maintenance for them; but while A. received the annuity of £500, they were to have no more than an annuity of £50 each, as they would reside with her; and should any of the daughters marry without their mother's consent, or their brother's, after her decease, any so doing should have but an annuity of £50 per annum during her life, payable to her own receipt. The testator's wife died before him. At his death A. and another daughter, E., were unmarried. *Held*, that after the termination of the annuity of £500 by the marriage of A., E. was entitled to the annuity of £100, and that it did not determine on her marriage with the consent of her brother. *In re Newcomens, minors*, 16 Ir. Ch. Rep. 315, R.

A testator devised and bequeathed all his real and personal estate, including his farms of C. and G., to his daughter, subject to the following conditions, and to the further disposition of his property in the event of the non-observance thereof—First, that his daughter should not marry a cousin-german; and in that event he gave her a sum of £1,000 subject to the next condition; and in such case he left all the residue of his property, after payment of the £1,000 to his brother and his brother's wife, and the survivor; and after the death of the survivors he left his farms of C. & G. to their sons and their issue, as tenants in common, with like remainder to his brother's unmarried daughters, and all the residue of his property, save his said farms of C. and G., after payment of the said sum of £1,000 to his nieces. The second condition was that, in case his daughter should marry, a jointure of £200 a year should be settled on her, and £4,000, at least, should be secured to the issue of the marriage; and in the event of the jointure and £4,000 not being so secured, he left all his real and personal property, in case his daughter should not marry a cousin-german (or, in case she should marry a cousin-german, then in lieu thereof said sum of £1,000), after such marriage, to trustees upon trust to pay the annual income of it to his daughter, for her separate use, and after her death to dispose of all his property, or of the sum of £1,000, among her issue, as his daughter should appoint; and if there should be no issue, in such manner as she should direct; but having regard to the condition that, if she should marry, and die without lawful issue, the lands of C. and G. should go in the manner therein mentioned; and he left all the residue of his property, save the said farms of C. and G., to his nieces, subject to a sum which he empowered his daughter to dispose of in a certain event which did not occur. The daughter married her cousin-german, who made

no settlement on the marriage, and died without issue, and without having made any appointment of the £1,000. *Held*, that her administrator was entitled to it. *Welby v. Cormick*, 16 Ir. Ch. Rep. 74, R.

A testator devised his real estate to trustees, upon trust, out of the rents, etc., or by demise, mortgage or sale, to raise £1000 for each of his daughters; and directed his trustees to pay to, or permit each of his daughters to receive, the interest of the £1000 provided for her, for the term of her natural life, from his death; and in the event of their being married, on certain trusts, for their husbands and children; and upon the death of, and according and when each of his daughters should die unmarried, or being married should die without leaving issue sons who should attain twenty-one or daughters who should attain twenty-one or marry, upon trust to pay the principal sum of £1000 provided for her, to and amongst all or any of the testator's other children, in such shares, &c., as each of his daughters so dying should by deed or will appoint; and in default of such appointment, upon trust to apply the principal sum of £1000 of her so dying to and amongst the testator's then surviving children, and the issue of such of them as should be dead, in equal shares. By a codicil he revoked his will so far as the sum of £1000 to each of his daughters was given absolutely; and he declared his will to be that, in the event of his daughters, or any of them, remaining single, they or she remaining single or unmarried should only have an interest for their or her natural lives or life, and no longer, in the said sum of £1000. *Held*, that the codicil revoked the power of appointment given by the will to his daughters who should die unmarried and without issue, but did not revoke the gifts in default of appointment of the shares of such daughters. *Kellett v. Kellett*, 16 Ir. Ch. Rep. 63, R.

A testator, after reciting that he had demised a certain house and lands to A., for the lives of his daughters, subject to the rent of £2 10s. an acre, declared that the lease was so made for the use and benefit of his daughters and the survivors of them. No such lease was made; and by a codicil he directed that his then surviving daughters should have the house, lands, furniture, and plate at their disposal. *Held*, that the daughters took the house and lands absolutely, and discharged of the rent of £2 10s. per acre. *Ib.*

A testator directed his household furniture, &c., to be sold, and the produce thereof, with other moneys, to be laid out in stock; the interest to be paid to his wife for her life; and after her death the stock to be sold, and the half of the produce to be paid to H. C., eldest son of his niece E.; and the other half to be

divided equally between the children of E. Secondly, he left all stock, &c., of which he should die possessed to his wife during her life, and after her death he directed the same to be sold, and £3000 of the produce to be paid to H. C., and the remainder to be divided equally between all the other children of his niece E.; and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one half to go to his niece E.; and he appointed an executor of his property in France; and he directed that his said executors should not be liable for any loss which might happen in placing out his property according to the direction of his will, except for wilful neglect, &c.; and in case H. C. should die before he attained twenty-one, he directed that the "said property and effects" should go to his (the testator's) nearest heirs on his mother's side, equally. E., the testator's niece, was his nearest heir, both on his father's and mother's side, and his next of kin. H. C. died under age. *Held*, that "my said property and effects" in the third clause, did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to H. C.

Secondly, that it applied to all the property which H. C. would have taken, and was not confined to the third clause.

Thirdly that E., though heir and next of kin, both on the father's and mother's side, took H. C.'s share under that clause. *In re Willomier's Trusts*, 16 Ir. Ch. Rep. 389, R.

The word "said" applies to the immediate antecedent. *Ib.*

A testator bequeathed the life use of all his funded property, moneys, and security for money, to his sons A. and B., share and share alike for their lives, with power to them to invest it; and after their respective deaths he directed the issues and profits to arise therefrom to go to their respective eldest sons born in wedlock, share and share alike, for and during each of their natural lives and life, and so on to the eldest sons of the eldest sons born in wedlock in succession, share and share alike, on their attaining their respective ages of twenty-one years, subject to certain bequests, with cross limitations to A. and B.; and if they both died without male issue, among their female issue as they should respectively appoint. There was no son of A. born at the testator's death. *Held*, to carry out the general intent, that the will must be construed to give the eldest son of A., who was born after the testator's death, an estate tail in real estate, and therefore that he took an absolute interest in his share of the testator's personal property. *In re Cleary's Trusts*, 16 Ir. Ch. Rep. 438, R.

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# APPENDIX TO THE IRISH JURIST,

CONTAINING

## The Public General Statutes

PASSED IN THE SESSION 1866, AND 29 & 30 VICTORIA.

*N.B. The Statutes relating to Ireland only are printed in full.*

### CAP. I.

An Act to empower the Lord Lieutenant or other Chief Governor or Governors of *Ireland* to apprehend, and detain for a limited time, such persons as he or they shall suspect of conspiring against Her Majesty's Person and Government.

[17th February 1866.]

Sec. 1. *Persons imprisoned in Ireland for High Treason or Treason Felony, &c. may be detained till 1st September, 1866, and shall not be bailed or tried without an Order from the Privy Council.*

2. *Persons to whom Warrants of Commitments are directed shall detain the Persons so committed in safe Custody.*

3. *Persons charged with Custody, as also Place of Detention, may be changed by Warrant herein mentioned.*

4. *Copies of Warrants to be transmitted to the Clerk of the Crown for Dublin.*

‘WHEREAS a treasonable conspiracy now unfortunately exists in *Ireland*:’

Therefore, for the better preservation of Her Majesty's most sacred person, and for securing the peace, the laws, and liberties of this kingdom, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That all and every person and persons who is, are, or shall be within prison within that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland* at or on the day on which this Act shall receive Her Majesty's royal assent, or after, by warrant

of Her Majesty's most honourable Privy Council of *Ireland*, signed by six of the said Privy Council, for high treason or treason felony or treasonable practices, or suspicion of high treason or treason felony or treasonable practices, or by warrant signed by the Lord Lieutenant or other Chief Governor or Governors of *Ireland* for the time being, or his or their Chief Secretary, for such causes as aforesaid, may be detained in safe custody without bail or mainprize until the first day of *September* one thousand eight hundred and sixty-six, and that no judge or justice of the peace shall bail or try any such person or persons so committed without order from Her said Majesty's Privy Council until the said first day of *September* one thousand eight hundred and sixty-six, any law or statute to the contrary notwithstanding.

2. In cases where any person or persons have been before the passing of this Act, or shall be during the time this Act shall continue in force, arrested, committed, or detained in custody by force of a warrant or warrants of Her Majesty's Most Honourable Privy Council of *Ireland*, signed by six of the said Privy Council, for high treason or treason felony or treasonable practices, or suspicion of high treason or treason felony or treasonable practices, or by warrant or warrants signed by the Lord Lieutenant or other Chief Governor or Governors of *Ireland* for the time being, or his or their Chief Secretary, for such causes as aforesaid, it shall and may be lawful for any person or persons to whom such warrant or warrants have been or shall be directed to detain such person or persons so arrested or committed in his or their custody in any place whatever within *Ireland*, and that such person or persons to whom such warrant or warrants have been or shall be directed shall be deemed and taken to be to all intents and purposes lawfully

authorized to detain in safe custody, and to be the lawful gaolers and keepers of such persons so arrested, committed, or detained, and that such place or places where such persons so arrested, committed, or detained are or shall be detained in custody shall be deemed and taken to all intents and purposes to be lawful prisons and gaols for the detention and safe custody of such person and persons respectively; and that it shall and may be lawful to and for the Lord Lieutenant or other Chief Governor or Governors of *Ireland* for the time being, by warrant signed by him or them, or for the Chief Secretary of such Lord Lieutenant or other Chief Governor or Governors, by warrant signed by such Chief Secretary, or for Her Majesty's Privy Council of *Ireland*, by warrant signed by six of the Privy Council, from time to time, as occasion shall be, to change the person or persons by whom and the place in which such person or persons so arrested, committed, or detained shall be detained in safe custody.

3. Provided always, that copies of such warrants respectively shall be transmitted to the clerk of the crown in and for the county of the city of *Dublin*, and shall be filed by him in the public office of the pleas of the crown in the city of *Dublin*.

#### CAP. II.

An Act to amend the Law relating to Contagious or Infectious Diseases in Cattle and other Animals.  
[20th February 1866.]

#### CAP. III.

An Act to amend The Telegraph Act, 1863.  
[6th March 1866.]

- Sec. 1. Powers vested in secretary of state under 26 & 27 Vict. c. 112. s. 52, may be exercised, by Lord Lieutenant of Ireland.*
2. *Where such powers are exercised, sect. 51 of above recited Act to be altered as to Ireland.*
3. *Extension of sects. 48 to 53 of above-recited Act to all companies.*
4. *Short Title.*

'Be it enacted by the Queen's most Excellent Majesty by and with the advice and consent of the lords spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. The powers vested in one of her Majesty's principal secretaries of state, by section fifty-two of the Telegraph Act, 1863, may be exercised in *Ireland* by the Lord Lieutenant or other chief governor or governors of *Ireland* for the time being, as well as by one of her Majesty's principal secretaries of state, subject, with respect to compensation, and in all other respects, to the provisions in that section contained.

2. Where the powers of section fifty-two of the said Act are exercised by the Lord Lieutenant or other chief governor or governors of *Ireland*, then and in every such case, in section fifty-one of the same Act, the Lord Chief Justice of her Majesty's Court of Common Pleas in *Dublin* shall be deemed to be substituted for the Lord Chief Justice of her Majesty's Court of Common Pleas at *Westminster*.

3. The provisions of the following section of the said Act, namely, sections forty-eight to fifty-one (both inclusive), section fifty-two as amended by this Act, and section fifty-three, shall extend and apply to all incorporated companies, existing or future, constituted with the object or carrying on the business of constructing, maintaining, or working telegraphs, and to the works of those companies.

4. This Act may be cited as the Telegraph Act Amendment Act, 1866.

#### GAP. IV.

An Act to amend the Law relating to Contagious Diseases amongst Cattle and other Animals in *Ireland*.  
[6th March 1866.]

11 & 12 Vict. c. 107. 16 & 17 Vict. c. 62.

- Sec. 1. Powers by said Acts vested in Privy Council may be exercised by the Lord Lieutenant, &c.*
2. *The Lord Lieutenant, with the advice of Privy Council in Ireland, may make orders and regulations for the purposes of the recited Acts and this Act.*
3. *All orders and regulations made under this Act shall be published in the Dublin Gazette.*
4. *Dublin Gazette shall be evidence of all orders or regulations found therein.*
5. *Recovery and application of penalties.*
6. *Penalty for contravening provisions of this Act, or order made in pursuance thereof.*
7. *Power of constable or police officer appointed to carry into effect the purposes of this Act Power of justice herein.*
8. *Recovery of expenses incurred under previous section.*
9. *Orders of Privy Council shall remain in force until modified, &c.*
10. *A fund to be provided for defraying expenses of this Act, to be assessed by the Poor Law Commissioners on Unions.*
11. *Treasurers of Unions shall pay over amount so assessed to bank of Ireland.*
12. *All claims for compensation to be sent to office of the chief secretary of Lord Lieutenant.*
13. *If a further sum required the same to be certified to the commissioners and assessed by them.*
14. *If occasion shall not arise for application of sums assessed the fact to be certified to the commissioners.*
15. *This Act, and recited Acts to be construed together.*
16. *Interpretation.*
17. *Short title.*
18. *To extend to Ireland only.*

'WHEREAS an Act was passed in the eleventh and twelfth years of the reign of her present Majesty, chapter one hundred and seven, for the more effectually preventing the spreading of contagious or infectious disease amongst cattle, sheep, horses, swine, or other animals:

'And whereas the said Act has been extended and continued by an Act passed in the sixteenth and seventeenth years of the reign of her Majesty, chapter

sixty-two, and has by sundry Acts been further continued as so extended, and is now in force until the first day of *August* one thousand eight hundred and sixty-six and the end of then next session of Parliament: and whereas it is expedient, so far as *Ireland* is concerned, to amend the said Act:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The several powers and authorities by the said recited Acts vested in the lords and others of her Majesty's Privy Council shall and may be exercised by the Lord Lieutenant or other chief governor or governors of *Ireland* for the time being, by and with the advice of her Majesty's Privy Council in *Ireland*.

2. It shall be lawful for the said Lord Lieutenant or other chief governor or governors of *Ireland*, by and with the advice of her Majesty's Privy Council in *Ireland*, from time to time to make such orders and regulations as to him or them may seem necessary for the purposes in the said recited Acts mentioned, and for the purpose of regulating the embarkation and landing of persons in charge of cattle or sheep or other animals, and of prohibiting and regulating the importation into *Ireland* of cattle, dogs, and other animals, and of all other articles likely to carry or communicate infection, and all such orders and regulations as to him or them may seem necessary (including the compulsory slaughter and burial of animals in an infected state or likely to propagate infection), for the purpose of preventing the introduction of the cattle plague into *Ireland*, and for the purpose of preventing the spreading of the same in case it should appear in *Ireland*, and of making all other orders or regulations for enforcing and giving better effect to this or the said recited Acts; and such orders and regulations, when made, and published in the *Dublin Gazette*, as hereinafter mentioned, shall have the same force as if they had been inserted in this Act.

3. All orders and regulations made under the authority of this Act shall, within one week after the making thereof, be published in the *Dublin Gazette*; and copies of the said orders and regulations shall be posted at such places and in such manner as the Lord Lieutenant or other chief governor or governors of *Ireland*, with the advice and consent of her Majesty's Privy Council in *Ireland* may direct.

4. In all courts of justice a copy of the *Dublin Gazette*, purporting to be printed by the Queen's authority, shall be conclusive evidence of the due making and publication of the orders or regulations which may be found therein, and it shall not be necessary to prove any other publication or the posting of the said orders and regulations.

5. All penalties imposed by this Act or the recited Acts, save as hereinafter provided, may be recovered in *Ireland* before a justice at petty sessions, in the manner related by the Acts regulating petty sessions in *Ireland*; and all penalties shall be applied as follows, that is to say, a part thereof not exceeding one-third may be awarded to the informer, and the rest to her Majesty, to be applied in aid of the fund by this Act created.

6. If any person acts in contravention of any provisions in this Act contained, or any order made in pursuance of this Act, he shall for each offence incur a penalty not exceeding twenty pounds, and where any such act is committed with respect to more than four animals, a penalty not exceeding five pounds for each animal may be imposed instead of the penalty of twenty pounds.

7. If any person moves or otherwise deals with any animal, matter, or thing in contravention of this Act or any order or regulation made in pursuance thereof, or if any drover or person in charge of any such animal, matter, or thing acts in contravention of any such order or regulation, any inspector or other officer appointed for carrying into effect the purposes of this Act, or any constable or police officer, may take such offender into custody, and detain him for such time as may be necessary to bring him before any justice of the peace, who shall thereupon be authorized to adjudicate in a summary manner on the penalty to be paid by him; any such officer may also seize any animal, matter, or thing in the charge of the offender, and take them to some place where they can be safely kept, and there detain them until he can obtain an order of a justice respecting them.

Any justice to whom application is made for an order respecting any animal, matter, or thing detained under this section, may order same to be detained or disposed of in such manner as may be directed by any orders or regulations to be made in pursuance of this Act; provided that no right of compensation shall be given in respect of animals, matters, or things seized or disposed of under this section.

8. Any expenses incurred under this last section may be recovered in a summary manner from the owner of the animal, matter, or thing in respect of which such expenses have been incurred, and the animal, matter, or thing may be detained until all such expenses have been defrayed; and if such expenses are not paid within four days, the same may be sold by public auction or private contract, and the monies arising from such sale applied in payment of the said expenses, including the expenses of the sale, and the overplus (if any) be returned to the owner or person in charge thereof.

9. All orders heretofore made by her Majesty's Privy Council shall be and remain in force and effect unless and until the same shall be modified or altered, so far as relates to *Ireland*, by the Lord Lieutenant and Privy Council, under the powers of this Act.

10. 'And whereas it is expedient, in case the cattle disease now prevailing in *Great Britain*, known as the rinderpest, should appear in *Ireland*, to provide a fund for defraying the expenses of carrying this Act into execution, and for compensating the owners of cattle the slaughter of which may be compelled by authority: Be it further enacted, that on the receipt of the chief secretary or under secretary of the Lord Lieutenant to the effect that a sum equivalent to a certain poundage, to be specified in said certificate, on the net annual value of the property rateable to the poor in all the unions in *Ireland* is required for the purpose aforesaid, it shall be lawful for the commissioners for administering the laws for relief of the poor in *Ireland* to assess such sum, by an

order under their seal, upon the several unions, in proportion to the net annual value of the rateable property therein, according to the valuation in force for the time being; and the said commissioners shall make such order, and shall transmit to the board of guardians, and likewise to the treasurer of each union, a copy thereof, stating the amount so assessed on such union; provided that no such certificate or order shall authorize the assessment of more than one halfpenny in the pound on the net annual value of the rateable property as aforesaid.

11. Forthwith on the receipt of such order the treasurer of the union shall, out of the funds then lying in his hands to the credit of the guardians, or, if there shall be then no sufficient assets out of the monies next received by him and placed to the credit of the guardians, pay over the amount so assessed on the union to the Bank of *Ireland*, to be there placed to a separate account, to be entitled the "cattle plague account;" and the guardians of the union shall in their account with the electoral divisions of the union debit each electoral division with its proportion of the said sum, according to the net annual value for the time being of the rateable property situate in each such division.

12. All claims for compensation for cattle which shall have been compelled to be slaughtered as aforesaid shall be sent to the office of the chief secretary of the Lord Lieutenant in *Dublin*, and shall be there dealt with and disposed of in accordance with the regulations in that behalf to be made and approved by the Lord Lieutenant and Privy Council; provided that in the case of cattle affected with the disease no greater amount shall be paid as compensation than one half of the actual value thereof immediately before being attacked by the disease, such value to be ascertained, certified, and reported as in the said regulations shall be provided, the sum in no case to exceed the sum of twenty pounds for each animal, and in the case of such cattle being insured, and the insurance receivable by the owner, no more than the difference, if any, between the one half of the actual value thereof so limited, and to be ascertained as aforesaid, and the amount of insurance so receivable; and in case of animals compelled to be slaughtered by reason of having been in the same shed or stable, or in the same herd or flock, or in contact with any animal infected with the disease, no greater amount shall be paid as compensation than three-fourths of the actual value of the animal so slaughtered, not to exceed the sum of twenty-five pounds for each animal, and in the case of cattle insured, and for which insurance is receivable by the owner, no more than the difference, if any, between the three-fourths of the actual value thereof so limited, and to be ascertained as aforesaid and the amount of the insurance so receivable.

13. If after the disbursement of the said fund in the manner aforesaid a further sum shall be required for like purposes, such further sum shall be certified to the said commissioners, and assessed by them, and paid to the said account as hereinbefore enacted; provided that no larger sum shall be levied under the authority of this Act than shall be equivalent in the whole to a poundage of fourpence in the pound on

the net annual value of the rateable property in the unions in *Ireland*.

14. If after the assessment and payment of any such sum or sums as aforesaid into the Bank of *Ireland* occasion shall not arise for the application of the whole or any part thereof to the purpose aforesaid, the fact shall be certified, as hereinbefore provided, to the said commissioners, who shall thereupon ascertain the amount of the remaining balance, and make and issue an order under their seal assigning the proportions returnable to each union according to its net annual value, and the Bank of *Ireland* shall, on receiving direction to that effect from the chief secretary or under-secretary of the Lord Lieutenant, remit the sums so assigned to the treasurers of the said unions respectively, and the guardians of each union shall, on the treasurer's receipt of the sum so assigned, credit each electoral division with its proportion according to the net annual value of the rateable property situate in each.

15. This Act and the said recited Acts shall be construed together, and all provisions of the said recited acts shall remain in full force save to the extent to which they have been modified or altered by this Act.

16. The words "justice of the peace" shall mean, within the police district of *Dublin* metropolis, one of the divisional justices of said district.

17. This Act may be cited as "The Cattle Disease Act (*Ireland*), 1866."

18. This Act shall extend to *Ireland* only.

#### GAP. V.

An Act for amending the Laws relating to the Investments on account of Savings Banks and Post Office Savings Banks. [13th March, 1866.]

- Sec. 1. *Power to treasury to substitute terminable annuities for capital stock standing to savings bank account.*
2. *Effect of substitution of terminable annuities for capital stock.*
3. *Power of Commissioners of Treasury as to payment to Commissioners of National Debt.*
4. *Power to Treasury to cancel capital stocks of annuities and substitute terminable annuities.*
5. *Warrants to be sufficient authority for cancellation, &c.*
6. *Short title.*

'WHEREAS in pursuance of divers Acts of Parliament the investments made by the Commissioners for the Reduction of the National Debt of the monies remitted to them on account of ordinary savings banks and post office savings banks consist in part of capital stocks and annuities standing in their names in the books of the governor and company of the Bank of *England* to two separate accounts, the one intitled "the account of the fund for the banks of savings," and the other "the account of the post office savings banks fund:"

'And whereas it is expedient to make further provision in relation to the said investments:'

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords

spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, as follows:—

1. The Commissioners of her Majesty's Treasury may, if they think it advantageous to the public service, by warrant addressed to the governor and company of the Bank of *England*, direct them to cancel any amount the said Commissioners of the Treasury may think fit, not exceeding in the whole two millions five hundred thousand pounds, of the capital stocks of annuities standing on each of the said savings bank accounts, and to substitute for the stock so cancelled on each account an annuity terminable at the expiration of a period not exceeding thirty years, and equivalent in value to the amount of stock cancelled, such value to be certified to the said Commissioners of the Treasury under the hands of the Comptroller-General or Assistant Comptroller-General and of the Actuary of the National Debt office, and to be ascertained according to the tables for the time being in force in relation to the grant of annuities by the Commissioners for the Reduction of the National Debt under the Act tenth *George* the Fourth, chapter twenty-four.

2. Upon the cancellation of any stock in pursuance of this Act, all dividends payable thereon shall cease to be payable from and after the the last day on which they were due previously to such cancellation, and the terminable annuity substituted for such stock shall be chargeable upon and payable out of the consolidated fund of the United Kingdom, or the growing produce thereof, in such proportions and at such times as may be fixed by the warrant of the said Commissioners of the Treasury.

3. The Commissioners of her Majesty's Treasury may from time to time vary the periods at which payments are to be made from the consolidated fund to the Commissioners for the Reduction of the National Debt, on account of any annual charges created by any Act for the time being in force for savings banks and post office savings banks.

4. The Commissioners of her Majesty's Treasury may in like manner, from time to time, when they shall consider it advantageous for the public service, direct the cancelling of such further amounts of capital stocks of annuities held by the Commissioners for the Reduction of the National Debt for post office savings banks as they shall consider expedient, and may substitute equivalent terminable annuities under the provisions of this Act in lieu of the capital stocks of annuities so cancelled.

5. The warrants to be issued to the said governor and company for the cancellation of any capital stock and the creation of any terminable annuity under this Act shall be a sufficient authority for such cancellation and creation.

6. This Act may be cited for all purposes as "The Savings Bank Investment Act, 1866."

#### CAP. VI.

An Act to supply the sum of one million one hundred and thirty-seven thousand seven hundred and seventy-two pounds out of the Consolidated Fund to the Service of the Year ending the thirty-first day

of *March*, one thousand eight hundred and sixty-six. [13th *March*, 1866.]

#### CAP. VII.

An Act to enable her Majesty to settle an Annuity on her Royal Highness the Princess *Helena Augusta Victoria*. [23rd *March*, 1866.]

#### CAP. VIII.

An Act to enable her Majesty to provide for the Support and Maintenance of his Royal Highness Prince *Alfred Ernest Albert* on his coming of Age. [23rd *March*, 1866.]

#### CAP. IX.

An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters. [23rd *March*, 1866.]

#### CAP. X.

An Act for the Regulation of her Majesty's Royal Marine Forces while on shore. [23rd *March*, 1866.]

#### CAP. XI.

An Act for the Cancellation of certain Capital Stocks of Annuities standing in the Names of the Commissioners for the Reduction of the National Debt. [23rd *March*, 1866.]

#### CAP. XII.

An Act to make Provision for the Government of *Jamaica*. [23rd *March*, 1866.]

#### CAP. XIII.

An Act to apply the Sum of Nineteen Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and sixty-six. [23rd *March*, 1866.]

#### CAP. XIV.

An Act for the Abolition of the Offices of Treasurer and of High Bailiff of County Courts as Vacancies shall occur, and to provide for the Payment of future Registrars of County Courts. [23rd *April*, 1866.]

#### CAP. XV.

An Act to amend the Act of the Eleventh and Twelfth Years of Her present Majesty, Chapter One hundred and seven, to prevent the spreading of contagious or infectious Disorders among Sheep, Cattle, and other Animals. [23rd *April*, 1866.]

#### CAP. XVI.

An Act for facilitating the public Exhibition of Works of Art in certain Exhibitions. [30th *April*, 1866.]

Sect. 1. *Power to owners of works of art to lend them to public exhibitions.*

2. *Due precautions to be taken for preservation of such works.*

3. *Definition of "owner for the time being."*

4. *Short title.*

‘WHEREAS the owners of works of art have shown great willingness to lend them for public exhibition:

‘And whereas it has been proposed to hold exhibitions of national portraits by means of loans, and to contribute works of art now in this country to the Universal Exhibition at *Paris* in One thousand eight hundred and sixty-seven:

And whereas it is expedient to facilitate the loan of such works of art to the above-named exhibition:’

Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The owner for the time being of any work of art may, without incurring any responsibility for any consequent loss or injury, lend such work to the lord president for the time being of Her Majesty’s most honourable privy council, for any period not exceeding twelve months, to be exhibited to the public by him or by his direction at the above-mentioned exhibitions.

2. It shall be the duty of the lord president to take due precautions for the preservation of all works of art lent to him in pursuance of this Act, but he shall not be personally liable for any loss or injury any article may sustain.

3. The expression “owner for the time being” shall include trustees of museums and other bodies of persons, whether corporate or unincorporate, having in their possession or under their control works of art, on trust for any public purpose, or for any artistic or scientific society, or possessed thereof on behalf of themselves and their successors, it shall also include any tenant for life or other person beneficially entitled (otherwise than as mortgagee) to the possession or enjoyment of works of art for life or any other limited period, and being of full age.

4. This Act may be cited for all purposes as “The Art Act, 1866.”

#### CAP. XVII.

An Act to regulate the Inspection of Cattle Sheds, Cowhouses, and Byres within Burghs and populous Places in *Scotland*. [30th April 1866.]

#### CAP. XVIII.

An Act to make Provision for the Transfer of the Assets, Liabilities, and Management of the *Bengal, Madras, and Bombay* Military Funds, the *Bengal* Military Orphan Society, and other Funds, to the Secretary of State for *India* in Council.

[30th April, 1866.]

#### CAP. XIX.

An Act to amend the Law relating to Parliamentary Oaths. [30th April, 1866.]

- Sec. 1. *Oath to be taken by members of Parliament,*  
 2. *The name of the sovereign for the time being to be used in the oath.*  
 3. *Time and manner of taking the oath.*  
 4. *Provision in favour of Quakers, &c.*  
 5. *Penalty for omission to take oath.*  
 6. *Repeal of Acts and parts of Acts in Schedule.*  
 7. *Short title.*

‘WHEREAS it is expedient that one uniform oath should be taken by members of both Houses of Parliament on taking their seats in every Parliament:’

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The oath to be made and subscribed by members of both Houses of Parliament on taking their seats in every Parliament shall be in the form following:

‘I, A. B. do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria; and I do faithfully promise to maintain and support the succession to the Crown, as the same stands limited and settled by virtue of the Act passed in the reign of King William the Third, intitled, “An Act for the further Limitation of the Crown, and better securing the rights and liberties of the subject.” and of the subsequent Acts of Union with Scotland and Ireland. So help me GOD.’

2. Where in the oath hereby appointed the name of her present Majesty is expressed, the name of the sovereign of this Kingdom for the time being by virtue of the Act “for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,” shall be substituted from time to time with proper words of reference thereto.

3. The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every member of the House of Peers at the table in the middle of the said House before he takes his place in the said House, and whilst a full House of Peers is there with their Speaker in his place, and by every member of the House of Commons at the table in the middle of the said house, and whilst a full House of Commons is there duly sitting, with their Speaker in his chair, at such hours and according to such regulations as each House may by its standing order direct.

4. Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the form of the oath hereby appointed, substituting the words “solemnly, sincerely, and truly declare and affirm,” for the word “swear,” and omitting the words “So help me God;” and the making and subscribing such affirmation with such substitution as aforesaid by a person hereby authorized to make and subscribe the same shall have the same effect as the making and subscribing by other persons of the oath hereby appointed.

5. If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said house, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of her Majesty’s Superior Courts at *Westminster*; and if any member of the House of Commons votes as such in the said house, or sits during any debate



after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead.

6. There shall be repealed the several Acts and parts of Acts specified in the Schedule hereto to the extent in the said Schedule in that behalf mentioned: provided always, that the repeal of these Acts, or any of them, or of any parts thereof, shall not be construed to weaken or in any manner to affect any laws or statutes now in force for preserving and upholding the supremacy of our Lady the Queen, her heirs and successors, in all matters civil and ecclesiastical within this realm and other her Majesty's dominions.

7. This Act may be cited for all purposes as "The Parliamentary Oaths Act, 1866."

#### SCHEDULE.

*The portions printed in Italics show the extent of repeal.*

30 Car. 2, stat. 2, c. 1.—An Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament.—*So much as is unrepealed.*

13 Will. 3, c. 6.—An Act for the further Security of his Majesty's Person, and the Succession of the Crown in the Protestant Line, and for extinguishing the Hopes of the pretended Prince of Wales and all other Pretenders, and their open and secret abettors.—*Sections 10, 11.*

1 Geo. 1, stat. 2, c. 13.—An Act for the further Security of his Majesty's Person and Government and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the Hopes of the pretended Prince of Wales, and his open and secret Abettors.—*Sections 16, 17.*

6 Geo. 3, c. 53.—An Act for altering the oath of abjuration and the assurance, and for amending so much of an act of the seventh year of her late Majesty Queen Anne, intituled An Act for the Improvement of the Union of the Two Kingdoms, as after the Time therein limited requires the delivery of certain Lists and Copies therein mentioned to Persons indicted of High Treason or Misprision of Treason.—*So far as relates to oaths to be taken by members of either House of Parliament.*

10 Geo. 4, c. 7.—An Act for the Relief of his Majesty's Roman Catholic Subjects.—*So far as relates to oaths to be taken by members of either House of Parliament.*

6 & 7 Vict. c. 6.—An Act to alter the Hours within which certain Oaths and Declarations are to be made and subscribed in the House of Peers.—*The whole Act.*

21 & 22 Vict. c. 48.—An Act to substitute One Oath for the Oaths of Allegiance, Supremacy, and Abjuration, and for the Relief of Her Majesty's Subjects professing the Jewish Religion.—*So far as relates to oaths to be taken by members of either House of Parliament.*

21 & 22 Vict. c. 49.—An Act to provide for the Relief of Her Majesty's Subjects professing the Jewish Religion.—*So far as relates to oaths to be taken by members of either House of Parliament.*

22 Vict. c. 10.—An Act to settle the Form of Affirmation to be made in certain Cases by Quakers and other Persons by Law permitted to make an Affirmation instead of taking an Oath.—*So far as relates to oaths to be taken by members of both Houses of Parliament.*

23 & 24 Vict. c. 63.—An Act to amend the Act of the Twenty-first and Twenty-second Years of Victoria, Chapter Forty-nine, to provide for the Relief of Her Majesty's Subjects professing the Jewish Religion.—*The whole Act.*

#### CAP. XX.

An Act to indemnify *William Forsyth Esquire*, One of Her Majesty's Counsel, from any penal Consequences which he may have incurred by sitting or voting as a Member of the House of Commons while holding the Office of Standing Counsel to the Secretary of State in Council of India.

[30th April, 1866.]

#### CAP. XXI.

An Act to authorize the Commissioners of Her Majesty's Works and Public Buildings to acquire by compulsory Purchase or otherwise certain Lands Houses, and Premises in the Parish of *Saint Margaret, Westminster*; and for other purposes.

[18th May, 1866.]

#### CAP. XXII.

An Act to render it unnecessary to make and subscribe certain Declarations as a Qualification for Offices and Employments; to indemnify such persons as have omitted to qualify themselves for Office and Employment; and for other purposes relating thereto.

[18th May, 1866.]

#### CAP. XXIII.

An Act to alter certain Duties of Customs in the *Isle of Man*, and for other Purposes.

[18th May, 1866.]

#### CAP. XXIV.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Winchester, Burton-upon-Trent, Loughon, Accrington, Preston, Bangor, Elland, Halstead, Wadsworth, Canterbury, Dartmouth, Dukinfield, Stroud, and Bridlington*, and for other Purposes relative to certain Districts under the said Act.

[18th May, 1866.]

#### CAP. XXV.

An Act to consolidate and amend the several Laws regulating the Preparation, Issue, and Payment of Exchequer Bills and Bonds.

[18th May, 1866.]

#### CAP. XXVI.

An Act to secure the Repayment of Public Moneys advanced for the Drainage and Improvement of Lands and other like Objects in *Ireland*.

[18th May, 1866.]

5 & 6 Vic. c. 89. 10 & 11 Vic. c. 32. 26 & 27 Vic. c. 88. 27 & 28 Vic. c. 72. 28 & 29 Vic. c. 62. 28 & 29 Vic. c. 88.

- Sec. 1. *All public moneys advanced to be charged and chargeable as if 28 & 29 Vic. c. 88 had not been passed.*
2. *Orders to be registered though affecting lands recorded under 28 & 29 Vic. c. 88.*
3. *Sec. 62 of 21 & 22 Vic. c. 72 to apply to all charges, &c.*

‘WHEREAS under and by virtue of a certain Act of the session of the fifth and sixth years of her Majesty, chapter eighty-nine, being an Act to promote the drainage of land and improvement of navigation and water-power in connexion with such drainage in *Ireland*, and certain Acts amending the same, and of a certain other Act of the session held in the tenth and eleventh years of her Majesty, chapter thirty-two, being an Act to facilitate the improvement of landed property in *Ireland*, and of the several Acts amending and extending the provisions of the said Acts respectively; and under and by virtue of a certain Act, being the “*Drainage and Improvement of Lands Act (Ireland)*, 1863,” and certain other Acts of the session of the twenty-seventh and twenty-eighth years of her Majesty, chapter seventy-two, and of the session of the twenty-eighth and twenty-ninth years of her Majesty, chapter fifty-two, for amending the provisions of the said last mentioned Act; and under and by virtue of a certain Act of the session of the ninth year of her Majesty, chapter three, being an Act to encourage the sea fisheries of *Ireland*, by promoting and aiding with grants of public moneys the construction of piers, harbours, and other works, and the Acts amending the same, provision is made for the advance of public moneys for the drainage and improvement of lands and estates, and to aid in the construction of public works in *Ireland*, and for the securing all such advances by charging the same on the lands, estates, and interests of proprietors and others, and in priority to other charges and incumbrances as in the said several Acts is particularly provided; and by certain of the said Acts it is enacted that such charges should have priority from the registration in the Registry of Deeds Office of *Ireland* of certain orders of the Commissioners of Public Works in *Ireland* thereby directed to be so registered:’ ‘And whereas divers sums of public moneys have been already advanced for such purposes, and on such security, and it is intended that further sums will be hereafter advanced for the like purposes and upon the like security:

‘And whereas Acts of Parliament may be hereafter passed providing for the advances of public moneys for the like and other purposes, and on the like security:

‘And whereas in the session of the twenty-eighth and twenty-ninth years of her Majesty an Act was passed called the “*Record of Title Act (Ireland)*, 1865,” and thereby provision is made for the recording of titles to lands sold and conveyed, or the title to which may be declared by the Landed Estates Court in *Ireland*; and it is thereby enacted that, subject as therein mentioned, the recorded owner for the time being shall be and be deemed to be absolutely and indefeasibly possessed of and entitled to such recorded estate against all persons, and free from all rights, interests, claims and demands whatsoever, in-

cluding any estate, claim, or interest of her Majesty, her heirs and successors; provided always, that nothing therein contained should prejudice or affect any rentcharge in lieu of tithe, or any crown rent or quit rent to the crown, or any charge imposed before the day of the passing of that Act under any public Act or Acts for promoting drainage or land improvement in *Ireland*; and it is also thereby enacted that the provisions of the several Acts of Parliament then in force relating to the registry of deeds in *Ireland* should cease to be applicable to any land when placed on the record under the provisions of that Act, and so long as it remains thereon:

‘And whereas it is apprehended that the provisions of the said “*Record of Title Act*” will operate to extinguish or endanger and postpone in many instances charges created to secure the repayment of public moneys advanced under the said Acts when such moneys may have been or may be advanced after the passing of the said “*Record of Title Act*” and otherwise; and difficulties have arisen and may arise as to the registration of such orders as aforesaid, when such orders may have been or may be made with respect to lands, the title to which has been or may hereafter be recorded; and it is expedient fully to provide for the repayment of public money advanced for the improvement of lands and other the like objects, and for that purpose to amend the sixty-second section of the Act of the session held in the twenty-first and twenty-second years of her Majesty, being an Act to facilitate the sale and transfer of land in *Ireland*:’

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. That in all cases where public moneys have been or may hereafter be advanced under and by virtue of the provisions of the said Acts, or any of them, or by virtue of any Act which may be hereafter passed for the like purpose, the said moneys so advanced shall be charged and chargeable on all lands and estates, and interest in lands, and on all persons and bodies whatsoever, in the same manner and in the same priority, and shall be recoverable by the same means in all respects, as if the said “*Record of Title Act (Ireland)*, 1865,” had not been passed.

2. Every order made or to be made by the Commissioners of Public Works in *Ireland*, and by any of the said Acts directed to be registered in the Registry of Deeds Office in *Ireland*, shall be registered in said office although such order affect or purport to affect lands in *Ireland* the title of which may be recorded under the said “*Record of Title Act*,” and every such order shall be also registered in the Record of Title Office as against any lands recorded therein, and affected, or purporting to be affected, by such order.

3. The sixty-second section of the said Act to facilitate the sale and transfer of land in *Ireland* shall apply to and include all charges made or to be made by virtue of any Act authorizing the advance of public money upon the security of lands in *Ireland*.

## CAP. XXVII.

An Act to amend the Dockyard Extensions Act, 1865. [18th May, 1866.]

## CAP. XXVIII.

An Act to enable the Public Works Loan Commissioners to make Advances towards the Erection of Dwellings for the Labouring Classes. [18th May, 1866.]

## CAP. XXIX.

An Act to authorise the Inclosure of certain Lands in pursuance of a Report of the Inclosure Commissioners for *England and Wales*. [18th May, 1866.]

## CAP. XXX.

An Act to amend The Harbours and Passing Tolls, &c. Act, 1861. [18th May, 1866.]

Sec. 1. *Power for Board of Trade to authorise suspension of Sinking Fund, &c. under certain Harbour Acts.* 24 & 25 Vict. c. 47.

2. *Restriction on reborrowing.*

3. *Short Title.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Where under the Harbours and Passing Tolls, &c. Act, 1861, any loan has been or is about to be made by the Public Works Loan Commissioners to a harbour authority having borrowing powers under a special Act by which the extinguishment of any debt of the harbour authority by means of annual payments of a prescribed amount or within a prescribed time is required, and the Board of Trade, on the application of the harbour authority, are satisfied that by virtue of the provision made or about to be made for repayment within a certain time of any such loan or loans from the Public Works Loan Commissioners there will be extinguished an amount of debt of the harbour authority not less than that which would in the same time be extinguished under the provisions of the special Act, and the Board of Trade thereupon certify in writing to the effect that it is expedient that the operation of the provisions of the special Act relative to the extinguishment of debt, or such of them as are referred to in the certificate, should as from a time therein specified, and subject to any conditions therein expressed, be suspended during the period or periods for repayment of such loan or loans to the Public Works Loan Commissioners, then and in every such case the operations of those provisions shall be and the same is by virtue of this Act and of the certificate suspended accordingly.

2. Any money borrowed from the Public Works Loan Commissioners to which any certificate of the Board of Trade under this Act relates, when paid off shall not be reborrowed.

3. This Act may be cited as The Harbour Loans Act, 1866.

## CAP. XXXI.

An Act to provide for Superannuation Allowances to Officers of Vestries and other Boards within the Area of the Metropolis Local Management Act. [18th May, 1866.]

## CAP. XXXII.

An Act further to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes. [11th June 1866.]

## CAP. XXXIII.

An Act to confirm a Provisional Order under "The Land Drainage Act, 1861." [11th June, 1866.]

## CAP. XXXIV.

An Act to give further Facilities for the Establishment of Societies for the Assurance of Cattle and other Animals. [11th June 1866.]

Sec. 1. *Power to establish Societies for the Assurance of Animals to any amount under the Friendly Societies Act.*

2. *Contributions to be recoverable in the County Courts.*

3. *Short title.*

'WHEREAS it is expedient to give further facilities for the establishment of societies for the assurance of cattle and other animals, under the Friendly Societies Acts: "Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

1. Notwithstanding anything in the Act passed in the session holden in the eighteenth and nineteenth years of her Majesty, chapter sixty-three, intituled, *An Act to consolidate and amend the Law relating to Friendly Societies*, a society may be established under the provisions of the said Act for the assurance to any amount against loss by death of neat cattle, sheep, lambs, swine, and horses, from disease or otherwise; and neither the provisions in section nine of the said Act, that no member shall subscribe or contract for a sum payable on death or any other contingency exceeding two hundred pounds, nor section thirty-eight of the said Act, shall apply to any such society so established or which may hereafter be so established for such purpose.

2. All contributions, premiums, and other payments payable by any member of any such society, under the rules thereof, in respect of any assurance effected by him, shall be considered as a debt due by him to the society, and shall be recoverable as such in the County Court of the district within which the usual or principal place of business of the society is situate, in *Scotland* in the Sheriff Court of the county, and in *Ireland* before the assistant barrister within his district.

3. This Act may be cited for all purposes as the Cattle Assurance Act, 1866.

## CAP. XXXV.

An Act for the better Prevention of Contagious Diseases at certain Naval and Military Stations.

[11th June, 1866.]

Sec. 1. *Short title.*

2. *Interpretation of terms.*

3. *Act to commence from September 30, 1866, and then 27 & 28 Vict. c. 85, to cease to operate, except, &c.*

4. *Act to extend only to places in schedule.*

5. *Expenses of Act to be defrayed by admiralty, &c.*

6. *Appointment of visiting surgeons and assistants.*

7. *Appointment of inspector and assistant inspector of certified hospitals.*

8. *Power to admiralty, &c. to provide hospitals and certify them.*

9. *Power to certify other hospitals.*

10. *Inspection of certified hospitals.*

11. *Power to withdraw certificate.*

12. *Provision for moral and religious instruction.*

13. *Certificate and declaration of withdrawal to be gazetted.*

14. *Power to make regulations for certified hospitals. A printed copy of regulations to be evidence.*

15. *On information, justice may issue notice to woman who is a common prostitute.*

16. *Power to justice to order periodical medical examination.*

17. *Voluntary submission by woman.*

18. *Power to make regulations as to examinations.*

19. *Visiting surgeon to prescribe times, &c.*

20. *Certificate of visiting surgeon.*

21. *Placing in certified hospital for treatment.*

22. *Detention in hospital.*

23. *Power to transfer to another certified hospital.*

24. *Limitation of detention.*

25. *Power for woman detained to apply to justice for discharge.*

26. *During conveyance to certified hospital, &c., woman deemed to be in legal custody.*

27. *Expenses of woman's return home.*

28. *Punishment of women for refusing to be examined, &c.*

29. *Effect of order of imprisonment for absence &c., from examination.*

30. *Effect on order of imprisonment for quitting hospital, &c.*

31. *Penalty on woman discharged uncured conducting herself as prostitute.*

32. *Order to operate whenever woman is resident in any place where order made, &c.*

33. *Application for relief from examination.*

34. *Order for relief from examination on discontinuance of prostitution, &c.*

35. *Forfeiture of recognizance by return to prostitution.*

36. *Penalties for permitting prostitute having contagious disease to resort to any house, &c. for prostitution.*

37. *Application of 11 & 12 Vict. c. 43, and 14 & 15 Vict. c. 93 to this Act.*

38. *Forms in second schedule to be used.*

39. *Instruments may be in print, &c.*

40. *Presumption as to signature of justices, &c.*

41. *Mode of service.*

42. *Limitation of actions, &c.*

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

*Preliminary.*

1. This Act may be cited as the Contagious Diseases Act, 1866.

2. In this Act—

The term "Contagious Disease" means venereal disease, including gonorrhoea:

The term "police" means metropolitan police or other police or constabulary authorised to act in any part of any place to which this Act applies:

The term "superintendent" includes inspector:

The term "chief medical officer" means the principal physician or surgeon for the time being attached to or doing duty at a hospital, or the house surgeon or resident surgeon of the hospital:

The term "justice" means a justice of the peace having jurisdiction in the county, borough, or place where the matter requiring the cognizance of a justice arises, or in any part of any place to which this Act applies:

The term "two justices" means two or more justices assembled and acting together, and includes any police or stipendiary magistrate or other justice having by law for any purpose the powers of two justices.

3. This Act shall commence from and immediately after the thirtieth day of September one thousand eight hundred and sixty-six, and on the commencement of this Act the Contagious Diseases Prevention Act, 1864, shall cease to operate; but the discontinuance of that Act by this Act shall not affect the validity or invalidity of anything done or suffered before the commencement of this Act; and that discontinuance or anything in this Act shall not apply to or in respect of any offence, act, or thing committed or done or omitted before the commencement of this Act; and every such offence, act, or thing shall after and notwithstanding the commencement of this Act, have the same consequences and effect in all respects as if the Contagious Diseases Prevention Act, 1864, had not been discontinued.

Every order of a justice under the said Act shall remain in force as if this Act had not been passed.

Every hospital certified under the said Act shall continue to be a certified hospital, for the purposes of this Act, for three months after the commencement of this Act, unless before the expiration of that time the certificate is withdrawn or the hospital is certified under this Act; and every hospital certified under this Act shall be deemed a certified hospital for the purposes of the said Act, as long as the operation thereof continues for any purpose under this Act.

*Extent of Act.*

4. The places to which this Act applies shall be

the places mentioned in the first schedule to this Act, the limits of which places shall for the purposes of this Act be such as are defined in that schedule.

#### *Expenses of Execution of Act.*

5. Expenses incurred in the execution of this Act shall be paid under the direction of the Lord High Admiral of the United Kingdom or the commissioners for executing the office of Lord High Admiral (hereafter in this Act styled the admiralty) and of such one of her Majesty's principal secretaries of state as her Majesty thinks fit for the time being to entrust with the seals of the war department (hereafter in this Act styled the secretary of state for war) out of money to be provided by Parliament for that purpose.

#### *Visiting Surgeons.*

6. The admiralty or the secretary of state for war may, on the commencement of this Act, appoint a medical officer for each of the places to which this Act applies, to be, during pleasure, visiting surgeon there for the purposes of this Act, and may from time to time, on the death, resignation, or removal from office of any visiting surgeon, appoint another such officer in his stead.

The admiralty or the secretary of state for war may, from time to time as occasion requires, appoint a medical officer to be the assistant of any such visiting surgeon; and every such assistant shall have the like powers and duties as the visiting surgeon on whom he is appointed assistant.

A notice of the appointment of every such visiting surgeon and of every such assistant shall be published in the *London* or *Dublin Gazette*, according as the place for which he is appointed is in *England* or in *Ireland*.

A copy of the *Gazette* containing such a notice shall be conclusive evidence of the appointment.

#### *Inspector of Hospitals.*

7. The admiralty and the secretary of state for war shall, on the commencement of this Act, appoint a medical officer to be, during pleasure, inspector of certified hospitals under this Act, and shall from time to time, on the death, resignation, or removal from office of any such inspector, appoint another such officer in his stead.

The admiralty and the secretary of state for war may, from time to time, as occasion requires, appoint a medical officer to be an assistant inspector of certified hospitals under this Act, which assistant shall have the like powers and duties as the inspector.

A notice of the appointment of every such inspector and of every such assistant shall be published in the *London Gazette*.

A copy of the *Gazette* containing such a notice shall be conclusive evidence of the appointment.

#### *Certified Hospitals.*

8. The admiralty or the secretary of state for war may from time to time provide any buildings or parts of buildings as hospitals for the purposes of this Act, and any building or part of a building so provided and certified in writing by the admiralty or secretary of state for war (as the case may be) to be so provided shall be deemed a certified hospital under this Act; and every certified hospital so provided shall be

placed under the control or management of such persons as to the admiralty or the secretary of state for war from time to time seem fit.

9. The admiralty or the secretary of state for war may from time to time, on such application or with such consent as to them or him seems requisite, and on the report of the inspector of certified hospitals, certify in writing any building or part of a building (not provided as a hospital by the admiralty or secretary of state for war) to be useful and efficient as a hospital for the purposes of this Act, and thereupon that building or part of a building shall be deemed a certified hospital under this Act.

10. The inspector of certified hospitals shall from time to time visit and inspect every certified hospital.

11. The admiralty or the secretary of state for war may at any time, by declaration in writing, declare the certificate relative to any certified hospital withdrawn as from a time specified in the declaration, and thereupon the same shall cease to be a certified hospital as from the time so specified.

12. A hospital shall not be certified under this Act unless at the time of the granting of a certificate adequate provision is made for the moral and religious instruction of the women detained therein under this Act; and if at any subsequent time it appears to the admiralty or the secretary of state for war that in any such hospital adequate provision for that purpose is not made, the certificate of that hospital shall be withdrawn.

13. Every certificate and every declaration of withdrawal of a certificate relative to any hospital under this Act shall be published in the *London* or *Dublin Gazette*, according as the hospital to which the certificate or declaration relates is in *England* or in *Ireland*.

A copy of the *Gazette* containing any such certificate or declaration shall be conclusive evidence of such certificate or declaration.

Every certificate proved to have been made shall be presumed to be in force until the withdrawal thereof is proved.

14. The managers or persons having the control or management of each certified hospital shall make regulations for the management and government of the hospital, as far as regards women authorized by this Act to be detained therein for medical treatment, or being therein under medical treatment for a contagious disease, such regulations not being inconsistent with the provisions of this Act, and may from time to time alter any such regulations; but all such regulations, and all alterations thereof, shall be subject to the approval in writing of the admiralty or the secretary of state for war.

A printed copy of regulations purporting to be regulations of a certified hospital so approved, such copy being signed by the inspector of certified hospitals, or the chief medical officer of the hospital, shall be evidence of the regulations of the hospital, and of the due making and approval thereof, for the purposes of this Act.

#### *Periodical Medical Examinations.*

15. Where an information on oath is laid before a justice by a superintendent of police, charging to the

effect that the informant has good cause to believe that a woman therein named is a common prostitute, and either is resident within the limits of any place to which this Act applies, or, being resident within five miles of those limits, has, within fourteen days before the laying of the information, been within those limits for the purpose of prostitution, the justice may, if he thinks fit, issue a notice thereof addressed to such woman, which notice the superintendent of police shall cause to be served on her:

Provided that nothing in this Act contained shall apply or extend, in the case of *Woolwich*, to any woman who is not resident within one of the parishes of *Woolwich*, *Plumstead*, or *Charlton*.

16. In either of the following cases, namely:—

If the woman on whom such a notice is served appears herself, or by some person on her behalf, at the time and place appointed in the notice, or at some other time and place appointed by adjournment;—

If she does not so appear, and it is shown (on oath) to the justice present that the notice was served on her a reasonable time before the time appointed for her appearance, or that reasonable notice of such adjournment was given to her (as the case may be)—

The justice present, on oath being made before him substantiating the matter of the information to his satisfaction, may, if he thinks fit, order that the woman be subject to a periodical medical examination by the visiting surgeon for any period not exceeding one year, for the purpose of ascertaining at the time of each such examination whether she is affected with a contagious disease; and thereupon she shall be subject to such a periodical medical examination, and the order shall be a sufficient warrant for the visiting surgeon to conduct such examination accordingly.

The order shall specify the time and place at which the woman shall attend for the first examination.

The superintendent of police shall cause a copy of the order to be served on the woman.

17. Any woman, in any place to which this Act applies, may voluntarily, by a submission in writing signed by her in the presence of and attested by the superintendent of police, subject herself to a periodical medical examination under this Act for any period not exceeding one year.

18. For each of the places to which this Act applies, either the admiralty or the secretary of state for war (but not both for any one place) may from time to time make regulations respecting the times and places of medical examinations under this Act at that place, and generally respecting the arrangements for the conduct thereof of those examinations; and a copy of all such regulations from time to time in force for each place shall be sent by the admiralty or the secretary of state for war (as the case may be) to the clerk of the peace, town clerk (if any), clerk of the justices, visiting surgeon, and superintendent of police.

19. The visiting surgeon, having regard to the regulations aforesaid and to the circumstances of each case, shall at the first examination of each woman examined by him, and afterwards from time to time as occasion requires, prescribe the times and places at which she is required to attend again for exami-

nation; and he shall from time to time give or cause to be given to each such woman, notice in writing of the times and places so prescribed.

#### *Detention in Hospital.*

20. If on any such examination the woman examined is found to be affected with a contagious disease, she shall thereupon be liable to be detained in a certified hospital subject and according to the provisions of this Act, and the visiting surgeon shall sign a certificate to the effect that she is affected with a contagious disease, naming the certified hospital in which she is to be placed; and he shall sign that certificate in triplicate, and shall cause one of the originals to be delivered to the woman and the others to the superintendent of police.

21. Any woman to whom any such certificate of the visiting surgeon relates may, if she thinks fit, proceed to the certified hospital named in that certificate, and place herself there for medical treatment, but if after the certificate is delivered to her she neglects or refuses to do so, the superintendent of police, or a constable acting under his orders, shall apprehend her, and convey her with all practicable speed to that hospital, and place her there for medical treatment, and the certificate of the visiting surgeon shall be a sufficient authority to him for so doing.

The reception of a woman in a certified hospital by the managers or persons having the control or management thereof shall be deemed to be an undertaking by them to provide for her care and treatment, lodging, clothing, and food, during her detention in the hospital.

22. Where a woman certified by the visiting surgeon to be affected with a contagious disease places herself, or is placed as aforesaid, in a certified hospital for medical treatment, she shall be detained there for that purpose by the chief medical officer of the hospital until discharged by him by writing under his hand.

The certificate of the visiting surgeon, one of the three originals whereof shall be delivered by the superintendent of police to the chief medical officer, shall, when so delivered, be sufficient authority for such detention.

23. The inspector of certified hospitals may, if in any case it seems to him expedient, by order in writing signed by him, direct the transfer of any woman detained in a certified hospital for medical treatment from that certified hospital to another named in the order.

Every such order shall be made in triplicate, and one of the originals shall be delivered to the woman and the others to the superintendent of police.

Every such order shall be sufficient authority for the superintendent of police or any person acting under his orders to transfer the woman to whom it relates from the one hospital to the other, and to place her there for medical treatment; and she shall be detained there for that purpose by the chief medical officer of the hospital until discharged by him by writing under his hand.

The order of the inspector of certified hospitals, one of the originals whereof shall be delivered by the superintendent of police to the chief medical officer of the hospital to which the transfer is made, shall when so delivered be sufficient authority for such detention.

24. Provided always, That any woman shall not be detained under any one certificate for a longer time than three months, unless the chief medical officer of the hospital in which she is detained, and the inspector of certified hospitals, or the visiting surgeon for the place when she came or was brought, conjointly certify that her further detention for medical treatment is requisite (which certificate shall be in duplicate, and one of the originals thereof shall be delivered to the woman); and in that case she may be further detained in the hospital in which she is at the expiration of the said period of three months by the chief medical officer until discharged by him by writing under his hand; but so that any woman be not detained under any one certificate for a longer time in the whole than six months.

25. If any woman detained in any hospital considers herself entitled to be discharged therefrom, and the chief medical officer of the hospital refuses to discharge her, such woman shall on her request be conveyed before a justice who, if he is satisfied upon reasonable evidence that she is free from a contagious disease, shall discharge her from such hospital, and such order of discharge shall have the same effect as the discharge of the chief medical officer.

26. Every woman conveyed or transferred under this Act to a certified hospital shall, while being so conveyed or transferred thither, and also while detained there, be deemed to be legally in the custody of the person conveying, transferring, or detaining her, notwithstanding that she is for that purpose removed out of one into or through another jurisdiction, or is detained in a jurisdiction other than that in which the certificate of the visiting surgeon was made.

27. Every woman shall, on her discharge from the hospital, be sent to the place of her residence, if she so desires, without expense to herself.

*Refusal to be examined, &c.*

28. In the following cases, namely,—

If any woman subjected by order of a justice under this Act to periodical medical examination at any time temporarily absents herself in order to avoid submitting herself to such examination on any occasion on which she ought so to submit herself, or refuses or wilfully neglects to submit herself to such examination on any such occasion;

If any woman authorised by this Act to be detained in a certified hospital for medical treatment quits the hospital without being discharged therefrom by the chief medical officer thereof by writing under his hand (the proof whereof shall lie on the accused);

If any woman authorized by this Act to be detained in a certified hospital for medical treatment, or any woman being in a certified hospital under medical treatment for a contagious disease, refuses or wilfully neglects while in the hospital to conform to the regulations thereof approved under this Act;

Then and in every such case such woman shall be guilty of an offence against this Act, and on summary conviction shall be liable to imprisonment with or without hard labour, in the case of a first offence for

any term not exceeding one month, and in the case of a second or any subsequent offence for any term not exceeding three months; and in the case of the offence of quitting the hospital without being discharged as aforesaid the woman may be taken into custody without warrant by any constable.

29. If any woman is convicted of and imprisoned for the offence of absenting herself or of refusing or neglecting to submit herself to examination as aforesaid, the order subjecting her to periodical medical examination shall be in force after and notwithstanding her imprisonment, unless the surgeon or other medical officer of the prison, or a visiting surgeon appointed under this Act, at the time of her discharge from imprisonment, certifies in writing to the effect that she is then free from a contagious disease (the proof of which certificate shall lie on her), and in that case the order subjecting her to periodical medical examination shall, on her discharge from imprisonment, cease to operate.

30. If any woman is convicted of and imprisoned for the offence of quitting an hospital without being discharged, or of refusing or neglecting while in an hospital to conform to the regulations thereof as aforesaid, the certificate of the visiting surgeon under which she was detained in the hospital shall continue in force, and on the expiration of her term of imprisonment she shall be sent back from the prison to that certified hospital, and shall (notwithstanding anything in this Act) be detained there under that certificate as if it were given on the day of the expiration of her term of imprisonment, unless the surgeon or other medical officer of the prison, or a visiting surgeon appointed under this Act, at the time of her discharge from imprisonment, certifies in writing to the effect that she is then free from a contagious disease (the proof of which certificate shall lie on her), and in that case the certificate under which she was detained, and the order subjecting her to periodical medical examination, shall, on her discharge from imprisonment, cease to operate.

31. If on any woman leaving a certified hospital a notice in writing is given to her by the chief medical officer of the hospital to the effect that she is still affected with a contagious disease, and she is afterwards in any place for the purpose of prostitution without having previously received from a visiting surgeon appointed under this Act a certificate in writing endorsed on the notice or on a copy thereof certified by the chief medical officer of the hospital (proof of which certificate shall lie on her) to the effect that she is then free from a contagious disease, she shall be guilty of an offence against this Act, and on summary conviction before two justices shall be liable to be imprisoned, with or without hard labour, in the case of a first offence for any term not exceeding one month, and in the case of a second or any subsequent offence for any term not exceeding three months.

*Duration of order.*

32. Every order under this Act subjecting a woman to periodical medical examination shall be in operation and enforceable, in manner in this Act provided, as long as and whenever from time to time the woman to whom it relates is resident within the limits of the



place to which this Act applies wherein the order was made, or within five miles of those limits, but not in any case for a longer period than one year; and where the chief medical officer of a certified hospital, on the discharge by him of any woman from the hospital, certifies that she is free from a contagious disease (proof of which certificate shall lie on her), the order subjecting her to periodical medical examination shall thereupon cease to operate.

*Relief from examination.*

33. If any woman subjected to a periodical medical examination under this Act (either on her own submission or under the order of a justice), desiring to be relieved therefrom, and not being under detention in a certified hospital, makes application in writing in that behalf to a justice, the justice shall appoint by notice in writing a time and place for the hearing of the application, and shall cause the notice to be delivered to the applicant, and a copy of the application and of the notice to be delivered to the superintendent of police.

34. If on the hearing of the application it is shown to the satisfaction of a justice, that the applicant has ceased to be a common prostitute, or if the applicant, with the approval of the justice, enters into a recognizance, with or without sureties, as to the justice seems meet, for her good behaviour during three months thereafter, the justice shall order that she be relieved from periodical medical examination.

35. Every such recognizance shall be deemed to be forfeited if at any time during the term for which it is entered into the woman to whom it relates is (within the limits of any place to which this Act applies) in any public thoroughfare, street, or place for the purpose of prostitution, or otherwise (within those limits) conducts herself as a common prostitute.

*Penalties for harbouring, &c.*

36. If any person, being the owner or occupier of any house, room, or place within the limits of any place to which this Act applies, or being a manager or assistant in the management thereof, having reasonable cause to believe any woman to be a common prostitute and to be affected with a contagious disease, induces or suffers her to resort to or be in that house, room, or place for the purpose of prostitution, he shall be guilty of an offence against this Act, and on summary conviction thereof before two justices shall be liable to a penalty not exceeding twenty pounds, or, at the discretion of the justices, to be imprisoned for any term not exceeding six months, with or without hard labour:

Provided that a conviction under this enactment shall not exempt the offender from any penal or other consequences to which he may be liable for keeping or being concerned in keeping a bawdy house or disorderly house, or for the nuisance thereby occasioned.

*Procedure, &c.*

37. All proceedings under this Act before and by justices shall be had in *England* according to the provisions of the Act of the session of the eleventh and twelfth years of her Majesty (chapter forty-three), "to facilitate the performance of the duties of justices of

the peace out of sessions within *England* and *Wales* with respect to summary convictions and orders," and in *Ireland* according to the provisions of The Petty Sessions (*Ireland*) Act, 1851, as far as those provisions respectively are not inconsistent with any provision of this Act, and save that the room or place in which a justice sits to inquire into the truth of the statements contained in any information or application under this Act against or by a woman shall not, unless the woman so desires, be deemed an open court for that purpose; and, unless the woman otherwise desires, the justice may, in his discretion, order that no person have access to or be or remain in that room without his consent or permission.

38. The forms of certificates, orders, and other instruments given in the second schedule to this Act, or forms to the like effect, with such variations and additions as circumstances require, may be used for the purposes therein indicated and according to the directions therein contained, and instruments in those forms shall (as regards the form thereof) be valid and sufficient.

39. Any certificate, order, notice, or other instrument made or issued for the purposes of this Act may be partly in print and partly in writing.

40. In any proceeding under this Act any notice, order, certificate, copy of regulations, or other instrument purporting to be signed by a justice, superintendent of police, visiting surgeon, assistant visiting surgeon, surgeon or other medical officer of a prison, chief medical officer of a certified hospital, or the inspector or an assistant inspector of certified hospitals, or by any person in her Majesty's service or in that of the admiralty, shall on production be received in evidence, and shall be presumed to have been duly signed by the person, and in the character by whom and in which it purports to be signed, until the contrary is shown.

41. Every notice, order, or other instrument by this Act required to be served on a woman shall be served by delivery thereof to some person for her at her usual place of abode, or by delivery thereof to her personally.

42. Any action or prosecution against any person for anything done in pursuance or execution or intended execution of this Act shall be laid and tried in the county where the thing was done, and shall be commenced within three months after the thing done and not otherwise.

Notice in writing of every such action and of the cause thereof shall be given to the intended defendant one month at least before the commencement of the action.

In any such action the defendant may plead generally that the Act complained of was done in pursuance or execution or intended execution of this Act, and give this Act and the special matter in evidence at any trial to be had thereupon.

The plaintiff shall not recover if tender of sufficient amends is made before action brought, or if a sufficient sum of money is paid into court after action brought, by or on behalf of the defendant.

If a verdict passes for the defendant, or the plaintiff becomes nonsuit, or discontinues the action after issue joined, or if, on demurrer or otherwise, judg-

ment is given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and shall have the like remedy for the same as any defendant has by law or costs in other cases.

Though a verdict is given for the plaintiff, he shall not have costs against the defendant unless the judge before whom the trial is had certifies his approbation of the action.

## SCHEDULES.

### THE FIRST SCHEDULE.

Names of Places.	Limits of Places.
Portsmouth ...	The limits of the municipal borough of Portsmouth, and of the residue of the Island of Portsea, and of the parish of Alverstoke, and of the township of Landport.
Plymouth and Devonport	The limits of the following places; namely,— The municipal borough of Plymouth. The parliamentary borough of Devonport. The parish of Laira. The tithing of Pennycross or Western Peveril. The tithing of Compton Gifford. Torpoint, in the county of Cornwall, within the distance of half a mile from the Ferry Gate.
Woolwich ...	The limits of the parishes of Woolwich, Plumstead, and Charlton.
Chatham .....	The limits of the following parishes; namely,— Chatham, Gillingham, St. Nicholas, Rochester, St. Margaret, Rochester, The Precincts, Rochester, Brompton, New Brompton, Strood, and Frindsbury, and of the hamlet of Grange, otherwise Grench.
Sheerness ...	The limits of the parish of Minster, and of the township of Queensborough.
Aldershot ...	The limits of the following parishes; namely,— Purbright, Ash, Compton, Pepper Harrow, Frimley, Puttenham, Seal, and Tongham, Elstead, Farnham, Bisley,

in the  
county of  
Surrey.

Aldershot,  
Yateley,  
Crandall,  
Dogmersfield,  
Winchfield,  
Hartley Wintney,  
Cove,  
Eversley,  
Farnborough,  
Binstead,  
Bentley,  
Sandhurst, in the county of Berks.

in the,  
county of  
Hants.

Windsor ..... The limits of the following parishes; namely,—

New Windsor, } in the  
Old Windsor, } county of  
Clewer, } Berks.  
Eton, in the county of Bucks.

Colchester ... The limits of the following parishes or ecclesiastical districts; namely,—

Alb Saints.  
St. Botolph.  
St. Giles.  
St. James.  
St. John.  
St. Leonard.  
St. Martin.  
St. Mary at the Walls.  
St. Mary Magdalene.  
St. Nicholas.  
St. Peter.  
St. Runwald.  
The Holy Trinity.

Shorncliffe ... The limits of the following parishes; namely,—

Cheriton.  
Hythe.  
Folkestone.

The Curragh.. The limits of the following parishes; namely,—

Kilcullen.  
Kildara.  
Ballysax.  
Great Conwell.  
Morristown-beller.

Cork ..... The limits of the borough of Cork for municipal purposes.

Queenstown .. The limits of the town of Queenstown for the purposes of town improvement.

### THE SECOND SCHEDULE.

#### FORMS.

##### (A.)

#### *Gazette Notice of Appointments.*

London 18

THE lords commissioners of the admiralty have [or the secretary of state for war has] appointed R. S. to be visiting surgeon [or assistant visiting surgeon] for [Portsmouth, or the lords commissioners of the admiralty and the secretary of state for war have

appointed *P. T.* to be inspector (or assistant inspector) of certified hospitals] under The Contagious Diseases Act, 1866.

(B.)

*Certificate for Hospital provided by Admiralty, &c.*

THE CONTAGIOUS DISEASES ACT, 1866.

In pursuance of the above-mentioned Act, it is hereby certified by the commissioners for executing the office of lord high admiral of the United Kingdom [or by her Majesty's principal secretary of state intrusted with the seals of the war department], that the following building [or part of a building], namely, [here describe generally the building or part of building,] has been provided by the said lords commissioners [or secretary of state] as a hospital for the purposes of the said Act.

Dated this            day of            18            .

By order of the Lords Commissioners of the Admiralty.

(Signed) *C.P.*,  
Secretary of the Admiralty.

[Or

By order of the Secretary of State for War,

(Signed) *E.L.*,  
Under-Secretary of State.]

(C.)

*Certificate for Hospital not provided by Admiralty, &c.*

THE CONTAGIOUS DISEASES ACT, 1866.

In pursuance of the above-mentioned Act, it is hereby certified by the commissioners for executing the office of lord high admiral of the United Kingdom [or by her Majesty's principal secretary of state intrusted with the seals of the war department], that the following building [or part of a building], namely, [the lock wards of the Portsmouth, Portsea, and Gosport Hospital, or as the case may be,] is useful and efficient as a hospital for the purposes of the said Act.

Dated this            day of            18            .

By order of the Lords Commissioners of the Admiralty.

(Signed) *C.P.*,  
Secretary of the Admiralty.

[Or

By order of the Secretary of State for War.

(Signed) *E.L.*,  
Under-Secretary of State.]

(D.)

*Declaration of Withdrawal of Certificate.*

THE CONTAGIOUS DISEASES ACT, 1866.

In pursuance of the above-mentioned Act, it is hereby declared by the commissioners for executing the office of lord high admiral of the United Kingdom [or by her Majesty's principal secretary of state intrusted with the seals of the war department], that the certificate under the said Act dated the            day of            , constituting the hospital [or as the case may be] a certified hospital under the said Act, has been and the same is hereby withdrawn as from the            day of            18            .

Dated this            day of            18            .

By order of the Lords Commissioners of the Admiralty.

(Signed) *C.P.*,  
Secretary of the Admiralty.

[Or

By order of the Secretary of State for War.

(Signed) *E.L.*,  
Under-Secretary of State.]

(E.)

*Information.*

} THE information of *C.D.* of            , Super-  
to wit, } intendent of Police for            [or as  
the case may be], under The Contagious Diseases Act, 1866, taken the            day of            186            , before the undersigned, one of her Majesty's justices of the peace in and for the said [County] of            , who says he has good cause to believe that *A.B.* is a common prostitute, and is resident within the limits of a place to which the said Act applies, that is to say, at            in the [County] of            [or is a common prostitute, and being resident within five miles of a place to which the said Act applies, that is to say, at            in the county of            , was within fourteen days before the laying of this information, that is to say, on the            day of            , within these limits, that is to say, at            in the county of            , for the purpose of prostitution].

Taken and sworn before me the day and year first above mentioned.

(Signed) *L.M.*

(F.)

*Notice for Attendance of Women.*

To *A.B.* of

TAKE notice, that an information, a copy whereof is subjoined hereto, has been laid before me, and that, in accordance with the provisions of the Act therein mentioned, the truth of the statements therein contained will be inquired into before me, or some other justice, at            , on the            day of            , at

o'clock in the            noon,

You are therefore to appear before me or such other justice at that place and time, and to answer to what is stated in the said information.

You may appear yourself, or by any person on your behalf.

If you do not appear, you may be ordered, without further notice, to be subject to a periodical medical examination by the visiting surgeon under the said Act.

If you prefer it, you may, by a submission in writing signed by you in the presence of the superintendent of police [or as the case may be], and attested by him, subject yourself to such a periodical examination.

If you do so before the time above appointed for your appearance, it will not be necessary for you to appear then before a justice.

Dated this            day of            .

(Signed) *L.M.*,  
Justice of the Peace for

[Subjoin copy of information.]

(G.)

*Order subjecting Woman to Examination.*

{ Be it remembered, that on the      day  
to wit, } of      , in pursuance of The Contagious Diseases Act, 1866, I, one of her Majesty's justices of the peace in and for the said [County] of      , do order that A.B., of      , be subject to a periodical medical examination by the visiting surgeon for [Portsmouth, or as the case may be] for      calendar months from this day, for the purpose of ascertaining at the time of each such examination whether she is affected with a contagious disease within the meaning of the said Act, and that she do attend for the first examination at      on the      day of      at      o'clock in the noon.

(Signed) L.M.

(H.)

*Voluntary Submission to Examination.*

THE CONTAGIOUS DISEASES ACT, 1866.

I A.B. of      , in pursuance of the above-mentioned Act, by this submission, voluntarily subject myself to a periodical medical examination by the visiting surgeon for [Portsmouth, or as the case may be] for      calendar months from the date hereof.

Dated this      day of      18 .  
(Signed) A.B.

Witness,  
X.Y.,

Superintendent of Police for      [or as the case may be.]

(J.)

*Notice by Visiting Surgeon to Women of Times, &c. of Examination.*

To A.B. of

TAKE notice, that in pursuance of the Contagious Diseases Act, 1866, you are required to attend for medical examination as follows:

[Here state times and places of examination.]

Dated this      day of      18 .  
(Signed) E.F.

Visiting Surgeon for [Portsmouth].

(K.)

*Certificate of Visiting Surgeon.*

In pursuance of The Contagious Diseases Act, 1866, I hereby certify that I have this day examined A.B. of      , and that she is affected with a contagious disease within the meaning of that Act; and the certified hospital in which she is to be placed under the said Act is the      hospital.

Dated this      day of      18 .  
(Signed) E.F.

Visiting Surgeon for [Portsmouth].

(L.)

*Order by Inspector of Certified Hospitals for Transfer.*

By virtue of the power in this behalf vested in me

by The Contagious Diseases Act, 1866, I hereby order that A.B. of      , now detained under that Act in the certified hospital of      for medical treatment, be transferred thence to the certified hospital of      .

Dated this      day of      18 .

(Signed) M.N.,

Inspector of Certified Hospitals.

(M.)

*Certificate for Detention beyond Three Months.*

THE CONTAGIOUS DISEASES ACT, 1866.

WE, the undersigned, hereby certify that the further detention for medical treatment of A.B. of      , now an inmate of this hospital, is requisite.

Dated this      day of      18 , at the      hospital.

(Signed) M.N.,

Inspector of certified hospitals,  
[or as the case may be.]

G.H.,

Chief Medical Officer.

(N.)

*Discharge from Hospital.*

In pursuance of The Contagious Diseases Act, 1866, I hereby discharge A.B. of      from this hospital [add according to the fact, and certify that she is now free from a contagious disease].

Dated this      day of      18 , at the      hospital.

(Signed) G.H.,

Chief Medical Officer.

(O.)

*Certificate on Discharge from Imprisonment.*

THE CONTAGIOUS DISEASES ACT, 1866.

WHEREAS under the above-mentioned Act A.B. of      was on the      day of      convicted of the offence of      and has since been imprisoned for that offence in the gaol of      and is now discharged from imprisonment therein: Now in pursuance of the said Act I hereby certify that she is now free from a contagious disease.

Dated this      day of      .  
E.O.,

Surgeon of the gaol of      ,

[or E.F.,

Visiting Surgeon for Portsmouth].

(P.)

*Notice to Woman leaving Hospital.*

THE CONTAGIOUS DISEASES ACT, 1866.

To A.B.

As you are now leaving this hospital, I hereby, in pursuance of the above-mentioned Act, give you notice that you are still affected with a contagious disease.

Dated this      day of      .

(Signed) G.H.,

Chief Medical Officer.



Firewood . . . . .	1	0
Hoops . . . . .	2	0
Lathwood . . . . .	1	0
Shovel hilts . . . . .	2	0
Staves exceeding 72 inches in length, 7 inches in breadth, or 3½ inches in thickness . . . . .	2	0
Staves not exceeding 72 inches in length nor 7 inches in breadth nor 3½ inches in thickness (except staves for herring barrels) . . . . .	1	0
Teak and wood for shipbuilding purposes, formerly admitted free, and treenails, of all sorts . . . . .	1	0

## Furniture or hard woods, viz.:

Ambona wood . . . . .	each the ton	1	0
Beef wood . . . . .			
Black wood . . . . .			
Box wood . . . . .			
Cedar . . . . .			
Cherry wood . . . . .			
Cochinella . . . . .			
Ebony . . . . .			
King wood . . . . .			
Lignum Vitæ . . . . .			
Mahogany . . . . .			
Maple . . . . .			
New Zealand . . . . .			
Olive wood . . . . .			
Partridge wood . . . . .			
Purple wood . . . . .			
Rosewood . . . . .			
Santa Maria wood . . . . .			
Satin wood . . . . .			
Saunder or Sandal, white or yellow . . . . .			
Speckled wood . . . . .			
Sweet wood . . . . .			
Tulip wood . . . . .			
Walnut wood, except gun stocks . . . . .			
Zebra wood . . . . .			

Furniture and hard woods unenumerated (except veneers), not being ash, beech, birch, elm, oak, and wainscot . . . . .

It shall be lawful for the commissioners of her Majesty's treasury to remit the duty of customs chargeable on all such wood and timber imported into *Great Britain and Ireland* as shall have been landed under bond for security of duty on and after the twenty-sixth day of *March* one thousand eight hundred and sixty-six.

4. On and after the ninth day of *May* one thousand eight hundred and sixty-six the duties of customs now charged and payable upon the goods herein-after mentioned, upon their importation into *Great Britain and Ireland*, or on registration there, shall cease and determine; that is to say,

Pepper of all sorts . . . . .	the lb.	0	0	6
and £5 per cent. thereon.				

Ships, with their tackle, apparel, and furniture, viz.:

Foreign, built of wood, and ships built of wood in any of her Majesty's possessions abroad on the registration thereof as British ships at any port or place for the registry of British ships in Great Britain and Ireland:

For every ton of the gross registered tonnage without any deduction in respect of engine room or otherwise . . . . . 0 1 0

5. On and after the ninth day of *May* one thousand eight hundred and sixty-six so much of "The Customs Duties Consolidation Act, 1860," section one, as enacts "That a drawback on the exportation of wood and timber proportionate to the duties of customs paid thereon shall be allowed, provided that the person entitled thereto and claiming the same shall make and subscribe a declaration that the goods in respect of which he claims such drawbacks are of foreign or colonial produce, as the case may be, and show to the satisfaction of the commissioners of customs that customs duties to the like amount have been paid thereon upon the importation thereof," shall be and the same is hereby repealed.

## AS TO INCOME TAX.

6. The sum charged as the annual value or amount of any property profits, or gains in the several and respective assessments of income tax made in pursuance of the Act passed in the twenty-seventh years of her Majesty's reign, chapter eighteen, under Schedules (A.) and (B.) respectively of the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, for the year ended on the fifth day of *April* one thousand eight hundred and sixty-six, shall (except as to the several and respective concerns described in No. III. of Schedule (A.) of the Act passed in the fifth and sixth years of her Majesty's reign, chapter thirty-five, and otherwise as provided by the Acts relating to income tax) be taken as the annual value or amount of such property, profits, or gains respectively for the year commencing on the sixth day of *April* one thousand eight hundred and sixty-six, and the duties of income tax granted by this Act, and chargeable under the said schedules respectively, shall be computed, assessed, and charged according to such annual value or amount; and the commissioners executing the Income Tax Acts shall, for each place within their several and respective districts, cause duplicates of the assessment; of the said duties so computed, assessed, and charged under the said Schedules (A.) and (B.) for the said last-mentioned year to be made out and delivered, together with warrants for collecting the same; and in *England* the said commissioners shall appoint such persons, being inhabitants of the place to which the duplicate shall relate, as they the said commissioners shall think fit, to be collectors of the duties thereby charged, in like manner as if such persons had been presented to them by assessors under the Acts now in force: provided always, that the

said assessments shall be subject to be increased in like manner as the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty-six, and subject also to be abated or discharged at the end of the year commencing on the sixth day of *April* one thousand eight hundred and sixty-six for any cause allowed by the said Acts; provided that whenever it shall appear that any property, profits, or gains chargeable under the said schedules (A.) and (B.) respectively have not been charged by the assessments made for the year ended on the fifth day of *April* one thousand eight hundred and sixty, such property, profits, and gains shall be assessed to the duties of income tax granted by this Act under the provisions of the said several Acts applicable thereto.

7. No assessors shall be appointed for the duties payable under the said Schedules (A.) and (B.) but the inspectors or surveyors of taxes shall act as assessors in respect of such duties whenever it shall be necessary; and in lieu of the poundage granted by the one hundred and eighty-third section of the Act of the fifth and sixth years of her Majesty, chapter thirty-five, to be divided between the assessors and collectors in regard to the duties which shall be collected under the said Schedules (A.) and (B.) there shall be paid a poundage of three halfpence to the collectors of the said duties.

8. The several and respective concerns described in No. III. of Schedule (A.) of the said Act passed in the fifth and sixth years of her Majesty's reign, chapter thirty-five, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule (D.) of the said Act, so far as such rules are consistent with the said No. III.: provided that the annual value or profits and gains arising from any railway shall be charged and assessed by the commissioners for special purposes.

9. The provisions made by the several Income Tax Acts in force on the fifth day of *April* one thousand eight hundred and sixty-six for assessing and charging the duties on dividends and shares of annuities payable out of the revenue of any foreign state or colonial government, and all interest, dividends, or other annual payments payable out of or in respect of the funds, stocks, shares, or securities of any foreign or colonial company, society, adventure, or concern intrusted to any person in the United Kingdom for payment to any person therein, shall be and the same are hereby extended and shall be applied to the assessing and charging of the income tax on all such dividend and shares of annuities, and interest, dividends, and other annual payments, where the right or title of the person to whom the same may be payable is shown by the registration or entry of the name of such person in any book or list ordinarily kept in the United Kingdom; and for the purpose of such assessment and charge the agent or other person having the ordinary custody of such book or making such list shall be deemed to be the person intrusted with the payment of such dividends and shares of annuities, and interest, dividends and other annual payments, within the meaning of the said Income Tax Acts.

## SCHEDULES.

### SCHEDULE (A.)

CONTAINING the DUTIES of CUSTOMS granted by this Act.

The duties of customs now charged on tea shall continue to be levied and charged,

On and after the first day of August one thousand eight hundred and sixty-six until the first day of August one thousand eight hundred and sixty-seven, on the importation thereof into Great Britain and Ireland; that is to say,

Tea . . . . . the lb. 0 0 6

In lieu of the duties of customs now charged on wine, the following duties shall be charged thereon, on the importation thereof into Great Britain and Ireland, on and after the ninth day of May one thousand eight hundred and sixty-six, that is to say,

	Containing less than the following Rates of Proof Spirit verified by Sykes' Hydrometer, viz.:	
	26 Degrees.	42 Degrees.
Red Wine, the Gallon . . . .	£ s. d. 0 1 0	£ s. d. 0 2 6
White Wine . . . . .	0 1 0	0 2 6
Lees of such Wine . . . . .	0 1 0	0 2 6

and for every degree of strength beyond the highest above specified an additional duty of threepence per gallon. Ten per cent. of proof spirit may be used in the fortifying of any wine in bond, provided that the wine so fortified be not thereby raised to a greater degree of strength than forty per cent. of such proof spirit, if for home consumption.

### SCHEDULE (B.)

CONTAINING the DUTIES of EXCISE granted by this Act.

#### *Mileage Duty on Stage Carriages.*

For and in respect of every mile which any stage carriage shall be licensed to travel in Great Britain on and after the second day of July one thousand eight hundred and sixty-six, the excise duty of one farthing, in lieu of the mileage duty now payable.

#### *On Licences to let Horses for Hire.*

For and in respect of every licence to be taken out yearly on and after the sixth day of July one thousand eight hundred and sixty-six by every person who shall let any horse for hire in Great Britain, with or without any carriage to be used therewith, the following duties; (that is to say),

Where the person taking out such . . . . . £ s. d.  
licence shall keep at one and the  
same time to let for hire one horse  
or one carriage only . . . . . 5 0 0



And where such person shall keep as aforesaid any greater number of horses or carriages

Not exceeding three horses or two carriages . . . . .	10	0	0
Not exceeding four horses or three carriages . . . . .	15	0	0
Not exceeding five horses or four carriages . . . . .	20	0	0
Not exceeding six horses or five carriages . . . . .	25	0	0
Not exceeding eight horses or six carriages . . . . .	30	0	0
Not exceeding twelve horses or nine carriages . . . . .	40	0	0
Not exceeding sixteen horses or twelve carriages . . . . .	50	0	0
Not exceeding twenty horses or fifteen carriages . . . . .	60	0	0
Exceeding fifteen carriages . . . . .	70	0	0
Exceeding twenty horses, then for every additional number of ten horses, and for any additional number less than ten over and above twenty, or any other multiple of ten horses, the further additional duty of . . . . .	10	0	0

in lieu of the duties now payable on such licences.

#### SCHEDULE (C.)

CONTAINING the RATES and DUTIES of INCOME TAX granted by this Act.

For one year commencing on the sixth day of April one thousand eight hundred and sixty-six, for and in respect of all property, profits, and gains mentioned or described as chargeable in the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, for granting to her Majesty duties on profits arising from property, professions, trades, and offices, the following rates and duties shall be charged; (that is to say.)

For every twenty shillings of the annual value or amount of all such property, profits, and gains (except those chargeable under Schedule (B.) of the said Act), the rate or duty of fourpence:

And for and in respect of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule (B.) of the said Act, for every twenty shillings of the annual value thereof—

In England the rate or duty of twopence:

And in Scotland and Ireland respectively the rate or duty of one penny halfpenny:

Subject to the provisions contained in section three of the Act twenty-sixth Victoria, chapter twenty-two, for the exemption of persons whose whole income from every source is under one hundred pounds a year, and relief of those whose income is under two hundred pounds a year.

#### CAP. XXXVII.

An Act to amend an Act of the fifty-fourth year of King George the Third, Chapter One hundred and

twenty-three, to prevent Frauds and Abuses in the Trade of Hops. [11th June, 1866.]

#### CAP. XXXVIII.

An Act to enable Boards of Guardians in Ireland to provide Coffins and Shrouds for the Burial of poor Persons who at the time of their Death were not in receipt of Relief from the Poor Rates.

[11th June, 1866.]

Sec. 1. *The guardians of each union shall provide means for the decent burial of poor persons dying in such union, in certain cases.*

2. *Former Acts and this Act to be construed as one.*

‘WHEREAS it is expedient that provision shall be made for the decent burial of poor persons in Ireland whose relatives may be unable to provide means for such purpose, although such deceased persons may not at the time of their death have been in receipt of relief under the Acts in force for the relief of the poor in Ireland, or dependant for support on any person receiving such relief:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act, it shall be lawful for the guardians of any union in Ireland, or in any case of urgency for the relieving officer, subject in both cases to any rule which the commissioners for administering the laws for the relief of the poor in Ireland may make in that behalf, to provide coffins and shrouds for the interment of poor persons dying within such union, although such persons may not at the time of their death been in receipt of relief under the Acts for the relief of the poor in Ireland, or dependant for support on any person receiving such relief; and the expense thereof shall be charged on the rates of the electoral division, or of the union, in like manner as the said deceased person would have been chargeable if he had been in receipt of relief at the time of his death.

2. The several Acts for the relief of the poor now in force in Ireland and this Act shall be construed as one Act, save so far as the same are inconsistent, one with the other, and the words herein used shall be interpreted in the manner prescribed by the Acts now in force.

#### CAP. XXXIX.

An Act to consolidate the Duties of the Exchequer and Audit Departments to regulate the Receipt, Custody, and Issue of Public Moneys, and to provide for the Audit of the Accounts thereof.

[28th June, 1866.]

Sec. 1. *Short title.*

2. *Definition of terms.*

3. *Power to her Majesty to appoint "comptroller" and "auditor general" and "assistant comptroller and auditor," who shall not hold any other offices during pleasure, nor be members or peers of Parliament.*

4. *Power to her Majesty to grant salaries as herein named, and also pensions.*
  5. *Present offices of comptroller general of the Exchequer and commissioners of audit to be abolished. Power to grant compensation allowances to commissioners of audit who are not re-appointed.*
  6. *On vacancy in office of comptroller and auditor general, &c., successor to be appointed.*
  7. *Assistant comptroller, &c. may act in absence of comptroller, &c.*
  8. *Treasury to appoint officers, clerks, &c., and to regulate numbers and salaries.*
  9. *The comptroller and auditor general to promote, suspend, or remove clerks, &c., and to make regulations, subject to approval.*
  10. *Gross revenues to be paid to Exchequer, and daily returns to be sent to comptroller and auditor general.*
  11. *Moneys to form one fund in the books of the Banks of England and Ireland applicable to Exchequer issues.*
  12. *Quarterly accounts of the income and charge of the consolidated fund to be prepared. If it appear by such account that there is a deficiency of the consolidated fund, comptroller, &c. to certify to Bank of England or Ireland, who may make advances.*
  13. *Credit to be granted to the treasury for consolidated fund services. Supplemental credits for services charged on the growing produce. Issues to principal accountants. Daily advices of issues to be sent to comptroller and auditor general.*
  14. *Royal order for supply services.*
  15. *Credits for supply services. Issues to principal accountants.*
  16. *Treasury to prepare accounts showing surplus income applicable to reduction of the national debt.*
  17. *Certain payments under contracts or leases to be made by the paymaster general.*
  18. *Treasury to determine what accounts shall be deemed public accounts.*
  19. *Treasury may direct consolidation of accounts at the bank.*
  20. *Accounts of stock may be opened in the books of the banks under official description of public officers. The banks may be authorized to receive dividends and sell stock.*
  21. *Annual accounts of issues for consolidated fund services to be prepared and audited for Parliament.*
  22. *Annual accounts of the appropriation of public money to be prepared for the House of Commons.*
  23. *Each department to keep such books of account as may be prescribed by the treasury.*
  24. *Description of account.*
  25. *A balance sheet or statement to accompany the appropriation account.*
  26. *The appropriation account to be accompanied by a statement explaining disposal of balances, &c.*
  27. *In what manner the examination of appropriation accounts shall be conducted by the comptroller and auditor general.*
  28. *The comptroller and auditor general to have access to books of account, &c. in the accounting departments.*
  29. *How the vouchers of appropriation accounts included in Schedule (B.) shall be examined.*
  30. *How other vouchers are to be examined.*
  31. *Objections made by the comptroller, &c. to be reported to the accounting department, and in certain cases to the treasury.*
  32. *What reports the comptroller and auditor general shall prepare for submission to Parliament.*
  33. *Accounts other than appropriation accounts to be examined under treasury directions by the comptroller and auditor general.*
  34. *By whom such accounts shall be rendered.*
  35. *Accountants to transmit their accounts, &c., to comptroller and auditor general under certain regulations.*
  36. *As to the examination and passing of accounts.*
  37. *Vouchers may be allowed though not stamped.*
  38. *Certificates of discharge to be delivered to accountant.*
  39. *Declaration of accounts before the Chancellor of the Exchequer abolished.*
  40. *Examination and passing of store accounts.*
  41. *Adjustment of balances on accounts, and when interest may be charged on such balances.*
  42. *When estate of a public accountant is sold under writ of extent, and the purchase money paid, the purchaser to be exonerated.*
  43. *Accountants to have in all cases a right of appeal to the treasury.*
  44. *Treasury may dispense with examination of certain accounts by the comptroller and auditor general.*
  45. *Saving all existing rights of the Crown.*
  46. *Acts in Schedule (C) to be repealed.*
  47. *Commencement of Act.*
- ‘WHEREAS it is expedient to consolidate the powers and duties of the comptroller of her Majesty’s Exchequer and of the commissioners for auditing the public accounts, and to unite in one department the business hitherto conducted by the separate establishments under them; and to make other provisions for the more complete examination of the public accounts of the United Kingdom:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:
1. This Act may be cited for all purposes as “The Exchequer and Audit Departments Act, 1866.”
  2. In this Act “the treasury” shall mean the commissioners of her Majesty’s treasury for the time being, or any two or more of them; “the Bank of England” shall mean the governor and company of the Bank of England; “the Bank of Ireland” shall mean the governor and company of the Bank of Ire-

land; "the national debt commissioners" shall mean the commissioners for the reduction of the national debt; "principal accountants" shall mean those who receive issues directly from the accounts of her Majesty's Exchequer at the Banks of *England* and *Ireland* respectively; "sub-accountants" shall mean those who receive advances, by way of imprest, from principal accountants, or who receive fees or other public moneys through other channels; "the secretaries of the treasury" shall include the assistant secretary.

3. At any time within twelve months after the passing of this Act it shall be lawful for her Majesty, her heirs and successors, by letters patent under the great seal of the United Kingdom to nominate and appoint the person who shall at that time hold the office of comptroller general of the receipt and issue of her Majesty's Exchequer, and chairman of the commissioners for auditing the public accounts, to be comptroller general of the receipt and issue of her Majesty's Exchequer and auditor general of public accounts, in this Act referred to as "comptroller and auditor general," and also to nominate and appoint one of the persons who shall at that time hold the offices of commissioners for auditing the public accounts to be "assistant comptroller and auditor."

The said comptroller and auditor general and assistant comptroller and auditor shall hold their offices during good behaviour, subject, however, to their removal therefrom by her Majesty, her heirs and successors, on an address from the two Houses of Parliament; and they shall not be capable of holding their offices together with any other office to be held during pleasure under the Crown, or under any officer appointed by the Crown; nor shall they be capable while holding their offices of being elected or of sitting as members of the House of Commons; nor shall any peer of Parliament be capable of holding either of the said offices.

4. Her Majesty may, by such letters patent, grant to the persons therein named the following salaries; that is to say,

To the comptroller and auditor general a salary of two thousand pounds *per annum*, and to the assistant comptroller and auditor a salary of one thousand five hundred pounds *per annum*; and such salaries shall be charged upon and paid out of the consolidated fund of the United Kingdom or the growing produce thereof.

It shall be lawful for her Majesty, her heirs and successors, by letters patent as aforesaid, to grant to any person who shall have executed the offices of comptroller and auditor general, or assistant comptroller and auditor, on his ceasing to hold such office, an annuity or pension not exceeding one half of the salary of his office to which he shall have been entitled immediately before he ceased to hold such office, if he shall have held either, or one after the other, of the said offices or the office of commissioner of audit for a period not less than fifteen years, and two thirds of his said salary if he shall have held either, or one after the other, of the said offices for a period not less than twenty years: provided always, that no such annuity or pension shall be granted to either of the said officers un-

less he be sixty years of age at the least, or be afflicted with some permanent infirmity disabling him from the due execution of his office, the same to be distinctly recited in such grant: provided also, that nothing herein contained shall prevent either of the said officers from receiving, in lieu of such annuity or pension, if he shall so elect, the amount of superannuation allowance to which he would have been entitled in respect of the full period during which he shall have served in the permanent civil service of the state, under the provisions of "The Superannuation Act, 1859."

5. On the appointment as aforesaid of a comptroller and auditor general and an assistant comptroller and auditor, the then existing letters patent of appointments of comptroller general of the Exchequer and of commissioners of audit shall be *ipso facto* revoked, and the present offices of comptroller general of the Exchequer and commissioners of audit shall be abolished, but the person appointed to be comptroller and auditor general shall have and perform all the powers and duties conferred or imposed on the comptroller general of the Exchequer and the commissioners for auditing the public accounts respectively by any enactments relative to those authorities respectively as far as the same are not repealed or altered by this Act or any other Act of the present session of Parliament; and it shall be lawful for the treasury to grant to each of the said commissioners of audit whose offices shall be abolished under the provisions of this Act, and who shall not be appointed to either of the said offices of comptroller and auditor general or assistant comptroller and auditor, an annual allowance by way of compensation, not exceeding the sum charged on the consolidated fund as the salary of such commissioners: provided always, that any commissioners who may be in receipt of emoluments exceeding the salary so charged on the consolidated fund shall be entitled to receive, in addition to the aforesaid compensation allowance, such proportion of the said emoluments as the treasury are empowered to grant under the provisions of "The Superannuation Act, 1859;" and such allowances shall be charged upon and paid out of the consolidated fund of the United Kingdom or the growing produce thereof.

6. On the death, resignation, or other vacancy in the office of the comptroller and auditor general, or of the assistant comptroller and auditor, her Majesty, her heirs and successors, may, by letters patent as aforesaid, nominate and appoint a successor, who shall have the same powers, authorities, and duties, and who shall be paid the like salary and the like annuity or pension out of the consolidated fund.

7. Anything which under the authority of this Act is directed to be done by the comptroller or auditor general may, in his absence, be done by the assistant comptroller and auditor, except the certifying and reporting on accounts for the House of Commons.

8. The treasury shall from time to time appoint the officers, clerks, and other persons in the department of the comptroller and auditor general, and her Majesty by order in council may from time to time regulate the numbers and salaries of the respective

grades or classes into which the said officers, clerks, and others shall be divided.

9. The comptroller and auditor general shall have full power to make from time to time orders and rules for the conduct of the internal business of his department, and to promote, suspend, or remove any of the officers, clerks, and others employed therein; and to prescribe regulations and forms for the guidance of principal and of sub-accountants in making up and rendering their periodical accounts for examination: provided always, that all such regulations and forms shall be approved by the treasury previously to the issue thereof.

10. The commissioners of customs, the commissioners of inland revenue, and the postmaster general shall, after deduction of the payments for drawbacks, bounties of the nature of drawbacks, repayments, and discounts, cause the gross revenues of their respective departments to be paid, at such time and under such regulations as the treasury may from time to time prescribe, to accounts to be intitled "The account of her Majesty's Exchequer," at the Bank of *England* and at the Bank of *Ireland* respectively, and all other public moneys payable to the Exchequer shall be paid to the same accounts, and accounts of all such payments shall be rendered to the comptroller and auditor general daily, in such form as the treasury may prescribe: provided always, that this enactment shall not be construed to prevent the collectors and receivers of the said gross revenues and moneys from cashing, as heretofore, under the authority of any Act or regulation, orders issued for naval, military, revenue, civil, or other services, repayable to the revenue departments out of the consolidated fund or out of moneys provided by Parliament.

11. All moneys paid into the Bank of *England* and the Bank of *Ireland* on account of the Exchequer shall be considered by the governor and company of the said banks respectively as forming one general fund in their books; and all orders directed by the treasury to the said banks for issues out of credits to be granted by the comptroller and auditor general, as herein-after provided for the public service, shall be satisfied out of such general fund; and with a view to economize the public balances, the treasury shall restrict the sums to be issued or transferred from time to time to the credit of accounts of principal accountants at the said banks, as herein-after provided, to such total sums as they may consider necessary for conducting the current payments for the public service intrusted to such principal accountants; and the said principal accountants may consider the sums so transferred to their accounts as constituting part of their general drawing balance applicable to the payment of all the services for which they are accountable; but such sums shall be carried in the books of such accountants to the credit of the respective services for which the same may be issued, as specified in such orders: provided always, that this enactment shall not be construed to empower the treasury or any authority to direct the payment, by any such principal accountant, of expenditure not sanctioned by any Act whereby services are or may be charged on the consolidated fund, or by a vote of the House of Commons, or by Act for the appropriation of the supplies annually granted by Parliament.

12. At the close of each of the quarters ending on the thirty-first day of *March*, the thirtieth day of *June*, the thirtieth day of *September*, and the thirty-first day of *December* in every year the treasury shall prepare an account of the income and charge of the consolidated fund in *Great Britain* and in *Ireland* for such quarter, and the charges for the public debt due on the fifth day of *April*, the fifth day of *July*, the tenth day of *October*, and the fifth day of *January* shall be included in the accounts of the said charge for the quarters ending on the days preceding the latter date; and a copy of such account shall forthwith be transmitted by the treasury to the comptroller and auditor general; and if it shall appear by such account that the income of the consolidated fund in *Great Britain* or in *Ireland* for the quarter is not sufficient to defray the charge upon it, the comptroller and auditor general, if satisfied of the correctness of the deficiency, shall certify the amount thereof to the Bank of *England* or to the Bank of *Ireland*, as the case may be, and upon such certificates the said banks shall be authorized to make advances, from time to time, during the succeeding quarter, on the application of the treasury, by writing, in a form to be from time to time determined by them, to an amount not exceeding in the aggregate the sums specified in such certificates; and all such advances shall be placed to the credit of the Exchequer accounts at the said banks, and be available to satisfy the orders for credits granted or to be granted upon the said accounts by the comptroller and auditor general; and the principal and interest of all such advances shall be paid out of the growing produce of the consolidated fund in the said succeeding quarter.

13. The comptroller and auditor general shall grant to the treasury, from time to time, on their requisitions authorizing the same, if satisfied of the correctness thereof, credits on the Exchequer accounts at the Banks of *England* and *Ireland*, or on the growing balances thereof, not exceeding the amount of the charge in the aforesaid quarterly account of the income and charge of the consolidated fund remaining unpaid.

The comptroller and auditor general shall also grant from time to time to the treasury, on similar requisitions, supplemental credits for services payable under any Act out of the growing produce of the consolidated fund, and not included in the aforesaid quarterly account; and the issues or transfers of moneys required from time to time by the principal accountants to enable them to make the payments intrusted to them shall be made out of such credits or orders issued to the said banks, signed by one of the secretaries of the treasury, or in their absence by such officer or officers as the treasury may from time to time appoint to that duty, and in all such orders the services for which the issues may be authorized shall be set forth. A daily account of all issues or transfers made from the Exchequer accounts, in pursuance of such orders, shall be transmitted by the said banks to the comptroller and auditor general.

14. When any sum or sums of money shall have been granted to her Majesty by a resolution of the House of Commons, or by an Act of Parliament, to defray expenses for any specified public services, it shall be lawful for her Majesty from time to time, by

her royal order under the royal sign manual, countersigned by the treasury, to authorize and require the treasury to issue, out of the credits to be granted to them on the Exchequer accounts as herein-after provided, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted.

15. When any ways and means shall have been granted by Parliament to make good the supplies granted to her Majesty by any Act of Parliament or resolution of the House of Commons, the comptroller and auditor general shall grant to the treasury, on their requisition authorizing the same, a credit or credits on the Exchequer accounts at the Bank of *England* and Bank of *Ireland*, or on the growing balances thereof, not exceeding in the whole the amount of the ways and means so granted. Out of the credits so granted to the treasury issues shall be made to principal accountants from time to time on orders issued to the said banks, signed by one of the secretaries of the treasury, or in their absence by such officer or officers as the treasury may from time to time appoint to that duty; and the services or votes on account of which the issues may be authorized shall be set forth in such orders: provided always, that the issues for army and navy services shall be made under the general heads of "army" and "navy" respectively.

A daily account of all issues made from the Exchequer accounts in pursuance of such orders shall be transmitted by the said banks to the comptroller and auditor general.

16. Within fifteen days after the expiration of the quarters ending on the thirty-first day of *March*, the thirtieth day of *June*, the thirtieth day of *September*, and the thirty-first day of *December* in every year the treasury shall prepare an account of the public income and expenditure of the United Kingdom, according to the actual receipt and issue of moneys on the Exchequer accounts at the Bank of *England* and Bank of *Ireland* in the twelve months ending on such quarter days respectively; and if there shall appear by such account to be a surplus of income above expenditure, the treasury shall certify the same to the national debt commissioners, and one fourth part of such surplus shall be applicable to the reduction of the national debt as herein-after directed; and the national debt commissioners shall publish from time to time in the *London Gazette* the sum which will be so applied in the ensuing quarter. The treasury shall cause one fourth part of such surplus income to be charged on the consolidated fund in the quarter succeeding the termination of such account; and the sum so charged shall be issued by the treasury from time to time in the next ensuing quarter to the national debt commissioners, who shall apply the same, during the said quarter, in redeeming funded or unfunded debt, or in repaying to the Bank of *England* or to the Bank of *Ireland* any advances made by them, under the provisions of this Act, towards supplying the deficiency of the consolidated fund during the said quarter; and all debt so redeemed shall be forthwith cancelled. And a copy of every account prepared by the treasury as aforesaid, verified by the comptroller and auditor general, shall be laid before the House of Commons

within fifteen days after the expiration of the said quarterly periods, if Parliament be then sitting, or if not sitting then within one week after Parliament shall be next assembled.

17. All debts accruing due under any contract or lease now or hereafter entered into or taken for the public service, and payable out of the supplies from time to time voted by Parliament to her Majesty for the public service, in any department for which the payments are made by the paymaster general, shall be discharged and paid in manner following; that is to say, such debts shall be payable on the order of the department, and the payment thereof shall be made by a draft drawn by the paymaster general on the Bank of *England*, according to the course and practice of his office, payable to the persons to whom such debts may be due, or to their agents.

18. The treasury may from time to time determine at what banks accountants shall keep the public moneys entrusted to them, and they may also determine what accounts so opened in the names of public officers or accountants in the books of the Bank of *England*, of the Bank of *Ireland*, or of any other bank, shall be deemed public accounts; and on the death, resignation, or removal of any such public officers or accountants the balances remaining at the credit of such accounts shall, upon the appointment of their successors, unless otherwise directed by law, vest in and be transferred to the public accounts of such successors at the said banks, and shall not, in the event of the death of any such public officers or accountants constitute assets of the deceased, or be in any manner subject to the control of their legal representatives.

19. It shall be lawful for the treasury, whenever they shall consider it for the advantage of the public service, to direct the accounts of any public officer or department, which by any Act or Acts are required to be kept under separate heads at the Bank of *England* or at the Bank of *Ireland*, shall be consolidated in such manner as they shall judge most convenient for the public service.

20. It shall be lawful for the Bank of *England* and Bank of *Ireland*, at the request of the treasury, signified by one of their secretaries, for the public convenience, to open and keep accounts of government stock and annuities in the books of the said banks under the official description of any public officer for the time being, without naming him; and the dividends on such stock and annuities may from time to time be received, and the stock and annuities or any part thereof to the credit of such account may from time to time be transferred, by the officer for the time being holding such office, as if such stock and annuities stood in his own name; and upon the death, resignation, or removal of any such public officer, the stock and annuities standing to the credit of such account, and all dividends thereon, including any dividends not theretofore received, shall become vested in his successor in office, and be receivable and transferable accordingly. And any such public officer in whose official description such government stock and annuities may be standing may, by letter of attorney, authorize the Bank of *England* or the Bank of *Ireland*, or all or any of their cashiers, to sell and trans-

fer all or any part of the stock or annuities from time to time standing in the books of the said banks on such account, and to receive the dividends due and to become due thereon; but no stock or annuities shall be sold or transferred at the said banks under the authority of such general letter of attorney, except upon an order in writing, signed by one of the secretaries of the treasury, directed to the proper officers of the said banks.

#### APPROPRIATION ACCOUNTS.

21. The treasury shall cause an account to be prepared and transmitted to the comptroller and auditor general for examination on or before the thirtieth day of *September* in every year, showing the issues made from the consolidated fund of *Great Britain and Ireland* in the financial year ended on the thirty-first day of *March* preceding, for the interest and management of the public funded and unfunded debt, for the civil list, and all other issues in the financial year for services charged directly on the said fund; and the comptroller and auditor general shall certify and report upon the same with reference to the Acts of Parliament under the authority of which such issues may have been directed; and such accounts and reports shall be laid before the House of Commons by the treasury on or before the thirty-first day of *January* in the following year, if Parliament be then sitting, and if not sitting, then within one week after Parliament shall be next assembled.

22. On or before the days specified in the respective columns of Schedule A. annexed to this Act, accounts of the appropriation of the several supply grants comprised in the Appropriation Act of each year shall be prepared by the several departments, and be transmitted for examination to the comptroller and auditor general and to the treasury, and when certified and reported upon as herein-after directed they shall be laid before the House of Commons; and such accounts shall be called the "appropriation accounts" of the moneys expended for the services to which they may respectively relate; and the treasury shall determine by what departments such accounts shall be prepared and rendered to the comptroller and auditor-general, and the comptroller and auditor general shall certify and report upon such accounts as herein-after directed; and the reports thereon shall be signed by the comptroller and auditor general: provided always, and it is the intention of this Act that the treasury shall direct that the department charged with the expenditure of any vote under the authority of the treasury shall prepare the appropriation account thereof: provided also, that the term "department" when used in this Act in connexion with the duty of preparing the said appropriation accounts, shall be construed as including any public officer or officers to whom that duty may be assigned by the treasury.

23. A plan of account books and accounts, adapted to the requirements of each service in order to exhibit, in a convenient form, the whole of the receipts and payments in respect of each vote, shall be designed under the superintendence of the treasury; and her Majesty may from time to time, by order in council, prescribe the manner in which each department of the public service shall keep its accounts.

24. An appropriation account of supply grants shall exhibit on the charge side thereof the sum or sums appropriated by Parliament for the service of the financial year to which the account relates, and on the discharge side thereof the sums which may have actually come in course of payment within the same period; and no imprest or advance, of the application of which an account may not have been rendered to and allowed by the accounting department, shall be included on the discharge side thereof.

25. The department charged with the duty of preparing the appropriation account of a grant shall, if required so to do by the comptroller and auditor general, transmit to him, together with the annual appropriation account of such grant, a balance sheet so prepared as to show the debtor and creditor balances in the ledgers of such department on the day when the said appropriation account was closed, and to verify the balances appearing upon the annual appropriation account: provided always, that the comptroller and auditor general may, if he thinks fit, require the said department to transmit to him in lieu of such balance sheet a certified statement showing the actual disposition of the balances appearing upon the annual appropriation account on the last day of the period of such account.

26. Every appropriation account when rendered to the comptroller and auditor general shall be accompanied by an explanation showing how the balance or balances on the grant or grants included in the previous account have been adjusted, and shall also contain an explanatory statement of any excess of expenditure over the grant or grants included in such account, and such statement as well as the appropriation account shall be signed by such department.

27. Every appropriation account shall be examined by the comptroller and auditor general on behalf of the House of Commons; and in the examination of such accounts the comptroller and auditor general shall ascertain, first whether the payments which the accounting department has charged to the grant are supported by vouchers or proofs of payments, and second, whether the money expended has been applied to the purpose or purposes for which such grant was intended to provide: provided always, and it is hereby enacted, that whenever the said comptroller and auditor general shall be required by the treasury to ascertain whether the expenditure included or to be included in an appropriation account, or any portion of such expenditure, is supported by the authority of the treasury, the comptroller and auditor general shall examine such expenditure with that object, and shall report to the treasury any expenditure which may appear, upon such examination, to have been incurred without such authority; and if the treasury should not thereupon see fit to sanction such unauthorized expenditure, it shall be regarded as being not properly chargeable to a Parliamentary grant, and shall be reported to the House of Commons in the manner herein-after provided.

28. In order that such examination may as far as possible proceed, *pari passu*, with the cash transactions of the several accounting departments, the comptroller and auditor general shall have free access, at all convenient times, to the books of account and other

documents relating to the accounts of such departments, and may require the several departments concerned to furnish him, from time to time, or at regular periods, with accounts of the cash transactions of such departments respectively up to such times or periods.

29. In conducting the examination of the vouchers relating to the appropriation of the grants for the several services enumerated in Schedule (B.) to this Act annexed, the comptroller and auditor general, after satisfying himself that the accounts bear evidence that the vouchers had been completely checked, examined, and certified as correct in every respect, and that they have been allowed and passed by the proper departmental officers, may admit the same as satisfactory evidence of payment in support of the charges to which they may relate: provided always, that if the treasury should desire any such vouchers to be examined by the comptroller and auditor general in greater detail, the comptroller and auditor general shall cause such vouchers to be subjected to such a detailed examination as the treasury may think fit to prescribe.

30. In conducting the examination of the vouchers relating to the appropriation of the grants for any services not enumerated in the aforesaid Schedule, the comptroller and auditor general shall test the accuracy of the castings and computation of the several items of such vouchers: provided always, that when any vouchers have been certified to be correct by any officers specially authorized to examine the same, it shall be lawful for the comptroller and auditor general, with the consent of the treasury, to dispense with a second examination of the particular items of such vouchers.

31. If during the progress of the examination by the comptroller and auditor general herein-before directed any objections should arise to any item to be introduced into the appropriation account of any grant, such objections shall, notwithstanding such account shall not have been rendered to him, be immediately communicated by him to the department concerned, and if the objections should not be answered to his satisfaction by such department, they shall be referred by him to the treasury, and the treasury shall determine in what manner the items in question shall be in the annual appropriation account.

32. In reporting as herein before directed, for the information of the House of Commons, the result of the examination of the appropriation accounts, the comptroller and auditor general shall prepare reports on the appropriation account of the army and on that of the navy separately.

He shall prepare a report on the appropriation accounts of the departments of customs, inland revenue, and post office.

He shall prepare a report or reports on the accounts relating to the several grants included within each of the classes into which the grants for civil services are divided in the Appropriation Act.

In all reports as aforesaid he shall call attention to every case in which it may appear to him that a grant has been exceeded, or that money received by a department from other sources than the grants for the year to which the account relates has not been applied

or accounted for according to the directions of Parliament, or that a sum charged against a grant is not supported by proof of payment, or that a payment so charged did not occur within the period of the account, or was for any other reason not properly chargeable against the grant.

If the treasury shall not, within the time prescribed by this Act, present to the House of Commons any report made by the comptroller and auditor general on any of the appropriation accounts, or on the accounts of issues for consolidated fund services, the comptroller and auditor shall forthwith present such report.

#### ACCOUNTS OTHER THAN APPROPRIATION ACCOUNTS.

33. Besides the appropriation accounts of the grants of Parliament, the comptroller and auditor general shall examine and audit, if required so to do by the treasury, and in accordance with any regulations that may be prescribed for his guidance in that behalf by the treasury, the following accounts; viz., the accounts of all principal accountants, the accounts of the receipt of revenue by the departments of customs, inland revenue, and post office, the accounts of every receiver of money which is by law payable into her Majesty's exchequer, and any other public accounts which, though not relating directly to the receipt or expenditure of Imperial funds, the treasury may by minute, to be laid before Parliament, direct.

34. The accounts which by the last preceding section the treasury are empowered to subject to the examination of the comptroller and auditor general shall be rendered to him by the departments or officers who may be directed so to do by the treasury; and the term "accountant," when used in this and the following sections of this Act with reference to any such accounts, shall be taken to mean the department or officer that may be so required by the treasury to render the same; and every public officer into whose hands public moneys, either in the nature of revenue or fees of office, shall be paid by persons bound by law or regulation to do so, or by subordinate or other officers whose duty it may be to pay such moneys, wholly or in part, into the receipt of her Majesty's exchequer, or to apply the same to any public service, shall, at such times and in such form as the treasury shall determine, render an account of his receipts and payments to the comptroller and auditor general; and it shall be the duty of the treasury to inform him of the appointment of every such officer.

35. Accountants shall transmit their accounts together with the authorities and vouchers relating thereto to the office of the comptroller and auditor general in such form, and for such periods, and under such regulations as he may from time to time provide for the guidance of such accountants: provided always, that no such regulations shall be obligatory on such accountants until they shall have been approved by the treasury.

36. The comptroller and auditor general shall examine the several accounts transmitted to him with as little delay as possible, and when the examination of each account shall be completed he shall make up a statement thereof in such form as he may deem fit; and if it shall appear from the statement so made up



of any account, being an account current, that the balance thereon agrees with the accountant's balance, or if it shall appear from any account rendered by an accountant, as well as from the statement of such account by the comptroller and auditor general, that the accountant is "even and quit," the comptroller and auditor general is hereby required to sign and pass such statement of accounts so made up by him as aforesaid: provided always, that in all other cases whatever, the comptroller and auditor general having made up the statement of account as herein-before directed shall transmit the same to the treasury, who, having considered such statement, shall return it to him, with their warrant attached thereto, directing him to sign and pass the account, either conformably to the statement thereof, or with such alterations as the treasury may deem just and reasonable; and a statement of the account made up by the comptroller and auditor general, in accordance with such treasury warrant, shall then be signed and passed by him: provided further, that a list of all accounts which the comptroller and auditor general may sign and pass (such list to be so prepared as to show thereon the charge, and balance of each account respectively) shall be submitted by him to the treasury twice in every year, *videlicet*, not later than the first week of February and the first week of August.

37. It shall be lawful for the comptroller and auditor general, in the examination of any accounts, to admit and allow, in cases where it shall appear to him to be reasonable and expedient for the public service, vouchers for any moneys expressed therein, although such vouchers be not stamped according to law.

38. As soon as any account shall have been signed and passed by the comptroller and auditor general, he shall transmit to the accountant a certificate, in which the total amount of the sums forming respectively the charge and discharge of such account, and the balance, if any, remaining due to or by such accountant, shall be set forth; and every such certificate shall be signed by him, and shall be valid and effectual to discharge the accountant, as the case may be, either wholly, or from so much of the amount with which he may have been chargeable, as he may appear by such certificate to be discharged from: provided always, that when any account, not being an account current, has been signed and passed by the comptroller and auditor general with a balance due thereon to the Crown, he shall not make out or grant any such certificate as aforesaid until the accountant has satisfied him either that he has discharged the full amount of such balance, and any interest that may, as herein-after provided, be payable thereon, or that he has been relieved from the payment thereof, or of so much thereof as has not been paid, by a warrant from the treasury.

39. No declaration shall be made by the comptroller and auditor general before the Chancellor of the Exchequer in relation to any account, or any state or statement thereof; nor shall any such state or statement be enrolled as of record in the office of her Majesty's remembrancer of the Court of Exchequer, any law, usage, or custom to the contrary notwithstanding; but every statement of an account made out, signed, and passed as aforesaid, shall be recorded in the office of the comptroller and auditor general,

and the recording of such statement of account in his office shall be as valid and effectual for enabling any process in the law against the party chargeable, and any other proceeding for the recovery of any balances and any interest thereon, and for all other purposes, as the enrolment of a declared account in the office of her Majesty's remembrancer would have been if this Act had not been passed; and a copy, certified under the hands of the comptroller and auditor general, of the record of any such statement of account, shall be taken notice of and proceeded upon in the like manner as the record of any such declared account, enrolled as aforesaid, might have been if this Act had not been passed.

40. In all cases where the comptroller and auditor general shall be required by the treasury to examine and audit the accounts of the receipt, expenditure, sale, transfer, or delivery of any securities, stamps, government stock or annuities, provisions, or stores, the property of her Majesty, he shall, on the examination of such accounts being completed, transmit a statement thereof, or a report thereon, to the treasury, who shall, if they think fit, signify their approval of such accounts to him, and he shall thereupon transmit to the accountant a certificate in a form to be from time to time determined by the comptroller and auditor general, which shall be to such accountant a valid and effectual discharge from so much as he may thereby appear to be discharged from.

41. Every accountant shall, on the termination of his charge as such accountant, or in case of a deceased accountant his representatives shall forthwith pay over any balance of public money then due to the public in respect of such charge to the public officer authorized to receive the same; and in all cases in which it shall appear to the comptroller and auditor general that balances of public money have been improperly and unnecessarily retained by an accountant, he shall report the circumstances of such cases to the treasury; and the treasury shall take such measures as to them may seem expedient for recovering by legal process, or by other lawful ways and means, the amount of such balance or balances, together with interest thereon, upon the whole or part of such balance or balances, for such period of time and at such rate, not exceeding five pounds *per centum per annum*, as to the treasury may appear just and reasonable.

42. In all cases where any estate belonging to a public accountant shall be sold under any writ of extent or any decree or order of the Courts of Chancery or Exchequer, and the purchaser thereof or of any part thereof shall have paid his purchase money into the hands of any public accountant authorized to receive the same, such purchaser shall be wholly exonerated and discharged from all further claims of her Majesty for or in respect of any debt arising upon the account of such accountant, although the purchase money so paid be not sufficient in amount to discharge the whole of the said debt.

43. In all cases in which an accountant may be dissatisfied with any disallowance or charge in his accounts made by the comptroller and auditor general, such accountant shall have a right of appeal to the treasury, who, after such further investigation as they may consider equitable, whether by *viva voce* exami-

nation or otherwise, may make such order directing the relief of the appellant wholly or in part from the disallowance or charge in question, as shall appear to them to be just and reasonable, and the comptroller and auditor general shall govern himself accordingly.

44. It shall be lawful for the treasury from time to time, if they see fit so to do, to dispense with the transmission, to the comptroller and auditor general, of any accounts not being accounts of the receipt and expenditure of public money, and with the audit of such accounts by him, any law, usage, or custom to the contrary notwithstanding; provided always, that copies of any treasury minutes dispensing with the audit of such accounts shall be laid before Parliament.

45. Nothing in this Act contained shall extend to abridge or alter the rights and powers of her Majesty to control, suspend, or prevent the execution of any process or proceeding, under this Act or otherwise, for recovering money due to the Crown.

46. The Acts mentioned in Schedule (C.) to this Act annexed shall be repealed to the extent mentioned in such Schedule, and all accounts required or directed to be audited by the board of audit shall be audited according to the provisions of this Act: but nothing herein shall be deemed to confer upon the treasury the powers with respect to audit vested in the admiralty by the "Greenwich Hospital Act, 1865," or to affect any right, title, obligation, or liability acquired or accrued before the commencement of this Act: provided always, that this Act shall not affect any proceedings which may have been commenced under any of the said Acts before this Act comes into operation.

47. This Act shall commence on the first day of April one thousand eight hundred and sixty-seven.

#### SCHEDULE A.

Grants or services to which the appropriation accounts relate.	Dates after the termination of every financial year to which appropriation accounts relate, on or before which they are to be made up and submitted.		
	To the comptroller and auditor general by the departments.	To the treasury by comptroller and auditor general.	To the House of Commons by the treasury.
Army	31 Dec.	31 Jan.	5 Feb.
Navy			
Miscellaneous Civil Services—(Classes I. to VII.)			
Revenue Departments (Salaries, Superannuation, &c., and Expenses)	30 Nov.	15 Jan.	31 Jan.
Post Office Packet Service, and All other Services voted in Supply			

If Parliament be then sitting, and if not sitting, then within six weeks after Parliament shall be next assembled.

#### SCHEDULE B.

Army;  
Navy;  
and such other services as the treasury, by their mi-

nute, to be laid before Parliament, may direct; but no such minute shall take effect until it shall have lain before the House of Commons thirty days, unless it shall have been previously approved by a resolution of the House of Commons.

#### SCHEDULE C.

##### EMENDMENTS REPEALED.

The portions printed in *Italics* show the extent of repeal.

25 Geo. 3, c. 52.—An Act for better examining and auditing the Publick Accounts of this Kingdom. —*Whole Act.*

27 Geo. 3, c. 13, in part.—An Act for repealing the several Duties of Customs and Excise, and granting other Duties in lieu thereof, and for applying the said duties, together with the other Duties composing the Publick Revenue; for permitting the Importation of certain Goods, Wares, and Merchandize, the Produce and Manufacture of the European Dominions of the French King, into this Kingdom; and for applying certain unclaimed monies, remaining in the Exchequer for the payment of Annuities on Lives, to the Reduction of the National Debt. —*In part, namely—section seventy-two.*

39 & 40 Geo. 3, c. 54, in part.—An Act for more effectually charging Publick Accountants with the Payment of Interest; for allowing interest to them in certain Cases; and for compelling the Payment of Balances due from them. —*In part, namely—sections four, five, six, nine, ten, and thirteen.*

45 Geo. 3, c. 55.—An Act to amend an Act made in the twenty-fifth year of His present Majesty, for better examining and auditing the Publick Accounts of this Kingdom; and for enabling the Commissioners, in certain Cases, to allow of vouchers, although not stamped according to law. —*Whole Act.*

46 Geo. 3, c. 141.—An Act for making more effectual Provision for the more speedy and regular Examination and Audit of the Publick Accounts of this Kingdom. —*Whole Act.*

47 Geo. 3, sess. 2, c. 39.—An Act for more effectually charging Publick Accountants with Interest upon Balances, and for other Purposes relating to the passing of Publick Accounts. —*Whole Act.*

52 Geo. 3, c. 52.—An Act to provide for the speedy and regular Examination and Audit of the Public Accounts of Ireland; and to repeal certain former Acts relating thereto. —*Whole Act.*

53 Geo. 3, c. 150.—An Act for the more speedy and effectual Examination and Audit of the Accounts of Military Expenditure in Spain and Portugal; for removing Delays in passing the Public Accounts; and for making new Arrangements for conducting the business of the Audit Office. —*Whole Act.*

57 Geo. 3, c. 48.—An Act to make further provision for the Adjustment of the Accounts of the Consolidated Fund of the United Kingdom; and for making good any occasional Deficiency which may arise in the said Fund in Great Britain or Ireland respectively; and to direct the Application of Monies by the Commissioners for the Reduction of the National Debt. —*Whole Act.*

1 & 2 Geo. 4, c. 121, in part.—An Act to alter and abolish certain Forms of Proceedings in the Exchequer and Audit Office relative to Public Accountants; and for making further Provisions for the Purpose of facilitating and expediting the passing of Public Accounts in Great Britain; and to render perpetual and amend an Act passed in the Fifty-fourth Year of His late Majesty for the effectual Examination of the Accounts of certain Colonial Revenues.—*Whole Act, except sections twenty-seven, twenty-eight, and twenty-nine.*

10 Geo. 4, c. 27.—An Act to amend the several Acts for regulating the Reduction of the National Debt.—*Whole Act.*

2 & 3 Will. 4, c. 26.—An Act to authorize the Commissioners for auditing the Public Accounts of Great Britain to examine and audit Accounts of the Receipt and Expenditure of Colonial Revenues.—*Whole Act.*

2 & 3 Will. 4, c. 99.—An Act for transferring the Powers and Duties of the Commissioners of Public Accounts in Ireland to the Commissioners for auditing the Public Accounts of Great Britain.—*Whole Act.*

2 & 3 Will. 4, c. 104.—An Act to regulate the Period of rendering the Public Accounts and making up the General Imprest Certificates.—*Whole Act.*

4 & 5 Will. 4, c. 15, in part.—An Act to regulate the Office of the Receipt of His Majesty's Exchequer at Westminster.—*Whole Act, except sections seven and twenty-six.*

3 & 4 Vict. c. 108, in part.—An Act for the Regulation of Municipal Corporations in Ireland.—*In part, namely—sections two hundred and thirteen and two hundred and fourteen.*

9 & 10 Vict. c. 92.—An Act to provide for the Preparation, Audit, and Presentation to Parliament of annual Accounts of the Receipts and Expenditure of the Naval and Military Departments.—*Whole Act.*

14 & 15 Vict. c. 42, in part.—An Act to make better Provision for the Management of the Woods, Forests, and Land Revenues of the Crown, and for the Direction of Public Works and Buildings.—*In part, namely—section thirty-eight wholly, and section thirty-nine as far as it relates to the accounts of the commissioners of her Majesty's works and public buildings.*

17 & 18 Vict. c. 19.—The Naval Pay and Prize Act, 1854.—*Whole Act.*

17 & 18 Vict. c. 94, in part.—An Act to alter the Mode of providing for certain Expenses now charged upon certain branches of the Public Revenues and upon the Consolidated Fund.—*In part, namely—sections three, four, and five.*

18 & 19 Vict. c. 96, in part.—The Supplemental Customs Consolidation Act, 1855.—*In part, namely—section one.*

24 & 25 Vict. c. 93.—An Act to provide for the Preparation, Audit, and Presentation to Parliament of annual Accounts of the Appropriation of the Moneys voted for the Revenue Departments.—*Whole Act.*

28 & 29 Vict. c. 93.—An Act to consolidate the offices of Comptroller General of the Exchequer and Chairman of the Commissioners for auditing the Public Accounts, and for other Purposes.—*Whole Act.*

## CAP. XL.

An Act to authorize a further Advance of Money for the Purposes of Improvement of Landed Property in Ireland. [28th June, 1866.]

10 & 11 Vict. c. 32. 12 & 13 Vict. c. 23. 12 & 13 Vict. c. 59. 13 & 14 Vict. c. 31. 13 & 14 Vict. c. 113. 15 & 16 Vict. c. 34. 23 & 24 Vict. c. 19. 25 & 26 Vict. c. 29.

Sec. 1. Power to treasury to issue one million pounds for the purposes of the Acts.

2. The commissioners of public works may make advances to such amounts as may be sanctioned.

3. Loans may be made repayable by a rent-charge calculated at the rate of £5 per cent. per annum.

4. Such rent-charge may be redeemed according to a Schedule to be approved.

5. Additional purposes for which loans may be made.

6. Provisions of former Acts to apply.

7. This and recited Acts to be construed as one Act.

WHEREAS an Act was passed in the session of Parliament held in the tenth and eleventh years of the reign of her present Majesty Queen Victoria, intituled *An Act to facilitate the Improvement of Landed Property in Ireland*; and a further Act was passed in the session of Parliament held in the twelfth year of the reign of her present Majesty, intituled *An Act to authorize further Advances of Money for the Improvement of Landed Property, and the Extension and Promotion of Drainage and other Works of public Utility in Ireland*; and a further Act was passed in the session of Parliament held in the twelfth and thirteenth years of the reign of her said Majesty, intituled *An Act to amend an Act of the Tenth Year of Her Majesty, for facilitating the Improvement of Landed Property in Ireland*; and a further Act was passed in the session of Parliament held in the thirteenth and fourteenth years of the reign of her said Majesty, intituled *An Act to authorize further Advances of Money for Drainage and the Improvement of Landed Property in the United Kingdom, and to amend the Acts relating to such Advances*; and a further Act was passed in the said last-mentioned session of Parliament, intituled *An Act to authorize the Transfer of Loans for the Improvement of Lands in Ireland to other Land*; and a further Act was passed in the session of Parliament held in the fifteenth and sixteenth years of the reign of her said Majesty, intituled *An Act to extend the Act to facilitate the Improvement of Landed Property in Ireland, and the Acts amending the same, to the Erection of Scotch Mills for Flax in Ireland*; and a further Act was passed in the session of Parliament held in the twenty-third year of the reign of her said Majesty, intituled *An Act to extend the Act to facilitate the Improvement of Landed Property in Ireland, and the Acts amending the same, to the Erection of Dwelling for the Labouring Classes in Ireland*; and a further Act was passed in the session of Parliament held in the twenty-fifth and twenty-sixth years of the reign of her said Majesty, intituled *An Act to amend and*

*enlarge the Acts for the Improvement of Landed Property in Ireland:*

'And whereas great benefit has been derived by means of loans under the said Acts, and it is expedient to authorize the advance of a further sum of money for the purposes of the said Acts, and to extend the objects for which such loans may be made, and to perpetuate such of the powers and provisions of the said Acts as are terminable:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That it shall be lawful for the commissioners of her Majesty's treasury from time to time to issue and advance, out of the growing produce of the consolidated fund of the United Kingdom of *Great Britain and Ireland* (in addition to the sums heretofore authorized to be advanced), such further sum or sums of money, not exceeding in the whole the sum of one million pounds, as may be required for the purposes of the said recited Acts and this Act.

2. Notwithstanding anything in the said Act of thirteenth and fourteenth of her Majesty, chapter thirty-one, or other of the said Acts, to the contrary, it shall be lawful for the commissioners of public works in *Ireland*, with the sanction of the commissioners of her Majesty's treasury, out of the aforesaid moneys, to make loans to any owner of lands in *Ireland*, for the purposes of the said recited Acts and this Act, of such sums and to such amounts, at such times and in such manner as the said commissioners of public works, with the sanction of the commissioners of the treasury, may think right and proper.

3. Notwithstanding anything in the said first-recited Act, it shall and may be lawful for the commissioners of public works, by and with the sanction of and subject to such rules and regulations as the lords commissioners of her Majesty's treasury (and in such cases as the said last-mentioned commissioners may think proper), to make loans or advances for the purposes of the said recited Acts or this Act, repayable by means of a rentcharge at five *per cent per annum*, payable for a term of thirty-five years instead of twenty-two years, as by the said first-recited Act provided; and in case any loan shall be so made, the lands specified in the order of the commissioners of public works for the making of such loan shall from the date of such order become charged with the payment to her Majesty of an annual rentcharge of five pounds for every one hundred pounds of such loan from time to time advanced, and so in proportion for any lesser amount, and to be payable for the term of thirty-five years, to be computed from the fifth day of *April* or tenth day of *October* which shall next happen after the advance in respect of which the rentcharge shall be charged, such rentcharge to be paid by equal half yearly payments on the fifth day of *April* and tenth day of *October* in every year, the first of such payments to be made on the second of such days which shall happen next after the issue of any such advance in respect of which the rentcharge shall be charged.

4. All such loans, repayable as last aforesaid, may

be redeemed according to a schedule to be prepared and certified by the actuary for the time being of the commissioners for the reduction of the national debt, and approved of by the lords commissioners of her Majesty's treasury.

5. In addition to the purposes for which loans may be made under the provisions of the said recited Acts, it shall be lawful for the commissioners of public works, in such cases as they may judge expedient for the promotion of agriculture or the improvement of lands, and subject to such rules and regulations as may from time to time be made by the commissioners of her Majesty's treasury, to make loans for the following purposes, that is to say:

The building or enlarging farm dwelling houses in connexion with farm offices and buildings erected or to be erected:

The erection and improvement (by means of alterations or additions) of dwelling houses for labourers:

Planting for shelter:

The execution of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter or object herein-before or in the said recited Acts or any of them mentioned, or for deriving the full benefit thereof.

6. All the powers, provisions, matters, and things in the said Acts, or any of them, contained or referred to, and relating to the security for and repayment of loans under the provisions of the same, shall apply to all loans duly authorized to be made under this Act.

7. This Act and the Acts herein-before recited or referred to shall be read together and construed as one Act, save so far as the provisions of this Act may be inconsistent with the provisions of the aforesaid Acts or any of them.

CAP. XLI.

An Act to amend the Nuisances Removal and Diseases Prevention Act, 1860. [28th June 1866.]

CAP. XLII.

An Act to amend the Law relating to Life Insurances in *Ireland*. [28th June, 1866.]

14 G. 3, c. 48.

Sec. 1. *Recited Act extended to Ireland.*

2. *Commencement of Act.*

'WHEREAS an Act was passed in the fourteenth year of the reign of his late Majesty King George the Third, intituled *An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances, except in Cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured*: And whereas it is expedient that the provisions of the said recited Act should be extended to *Ireland*: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the commencement of this Act the provisions of the said recited Act shall extend to *Ireland*.

2. This Act shall commence and take effect from

and after the first day of *November* in the year one thousand eight hundred and sixty-six, and shall apply to all policies of insurance upon lives entered into upon and after that date.

## CAP. XLIII.

An Act for the Establishment and Regulation of Savings Banks for Seamen and Marines of the Royal Navy. [28th June, 1866.]

## CAP. XLIV.

An Act to encourage the Establishment of Lodging Houses for the Labouring Classes in Ireland. [28th June, 1866.]

- Sec. 1. *Short title.*  
 2. *Interpretation of terms.*  
 3. *Act may be adopted in any borough.*  
 4. *Obuncil of corporation may determine that this Act shall be adopted.*  
 5. *On requisition of ratepayers the council or town commissioners to postpone proceedings for one year.*  
 6. *Expenses to be paid out of rates.*  
 7. *Net income to be paid to the credit of the borough fund.*  
 8. *Commissioners of public works may advance monies to companies, societies, or persons.*  
 9. *Advances may be made whether local or other authority has power to borrow.*  
 10. *Commissioners of public works, with the approval of the treasury, to make rules and regulations.*  
 11. *Period for repayment of advances.*  
 12. *Security for such advances.*  
 13. *Money advanced on security of land not to exceed moiety of the value.*  
 14. *Council, town commissioners, or society may appropriate lands.*  
 15. *Enactments applicable to the acquisition of lands by railway companies to apply.*  
 16. *Buildings to be erected.*  
 17. *Council or town commissioners, &c. may enter into contracts.*  
 18. *Certain sections of 10 & 11 Vict. c. 16, to apply.*  
 19. *Council, town commissioners, or company may make sale of lands vested in them for the purposes of this Act.*  
 20. *Management and regulation to be vested in the council or town commissioners.*  
 21. *Council or commissioners may make byelaws for the following purposes.*  
 22. *Printed copy of byelaws to be put up.*  
 23. *Proof of byelaws.*  
 24. *Recovery and application of fines.*  
 25. *Powers conferred on mortgagees.*  
 26. *Power to appoint a receiver in case of arrears being due.*

‘WHEREAS it is desirable for the health, comfort, and welfare of the inhabitants of towns and populous districts to encourage the erection and establishment of lodging houses and dwellings for the labouring classes in Ireland: Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and

consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In citing this Act for any purpose it shall be sufficient to use the expression “The Labouring Classes Lodging Houses and Dwellings Act (*Ireland*), 1866.”

2. In this Act the several words following shall have the several meanings hereby assigned to them:

The words “dwelling houses” shall include lodging houses:

The word “borough” shall mean and include any city, borough, or town:

The term “council” shall mean the mayor, aldermen, and burgesses, or other the municipal corporation of any borough, or any town having municipal commissioners under the Act third and fourth *Victoria*, chapter one hundred and eight:

The term “town commissioners” shall mean any commissioners intrusted with the paving, lighting or cleansing of any borough, or any commissioners in any townships under local Acts; and the word “person” shall include persons:

The term “public works commissioners” shall mean the commissioners of public works in *Ireland* for the time being:

The term “lords of the treasury” shall mean the lords commissioners of her Majesty’s treasury for the time being:

“Rates” shall mean the rates, tolls, rents, income, and other monies whatsoever which under the provisions of any Act shall be applicable for the general purposes of such Act:

“Lands” shall mean tenements and hereditaments of whatsoever nature or tenure:

“Justice” shall mean justice of the peace for the county, division, liberty, borough, or place where the matter requiring the cognizance of such justice shall arise.

3. This Act may be adopted for any borough in *Ireland* which now has or may hereafter have any municipal corporation, or in which now exist or may hereafter exist any commissioners for the paving, lighting, or cleansing of the same, under any public or local Act of Parliament or any charter, and any township having commissioners under local Acts.

4. The council of the corporation or the town commissioners of any such borough or commissioners for any township may, if they think fit, determine that this Act shall be adopted for such borough, town, or township, and then and in such case such of the provisions of this Act as are applicable in that behalf shall thenceforth take effect and come into operation in such borough, town, or township, and shall be carried into execution by such council or town commissioners as aforesaid.

5. Such council or town commissioners shall give not less than twenty-eight nor more than forty two days public notice of their intention to take into consideration the propriety of adopting this Act, and of the time and place for holding the meeting at which they will take it into consideration; and if there be presented to such council or town commissioners at that meeting a memorial in writing, signed by not less than one tenth in value of the persons liable to be

rated to rates made by such council or town commissioners, requesting such council or town commissioners to postpone such consideration for a period of one year, then and in such case such consideration shall be postponed for such period of one year, and shall be entered on as soon after the expiration of the year of postponement as such council or town commissioners shall think fit.

6. The expenses of carrying this Act into execution in any such borough in which it shall be so adopted shall be paid out of any rates which such council or such town commissioners may have power to impose for the purpose of paving, lighting, cleansing, or otherwise improving the borough, town, or township, and which rates it is hereby enacted may be increased for the purpose of defraying such expense, such increase to be subject to the approval of the lords of the treasury.

7. The net income arising from any lodging houses or dwellings built by any council or town commissioners after the payment of all outgoing, including the interest and instalments of principal of any borrowed money, shall be paid to the credit of the borough or town commissioners fund or otherwise in aid of the rates which may have been applied to the payment of the expenses aforesaid, and the council or town commissioners shall keep distinct accounts of their expenses, receipts, and liabilities with reference to the execution of this Act, to be called "The Labourers Dwellings Account."

8. For the purposes herein-after mentioned the commissioners of public works in *Ireland* may, out of the funds from time to time at their disposal, advance on loan to any such council or town commissioners as aforesaid, or to any company, society, or person as herein-after mentioned, namely, any railway company, or dock or harbour company or commissioners, or any other company, society, or association established for trading or manufacturing purposes in the course of whose business or in discharge of whose duties persons of the labouring class may be employed, any private person or persons entitled to any land held in fee simple or fee farm, or for lives renewable for ever or for any term of years whereof not less than eighty years shall be unexpired, and all such advances by way of loan shall be applied towards the purchase of lands or buildings and the erection, alteration, and adaptation of buildings to be used as dwellings for the labouring classes, and in providing all conveniences which may be deemed by the commissioners of public works proper in connexion with such dwellings, and in the case of loan to any such council or town commissioners as aforesaid the term "dwellings" in this section shall include lodging houses formed or erected by them under the authority of this Act.

9. Any such advance may be made whether the local or other authority, body corporate, society, or person or persons receiving the same has or has not power to borrow on mortgage or otherwise independently of this Act; but nothing in this Act contained shall repeal or alter any regulation, statutory or otherwise, whereby any company may be disabled from borrowing until a definite portion of capital is subscribed for, taken, or paid up, and no such advance

be made without the approval of the lords of the treasury.

10. It shall be lawful for the said commissioners of public works, with the approval of the said lords of the treasury, from time to time to make such rules and regulations as they may think fit with respect to applications for loans under this Act, and the terms and conditions on which such loans shall be made, and to issue such instructions and forms as they may think proper for the guidance and observance of persons or bodies applying for or receiving such loans, or executing such works, or rendering accounts of monies expended under this Act, or regarding the class of dwelling or lodging houses (as the case may be), towards the providing of which such loans may be made, and the adaptation thereof to the purposes intended, and as to the mode of providing for their maintenance, repair, or insurance.

11. The period for the repayment of such advances shall be regulated by the public works commissioners, with the sanction of the commissioners of the treasury, and shall in no case exceed forty years.

12. The repayment of any such money so advanced, with interest thereon at any rate not less than four pounds *per cent. per annum*, shall be secured as follows, namely, in the case of an advance to any such council or town commissioners by a mortgage solely of said rates so leviable by them respectively as aforesaid, or by such mortgage as herein-after mentioned, or by both, and in any other case by mortgage of the lands, buildings, or premises for the purposes of which such advance shall be made; and in the case of an advance to a company or society any part of whose capital remains uncalled up or unpaid, by a mortgage also of all capital so uncalled up or unpaid; and any such mortgage may be taken either alone or together with any other security which may be agreed upon.

13. The money so advanced on the security of any land or buildings shall not exceed one moiety of the value of the estate or interest in such land or buildings so proposed to be given in mortgage, and all such monies may be advanced by instalments as may be agreed upon.

14. Any such council or town commissioners, and every such other company, commissioners, society, or association, may appropriate for the purposes of this Act any lands vested in them respectively, and they may also respectively purchase or take on lease any lands or buildings necessary for the purposes of this Act; and every such commissioners, company, association, or society as aforesaid, for the purpose of taking and holding such lands, shall be deemed to be a body corporate, with right of perpetual succession: provided always, that no such council or town commissioners shall so appropriate, purchase, or take on lease any such lands or buildings without the sanction of the said lords of the treasury.

15. For the purpose of the acquisition of any such lands or buildings by said council, town commissioners, commissioners, company, society, association, or person as aforesaid, all the statutory enactments for the time being applicable to the acquisition of lands by railway companies in *Ireland* (save so far as they relate to the taking of lands otherwise than by agreement) shall be deemed to be incorporated with this

Act; and for the purposes aforesaid this Act shall be deemed the special Act, and the said council or town commissioners, society, association, or person as aforesaid the promoters.

16. The said council or town commissioners, company, society, association, or person may from time to time, on any lands so appropriated, purchased, or rented, or contracted so to be, respectively erect any buildings suitable for the dwellings or lodging houses, as the case may be, of the labouring classes, and convert any buildings so taken by them into such dwellings or lodging houses, and may from time to time alter, enlarge, repair, and improve the same, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences, and may enter into any contracts for the purposes aforesaid, and may apply to the purposes aforesaid any funds at their disposal respectively.

17. Any such council or town commissioners, company, society, or association may enter into any contracts for the purpose of supplying any such lodging houses provided or erected by them with gas, water, or other conveniences, and any commissioners or trustees for the supplying of any borough with gas or water may, if they shall think fit, supply gas or water to such lodging houses without charge, or at any reduced charge, or on other favourable terms.

18. Sections 56, 57, 58, 59, 60, 61, 62, 63, 64, 99, 100, 101, 102, 103 of the Commissioners Clauses Act, 1847, shall be incorporated with this Act, so far as regards any such council, town commissioners, or any dock or harbour company, or commissioners; and the term "commissioners" in the said clauses so incorporated shall mean and include any such council or town commissioners, dock or harbour company or commissioners as aforesaid, and this Act shall be deemed the special Act for the purpose of such incorporation.

19. Any such council, town commissioners, railway company, or dock or harbour company or commissioners, may from time to time, with the sanction of the lords of the treasury, make sale and dispose of any lands, houses, or buildings vested in such council, commissioners, or company as last aforesaid for the purposes of this Act, and may with the like sanction exchange any such lands, houses, or buildings for any others better suited for such purposes, with or without paying or receiving any money for equality of exchange, and the proceeds of all such sales shall be applied for the benefit of such council, commissioners, or company, or for the purposes of this Act, in such manner as the said lords of the treasury may approve or direct.

20. The general management, regulation, and control of any lodging houses established under this Act by any such council or town commissioners shall (subject to the provisions of this Act) be vested in such council or town commissioners respectively; and every lodging house established under this Act, and which shall be within the jurisdiction of any sanitary board, shall at all times be open to the inspection of such sanitary board, and the officers thereof from time to time authorized by such board to make such inspection.

21. That such council or town commissioners,

company, society, association, or person may make byelaws for the regulation of such lodging houses, and from time to time vary and alter such byelaws, and may appoint any penalty not exceeding five pounds for the breach by their officers respectively, or by any tenants or occupiers of such lodgings, of every such byelaw, and such byelaws among other things shall make sufficient provision for the following purposes:

1. For securing that such lodging houses shall be under the control of the officers and servants of the council or town commissioners, company, society, association, or person:
2. For securing the due separation at night of men and boys over eight years of age from women and girls:
3. For preventing damage, disturbance, interruption, indecent or offensive language and behaviour, and nuisances:
4. For determining the duties of the officers, servants, and others appointed by the council or town commissioners, company, society, association, or person: provided always, that no such byelaw shall be of any legal force until the same shall have received the approval of the chief secretary or under secretary for *Ireland*:

22. A printed copy of such byelaws shall be put up and at all times kept on every room of any such lodging house.

23. The production by any such council or town commissioners, company, society, association, or person of a copy of such byelaws, purporting to be signed by such chief secretary or under secretary, shall be sufficient proof in all courts of justice and elsewhere that such byelaws have been duly approved of by such secretary or under secretary.

24. All fines imposed by any such byelaws shall be recovered in a summary way before any justice, and one moiety of any such penalty shall be paid to the informer, and the other moiety to the council or town commissioners, company, society, association, or person, to be applied by them in aid of the expenses of such lodging houses.

25. Every mortgage under this Act shall confer on the mortgagees all the rights, powers, and privileges conferred on mortgagees by Part 2 of the Act of the session of the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and forty-five, and may contain any other covenants and conditions as may be agreed upon.

26. In addition to all such powers so conferred on such mortgagees, in case any interest or instalment of principal due on foot of any such mortgage to the said public works commissioners shall be unpaid for the space of thirty one days after the day appointed for the payment thereof, then it shall be lawful for the Court of Chancery in *Ireland*, upon the petition of the public works commissioners for the time being by their secretary, in a summary way to appoint a receiver over any rates or the rents and profits of any lands comprised in such mortgage, and such receiver shall have the same powers as any other receiver in the Court of Chancery, and shall apply the said rates, rents, and profits (after deducting all costs and out-



going) in and towards the monies due on foot of any such mortgage.

## CAP. XLV.

An Act to extend the provisions of the Act for the Encouragement of the Sea Fisheries in Ireland, by promoting and aiding with Grants of Public Money the Construction of Piers, Harbours, and other works.

[28th June, 1866.]

9 & 10 Vict. c. 3; 9 & 10 Vict. c. 75; 16 & 17 Vict. c. 136; 19 & 20 Vict. c. 37.

Sec. 1. Grants may be issued for purposes of first-recited Act.

2. Repeal of limit of grant to £5,000.

3. Grants and loans may be made in extension of existing works.

4. Advances may be made by way of loan.

5. Sums advanced by way of loan to be repayable by virtue of 16 & 17 Vict. c. 136.

6. This and recited Acts to be as one Act.

‘WHEREAS an Act was passed in the ninth year of the reign of her Majesty the now Queen, being *An Act to encourage the Sea Fisheries of Ireland, by promoting and aiding with Grants of Public Money the Construction of Piers, Harbours, and other Works*; and the provisions of such Act were extended by another Act of the session held in the ninth and tenth years of the reign of her said Majesty, chapter seventy-five:

‘And whereas another Act was passed in the session held in the sixteenth and seventeenth years of the reign of her said Majesty, being *An Act for enabling Grand Juries in Ireland to borrow Money from private Sources on the Security of Presentment, and for transferring to Counties certain Works constructed wholly or in part with Public Money*, and which last-mentioned Act was amended by an Act of the session held in the nineteenth and twentieth years of her said Majesty, chapter thirty-seven:

‘And whereas it is expedient to provide that further sums should be advanced by way of grant and loan for the purposes in the said firstly-recited Act and this Act, and to increase the amount of grants authorised to be made for such purposes respectively mentioned:’

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The commissioners of her Majesty’s treasury may cause to be issued from time to time to the commissioners of public works in Ireland, out of any moneys which may be granted by Parliament for that purpose, such further sums as the said commissioners of public works may find necessary for the purposes of the said firstly-recited Act.

2. So much of the said firstly-recited Act as limits the amount of grant to any one work to the sum of five thousand pounds is hereby repealed; and it shall be lawful for the said commissioners of public works, by and with the sanction of the said commissioners of her Majesty’s treasury, to make a grant or grants for any work under the said recited Act to an amount not

exceeding for any one work the sum of seven thousand five hundred pounds.

3. It shall be lawful for the commissioners of public works, with the sanction of the lords commissioners of her Majesty’s treasury, in addition to the purposes by the said firstly-recited Act, authorised, to make grants and loans towards the extension, enlargement, or improvement of any harbour, pier, quay, landing slip, or other works heretofore executed under the provisions of the said recited Acts; and such advances by way of grant and loan shall be deemed to be made by virtue of and in all respects to be within the provisions of the said recited Acts and of this Act: provided, however, that no such grant shall (including any grant previously made in aid of such pier or other work) exceed the sum of seven thousand five hundred pounds.

4. In all cases in which any grant of money may be made under the provisions of this Act for the purpose of defraying a portion of the total actual costs of any works, the amount of the residue of such costs, (with the sanction of the said commissioners of her Majesty’s treasury) may be advanced by way of loan by the said commissioners of public works out of any moneys applicable to loans at the disposal of the said last-mentioned commissioners.

5. All sums of money advanced by way of loan under the provisions of this Act, and payable by any county or district, shall be repaid and recovered under and by virtue of the provisions in that behalf contained in the said Act of the session held in the sixteenth and seventeenth years of her said Majesty, chapter one hundred and thirty-six, and all sums of money payable by any proprietor of lands in respect of moneys advanced by way of loan for or in respect of any work under the provisions of the said recited Acts or of this Act, with interest thereon, shall be charged upon the lands of such proprietor, in the manner and with the priority in the said first-recited Act mentioned. And all moneys recoverable in repayment of any advance by way of loan under the provisions of this Act shall be paid and applied in such manner as the said commissioners of her Majesty’s treasury may from time to time direct.

6. The said Acts herein-before recited or referred to shall be read together and construed as one Act.

## CAP XLVI.

An Act to authorise the Town Council of *Belfast* to levy and pay charges in respect of extra Constabulary.

[28th June 1866.]

28 & 29 Vict. c. clxxxiii.

Sec. 1. *Inspector General to include in his next certificate £2,152 0s. 9d. now remaining due from the borough of Belfast for extra constabulary.*

2. *The said sum to be applied as heretofore.*

3. *Future expenses for extra constabulary to be raised under 28 & 29 Vict. c. 70.*

4. *Short title.*

‘WHEREAS the Inspector General of Constabulary did on the twenty-sixth day of *February*, one thousand eight hundred and sixty-six, under the statutory powers in that behalf enabling him, duly sign and

issue his certificate, certifying that the sum of two thousand one hundred and fifty two pounds and ninepence had been incurred by the borough of *Belfast* in respect of extra constables, such sum being one moiety of the expenses of such constables from the first day of *April* to the thirty-first day of *August* one thousand eight hundred and sixty-five: "And whereas by "The County *Antrim* and *Belfast* Borough Act, 1865," it is amongst other things provided, that from and after the commencement thereof all the powers and duties of the grand jury of the county of *Antrim* in relation to the applotment and levying of county cess on any rateable property within the said borough shall cease: And whereas by reason of the said Act the grand jury of *Antrim* are unable to present and assess the said sum in the borough of *Belfast*: And whereas the said sum of two thousand one hundred and fifty-two pounds and ninepence is justly due and ought to be received from the said borough: "

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. When the inspector general of constabulary next after the passing of this Act shall make out a certificate, as provided by the sixth section of "The Constabulary (*Ireland*) Amendment Act, 1865," of the amount of the monies chargeable in respect of the expense of the additional force now added to the constabulary force of *Belfast* he shall add to such amount the said sum of two thousand one hundred and fifty-two pounds and ninepence, and when such certificate shall have been laid before the town council signed and certified in the manner provided by that Act, the town council shall forthwith make and levy a rate sufficient for the payment of the total amount stated in such certificate, and shall thereout, or out of any monies in their hands, pay the amount mentioned in such certificate to the paymaster-general's department in *Ireland*.

2. The said sum of two thousand one hundred and fifty-two pounds and ninepence when so paid over shall be applied in the same manner and for the same purpose as if the same had been raised in the manner heretofore accustomed before the passing of "The County *Antrim* and *Belfast* Borough Act, 1865."

3. Any expenses which hereafter may be chargeable to the borough of *Belfast* in respect of extra constabulary shall be certified, signed, approved, raised, and paid in the same manner as is provided by the sixth section of "The Constabulary (*Ireland*) Amendment Act, 1865."

4. This Act may be cited as "The *Belfast* Constabulary Act, 1866."

#### CAP. XLVII.

An Act to legalize the Payment and Distribution of *Indian Prize Money* by the Treasurer or Secretary of *Chelsea Hospital*, and to amend an Act for the consolidating and amending the Law relating to the Payment of *Army Prize Money*.

[28th June, 1866.]

#### CAP. XLVIII.

An Act to enable Her Majesty to settle an Annuity on Her Royal Highness the Princess *Mary Adelaide Wilhelmina Elizabeth of Cambridge*.  
[28th June, 1866.]

#### CAP. XLIX.

An Act to provide for the better Maintenance of Works executed under the Acts for the Drainage of Lands in *Ireland*.  
[16th July, 1866.]

5 & 6 Vict. c. 89; 26 & 27 Vict. c. 88.

Sec. 1. *Short title.*

2. *Where lands are subject to charge for drainage, &c., and the same are injuriously affected, person may take proceedings.*

3. *Such person to give notice to trustees or drainage board.*

4. *In case the trustees or drainage board neglect complainant to apply to the commissioners of public works.*

5. *The commissioners to consider memorial.*

6. *The commissioners to make an order.*

7. *Repairs to extend to bridge.*

8. *Commissioners may appoint a superintendent.*

9. *Complainant to pay preliminary expenses.*

10. *The powers of the commissioners to carry out works.*

11. *Expenses to be charged to the district.*

12. *The commissioners may make an order declaring the amount expended.*

13. *Power to make further order.*

14. *The commissioners to make advances.*

15. *The amount to be charged on lands in the district.*

16. *If amount not paid parties and lands to be liable to 1s. in the pound receiver's fee.*

17. *Recovery of monies.*

18. *Power to appoint a collector.*

19. *Commissioners may cause inspection of works and make the necessary repairs.*

20. *Order to be evidence.*

21. *Commissioners to be a corporation, and proceedings to be taken by them as such.*

22. *Orders, &c. may be sealed by the commissioners.*

23. *Penalty for obstructing or injuring works.*

24. *Construction of terms.*

"WHEREAS by an Act of Parliament of the session held in the fifth and sixth years of her Majesty, chapter eighty-nine, and by certain other Acts amending or varying the provisions of the same, provision is made for the appointment of trustees for the maintenance of drainage works executed under the powers of said Acts, and for the charging and levying such sums as may be necessary for the maintenance and conservancy of such works: And whereas large sums of public money have been advanced and expended in the drainage and improvement of lands under the provisions of the said Acts, and the lands so drained and improved form the security for repayment of such advances: And whereas it is frequently found that lands improved by such drainage works are allowed to be injuriously affected by reason of the insufficient main-

tenance of such works; and the trustees of the districts in which such lands are included neglect in many instances to maintain or repair the said works, and to take such proceedings as may be necessary to secure the lands in the district against deterioration arising from such neglect, and by reason thereof the said lands are prejudicially affected as to the security for the repayment of such expenditure, and no efficient remedy in such cases is provided by the said Acts: And whereas an Act was passed in the session of parliament held in the twenty-sixth and twenty-seventh years of the reign of her Majesty, chapter eighty-eight, intituled *an Act to enable landed proprietors to construct works for the drainage and improvement of lands in Ireland*; and provision is by the said Act and the Acts since passed amending the same made for the advance of public monies to drainage boards constituted under the said last-mentioned Acts to be expended upon the drainage and improvement of lands within their respective districts, and to be secured upon such lands; and provision is also thereby made for maintenance of the works constructed by such drainage boards by means of rates assessed upon the lands within such districts, and the proprietors thereof, according to the proportions specified in the awards in the said last-mentioned Act mentioned: And whereas the advantages to be derived from works of drainage are dependent upon the proper maintenance of such works: And whereas it is apprehended that difficulty may be experienced in enforcing the future maintenance of the works so constructed by such drainage boards, and it is expedient that further provision should be made for the maintenance of all such drainage works executed under the provisions of the said Acts, or any of them: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the *Drainage Maintenance Act, 1866*.

2. Where the lands of any person being a proprietor or lessee thereof shall be or shall have been subject to any charge for the drainage of any district under the provisions of the said Acts, or any of them, or to any rates or assessments for the maintenance of the drainage works in the same district, and the same lands shall be injuriously affected owing to the insufficient maintenance of the said drainage works, it shall be lawful for such person to take such proceedings as are herein-after directed.

3. Any such person or complainant shall and may serve a notice in writing, signed by himself or his authorized or known agent, upon the trustees or drainage board, as the case may be, for the time being of such district, or any two or more of them, or their clerk or other officer (if any such shall be appointed), setting forth the particular lands alleged to be injured, and the particular defects arising from the neglect or insufficiency of the proper maintenance of such drainage works to which injury shall be alleged to be attributable, and calling upon the said trustees or drainage board forthwith to cause such defects to be remedied or supplied: Provided always, that in

case such complainant shall be unable to effect service of such notice in manner as aforesaid, it shall be lawful for him to publish the same not less than three times in some newspaper circulating in such district, and such publication shall be deemed equivalent to such service as herein-before is mentioned.

4. In case the said trustees or drainage board shall, for the space of fourteen days, neglect to comply with the terms of such notice, it shall be lawful for such complainant to present a memorial to the commissioners of public works in *Ireland*, stating the neglect of such trustees or drainage board in the proper maintenance of such works, the nature of the injury and defect arising from such neglect, and the purport or contents of such notice as aforesaid, and the date or dates of the service, or of such publication as aforesaid of the same, and showing the particular nature of the alleged neglect or default of the said trustees or drainage board.

5. The commissioners shall consider such memorial and the subject thereof, and shall and may, if they shall think fit so to do, appoint an engineer or other competent person to inspect and report upon the subject of such memorial and the state of the works in any such district, and, if necessary, to furnish a specification and estimate of the probable cost of the necessary repair of such works, and a copy of such report, or the purport thereof, shall be furnished to the said trustees or drainage board, or their clerk or other officer; or the commissioners may cause the same, or the purport thereof, to be published not less than three times in some newspaper as aforesaid, and shall and may at the same time, by notice served or published as aforesaid, call upon such trustees or drainage board, within such period as shall be therein appointed (not less than one fortnight from the date of the service or publication of such notice), to show cause why the provisions of this Act should not be put in force with respect to the matters complained of.

6. The commissioners shall take into their consideration all such matters (if any) as shall be submitted to them by the said trustees or drainage board, and shall make, or cause to be made, such inquiries with reference to the premises as they may deem expedient, and shall and may, if they think fit, make an order under their common seal, declaring that the works of maintenance and repair therein specified ought to be forthwith executed pursuant to the provisions of this Act; and thereupon it shall be lawful for the commissioners to proceed to carry out such works of repair and maintenance as they may consider necessary.

7. The repair and maintenance of the works by the said recited Acts and this Act authorised to be made by the trustees or drainage boards, or by the said commissioners of public works, shall extend to and include the removal, reconstruction, or alteration of any existing bridge (not being a county bridge), culvert, or archway which in the opinion of the commissioners of public works may be insufficient for the discharge of the water in any district, and thereby causing injury to any lands within such district.

8. The commissioners may appoint some fit and proper person to be the superintendent for the execu-

tion of such works; and so from time to time, as occasion may require, the commissioners may appoint some other proper person to be such superintendent in the place of any person so originally appointed who may die, or refuse or become incapable to act, or whom the commissioners may think fit to remove and supersede; and the commissioners, by any such order, may fix and declare a proper salary or remuneration to be paid to such superintendent.

9. The commissioners, if they shall think fit, and before the making of any such order, may require any complainant as aforesaid to pay or secure to them such sum of money as shall be sufficient to defray any preliminary expenses to be incurred by the commissioners in relation to such complaint.

10. The commissioners shall possess all such powers and authorities for the purpose of executing the works to be by them executed as by any of the Acts herein-before mentioned or referred to are conferred on the trustees of any district or on any drainage board as aforesaid.

11. The expenses of the said works so to be constructed, and including all costs and charges properly incurred by the complainant or the commissioners in and about the obtaining and making such order or orders as aforesaid, or preliminary or consequential thereto, and the salary or remuneration of such superintendent as fixed and determined by the commissioners, shall be charged as herein-after provided.

12. The commissioners shall and may, upon completion of such works, or such part thereof as they may think proper and necessary, make an order declaring amongst other things that the amount mentioned in such order is and shall be charged upon the lands in such district and the proprietors thereof respectively; and in such order the commissioners shall state and declare the time or times when the amount mentioned in any such order shall be paid to the commissioners, the parties by whom, and the respective proportions in which such amount shall be paid, the commissioners in making such order having regard to the final award in the district for which such order shall be made, so far as any change of circumstances in each case may admit; and the commissioners may also insert in any such order all such determinations, matters, and things as they may think necessary and proper, and such order shall be called the charging order.

13. And in case the amount of money mentioned in such order as aforesaid shall be found insufficient for the purposes aforesaid, and of all expenses incidental to the execution of the said works, it shall be lawful for the commissioners, by any further order as aforesaid, from time to time to order and declare such further sum as they shall think fit to be charged on the said district for the purpose of the said works and the expenses incidental thereto; and thereupon such further and additional amount shall be deemed and taken to be part of the amount charged by such original order as aforesaid, and rated and recovered accordingly.

14. It shall be lawful for the commissioners, if they deem it expedient, out of any monies under their control and applicable to loans, and with the sanction of the lords commissioners of her Majesty's treasury,

to advance the sum mentioned in any such order or orders made by the commissioners, as herein-before provided, to be expended on the repair and maintenance of such works.

15. The amount mentioned in any such order, with interest on any sum so advanced, at a rate not exceeding five pounds *per cent. per annum* from the date of such advance until repayment thereof, shall thereupon become charged upon the lands in the said district and the proprietors thereof respectively, in like manner and in the same priority as maintenance rates imposed by virtue of the aforesaid Acts or any of them; and the said proprietors and their lands respectively shall be assessed, rated, and taxed therewith in the proportions mentioned in the order of the commissioners, in like manner in all respects as any sums of money could have been rated and assessed by the trustees or drainage board of any drainage district for the maintenance of the works within the same by virtue of the provisions of the aforesaid Acts or any of them.

16. In addition to all and every the sums which by any order of the commissioners shall be fixed and determined as payable in respect of any of the lands under the provisions of this Act, and the interest on such sums, there shall be paid to the commissioners one shilling in the pound on the total amount of the same respectively as and for receiver's fees thereon, to be charged, payable, and recoverable in like manner as such sums and interest aforesaid: Provided always, that no party or person, or the lands or property of such party or person, shall be liable to such additional charge, who shall, within thirty-one days next after the time appointed by any such order for payment of any such sum and interest as aforesaid, pay the amount thereof to the credit of the commissioners into the bank of *Ireland*, or into such other bank as the commissioners may for that purpose appoint.

17. The commissioners, for the purpose of assessing such sum of money as aforesaid, and for the recovery of the same, shall possess the same remedies against the same lands and persons, and the same powers, rights, and privileges, as are or would be possessed by any trustees or drainage board of any district, for the purpose of assessing and recovering any sums of money rated and assessed by them for the maintenance of the works in such districts, including a right to recover such rates and charges for maintenance by civil bill from the person or persons for the time being in possession or in receipt of the rents and profits of lands as proprietors in respect of which such rates or charges shall be payable.

18. It shall be lawful for the commissioners, if they shall consider it necessary so to do, by warrant, to appoint any person to be the collector of such rates or charges; and in case any person from whom such rates or charges shall be recoverable as aforesaid shall not pay the same to such collector when demanded, then and in such case such collector shall leave at the dwelling-house or last place of abode of such person a notice in writing, subscribed with the name and place of abode of such collector, requiring payment of such rate or charge within six days from the date of such notice, and expressing that within six days the

same may be paid to the collector at his house or office; and if the same shall not be paid within such period of six days, then it shall be lawful for the said collector to levy the same by distress and sale of the goods of such person wherever such goods may be found; and the proceeds of such distress or sale shall be applied in payment of the expenses of such distress and sale, and in the next place in payment of such rate, and the residue shall be paid to the owner of such goods.

19. It shall be lawful for the commissioners from time to time to cause inspection to be made by some engineer or other competent person of the works executed in any district under the said Acts or any of them; and if it shall appear from the report of the person so appointed that the works in any such district have not been kept and maintained in good order, repair and condition, so as in the opinion of the commissioners to be fit and proper for their intended purposes, or that any sudden breach or damage has occurred to any embankment or other work in any such district, it shall be lawful for the commissioners to cause a notice, addressed to the trustees or drainage board of such district, to be served or published as hereinbefore is directed, calling upon them to execute such works as in the opinion of the commissioners the circumstances of the case shall render necessary (and the nature of which shall be stated in such notice) within such period as shall be therein mentioned, and informing them that in default thereof such works will be executed by the commissioners pursuant to the provisions of this Act; and in case such works shall not be executed in accordance with the terms of such notice, it shall be lawful for the commissioners, by and with the sanction of the lords commissioners of her Majesty's treasury, to make and execute all such works as they may consider necessary and proper for the due and efficient repair of such works, and for the purposes aforesaid the commissioners shall possess all the powers so herein-before expressed to be conferred upon the trustees of any drainage district or any drainage board as aforesaid; and the commissioners, after the completion of such works, shall make an order declaring the amount expended by them in such last-mentioned works, including the expense of any preliminary survey as aforesaid, and of any superintendent appointed by the commissioners, and declaring that such amount, together with interest thereon from such date as in such order shall be mentioned, shall be charged on the lands and proprietors in such districts, and such order shall have the like effect in all respects, and all the provisions of this Act shall apply thereto in like manner, as if the same were an order of the commissioners made in pursuance of the provisions herein-before contained, and called the charging order.

20. Any order purporting to be made by the commissioners by virtue of this Act, or any copy thereof sealed by the commissioners, shall be conclusive evidence in all courts of justice and elsewhere that all the preliminaries required by this Act in order to the due making of such order have been duly complied with, and that the superintendent in such order named has been duly appointed, and that all and every the sums of money in such order mentioned have been

duly charged on the lands in such district, pursuant to the provisions of this Act; and any certificate of the commissioners stating that any monies therein mentioned have been advanced or expended under the provisions of this Act shall be in like manner conclusive evidence that such monies have been so advanced or expended.

21. The Commissioners of public works shall be a corporation for the purposes of this Act, with perpetual succession and a common seal; and all actions and other proceedings to be taken for the purpose of recovering any sums charged, rated, or assessed by virtue of this Act shall be taken by the said commissioners so incorporated; and all costs, charges, and expenses properly incurred in and about the same shall be deemed part of the expenses incidental to the said works to be executed as aforesaid.

22. All orders, warrants, or certificates made by the commissioners under this Act shall be under the seal of the commissioners.

23. Any person who obstructs any person in making any of the drains, or improvements in drains, made and executed under any of the Acts hereinbefore mentioned or referred to, or in this Act, and any person who dams up, obstructs, or permits to be dammed up or obstructed, or in any way injure or permit to be injured, any drains so opened or made, or injures or permits to be injured any of the banks or other works made or constructed in any such district, shall for each such offence incur a penalty not exceeding ten pounds, to be recovered in a summary manner before two or more justices at petty sessions, and all such penalties shall be paid to the trustees or drainage board, as the case may be, for the district in which such offence may be committed.

24. The term "commissioners" in this Act shall mean "the commissioners of public works in *Ireland*;" and this Act shall be read and construed together with the said Act of the fifth and sixth years of her Majesty, chapter eighty-nine, and the Acts amending the same; and also with the said Act of the twenty-sixth and twenty-seventh years of her Majesty, chapter eighty-eight, and the Acts amending the same. The definition of the term "proprietor" in the Act of fifth and sixth of her Majesty, chapter eighty-nine, shall apply to this Act.

#### CAP. L.

An Act to revive section sixty-nine of "The Nuisances Removal (*Scotland*) Act, 1856," relating to Burials in Burghs. [16th July, 1866.]

#### CAP. LI.

An Act to amend the Acts relating to Lunacy in *Scotland*, and to make further Provision for the Care and Treatment of Lunatics. [16th July, 1866.]

#### CAP. LII.

An Act to extend the Law relating to the Expenses of Prosecutions, and to make Provision for Expenses on Charges of Felony and certain Misdemeanours before examining Magistrates. [23rd July, 1866.]

## CAP. LIII.

An Act to amend certain Provisions of the Sheriff Court Houses (*Scotland*) Act, 1860.

[30th July, 1866.]

## CAP. LIV.

An Act to amend the Law relating to the Qualifications of Revising Barristers. [30th July, 1866.]

## CAP. LV.

An Act to enable the Postmaster General to sit in the House of Commons. [30th July, 1866.]

## CAP. LVI.

An Act for confirming certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Clynder, Hastings, and Newlyn*. [30th July 1866.]

## CAP. LVII.

An Act to make further Provision for the Enrolment of certain Deeds, Assurances, and other Instruments relating to Charitable Trusts.

[30th July 1866.]

## CAP. LVIII.

An Act for confirming certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Ardglass, Blackpool, (South), Cowes (West), Dawlish, Hope-man, Hornsea, Llandudno, Penzance, Plymouth, (Hoe), Redcar and Scarborough*.

[6th August 1866.]

24 & 25 Vict. c. 45.

Sec. 1. *Orders set out in schedule confirmed.*

2. *Short title.*

## ARDGLASS.

Sec. 1. *Amendment of Ardglass harbour order, 1864.*

2. *Undertakers.*

3. *Power to take specified lands by agreement.*

4. *Lands Clauses Acts incorporated.*

5. *Power to make works.*

6. *Description of works.*

7. *Commencement of rates.*

8. *Application of rates.*

9. *Pilotage, &c.*

10. *Incorporation of order of 1864.*

11. *Short title.*

‘WHEREAS a provisional order made by the board of trade under The General Pier and Harbour Act, 1861, is not of any validity or force whatever until the confirmation thereof by Act of Parliament:

‘And whereas it is expedient that the several provisional orders made by the board of trade under the said Act, and set out in the schedule to this Act, be confirmed by Act of Parliament:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

1. The several orders set out in the schedule to this Act shall be and the same are hereby confirmed;

and all the provisions thereof in manner and form as they are set out in the said schedule shall, from and after the passing of this Act, have full validity and force.

2. This Act may be cited as The Pier and Harbour Orders Confirmation Act, 1866.

## The SCHEDULE of Orders.

1. ARDGLASS.—Amendment of Order.
2. BLACKPOOL (South).—Construction of a Pier.
3. COWES (West).—Construction of a Pier.
4. DAWLISH.—Construction of a Pier.
5. HOPEMAN.—Improvement of a Harbour.
6. HORNSEA.—Construction of a Pier.
7. LLANDUDNO.—Construction of a Pier.
8. PENZANCE.—Construction of a Pier.
9. PLYMOUTH (Hoe).—Construction of a Pier.
10. REDCAR.—Construction of a Pier.
11. SCARBOROUGH.—Construction of a Pier.

## ARDGLASS.

*Order for the amendment of the Ardglass harbour order, 1864, and for the improvement, maintenance and regulation of the harbour at Ardglass, in the county of Down.*

1. The following clauses of the Ardglass Harbour Order, 1864, in this order called the order of 1864, namely, clauses 1 to 18 (both inclusive), 21, and 22, shall be deemed to be expunged therefrom.

2. Aubrey de Vere Beaucherk, of Ardglass Castle in the county of Down, esquire, his heirs and assigns, or other his successors in estate, shall be the undertakers of the works authorized by this order.

3. For the purposes of the works authorized by this order, the undertakers may from time to time, by agreement, enter on, take, and use all or any part of the lands shown on the plans deposited for the purposes of this order as intended to be taken for the purposes of the proposed works.

4. The Lands Clauses Consolidation Act, 1845, except so much thereof as relates to the purchase and taking of lands otherwise than by agreement, and The Lands Clauses Consolidation Acts Amendment Act, 1860, are hereby incorporated with this order.

5. Subject to the provisions of this order, and subject also to such alterations (if any) in the deposited plans as the board of trade requires from time to time before the completion of the works in order to prevent injury to navigation, the undertakers may, in or at the said harbour, and in the lines and on the levels and within the limits of deviation shown on the plans and sections deposited for the purposes of this order, make and maintain the works shown on the deposited plans.

6. The works authorized by this order comprises the following:

The repairing and rebuilding of the pier or quay for a length of 110 feet from the present quay:

The rebuilding and extension of the pier or quay for a further length of 100 feet seawards, and the erection of a beacon on the end of the same:

The deepening of portions of the harbour.

7. The right of the undertakers to demand and

receive rates shall commence from and after the repairing and rebuilding of the pier or quay for a length of 110 feet from the present quay, whether the remaining part of the works authorized by this order is completed or not, and not sooner; of which repairing and rebuilding a certificate signed by the chairmen of the quarter sessions having jurisdiction at the port of Ardglass shall be conclusive evidence, which certificate such chairman shall give on being satisfied of such repairing and rebuilding.

8. The rates received under this order shall be applicable for the purposes and in the order following:

- (1.) In paying the expenses of and connected with the applying for, obtaining, and making of this order.
- (2.) In paying the expenses of the maintenance, management, and regulation of the existing harbour and works, and of the works authorized by this order.
- (3.) And as to the surplus revenue of the harbour, that is to say, so much of the rates as remains after answering the purposes aforesaid, the same shall be applicable by the undertakers to and for their own proper use and benefit.

9. The undertakers shall be a pilotage authority and a local authority within the meaning of The Merchant Shipping Act, 1854, and Acts amending the same, with all the powers thereby conferred on pilotage authorities and on local authorities.

10. The provisions of the order of 1864 (save the clauses in this order specified as expunged therefrom) shall remain in full force, and shall be read together with this order as one order, the undertakers being substituted for the company.

11. This order may be cited as The Ardglass Harbour Order, 1866, and this order and the order of 1864 may be cited together as The Ardglass Harbour Orders, 1864 and 1866.

#### CAP. LIX.

An Act to appoint additional Commissioners for executing the Acts for granting a Land Tax and other Rates and Taxes. [6th August, 1866.]

#### CAP. LX.

An Act to defray the Charge of the Pay, Clothing, and Contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland; to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, and Surgeons Mates of the Militia; and to authorize the Employment of the Non-commissioned Officers.

[6th August, 1866.]

#### CAP. LXI.

An Act to confirm a Provisional Order under the Drainage and Improvement of Lands Act (Ireland), and the Acts amending the same.

[6th August, 1866.]

Sec. 1. *Provisional order in Schedule confirmed.*

2. *Short title.*

‘WHEREAS the commissioners of public works in Ire-

land have, in pursuance of “The Drainage and Improvement of Lands Act (Ireland), 1863,” and the Acts amending the same, duly made the provisional order contained in the Schedule to this Act annexed; and it is by the first-mentioned Act provided that no such orders shall be of any validity whatsoever until they shall be confirmed by Parliament; and it is expedient that said order should be so confirmed:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows;

1. The provisional order contained in the Schedule hereunto annexed is hereby confirmed, and from and after the passing of this Act shall be deemed to be a public general Act of Parliament of the like force and effect as if the provisions had been enacted in the body of this Act.

2. This Act may be cited for all purposes as “The Drainage and Improvement of Lands Supplemental Act (Ireland), 1866.”

#### SCHEDULE to which this Act refers.

Drainage and Improvement of Lands Act (Ireland), 1863.

26 & 27 Vict. c. 88, 27 & 28 Vict. c. 72, and 28 & 29 Vict. c. 52.

In the Matter of the Connell Drainage District in the County of Kildare.

Whereas certain proprietors of and persons interested in the lands upon and adjacent to the Connell Stream or River on or about the thirtieth day of January one thousand eight hundred and sixty-five presented their petition to the commissioners of public works in Ireland, under the provisions of the Drainage and Improvement of Lands Act (Ireland), 1863, and the Acts amending the same, accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information required by the said Act, showing, by reference to the said maps, the boundaries and area of the proposed drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that said lands within the proposed district should be constituted a separate drainage district under the provisions of the said Acts: And whereas the said commissioners referred the same to Samuel U. Roberts, Esq., civil engineer, an inspector duly appointed under the said Acts: And whereas all notices and inquiries required by the said Act have been duly given and made, and the said inspector has duly reported to us, the said commissioners, in writing, the result of his inquiries, and we, the said commissioners, have duly considered the same: And whereas no objection to the said report has been made to us: and whereas all preliminaries required by the said Act to precede the making of this provisional order have been performed and complied with: and whereas we, the said commissioners of public works in Ireland, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the



report of the said inspector assented thereto in writing: Now, therefore, in pursuance of the power given to us by the said Acts, we, the commissioners of public works in Ireland, do by this provisional order, under our common seal, constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on the map to which we have caused our common seal to be attached (and which Map is deposited in the office of public works in Ireland), a separate drainage district by the name of "The Connell Drainage District." And we, the said commissioners of public works, do, by this our order, order and direct that the time for the completion of the necessary works in the said district shall be limited to the first day of November which will be in the year one thousand eight hundred and sixty-seven.

And we further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for the said district shall consist of five members:

That the following persons shall be the members of the first drainage board; viz.—

1. Walter Hurley, of Old Connell House, esquire. 2. Hugh Kelly, of Great Connell, esquire. 3. Eyre Powell, of Great Connell, esquire. 4. James Coffey, of Tiercross, esquire. 5. George P. L. Mansfield, of Morristown Latten, esquire. All in the County of Kildare.

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette, and some newspaper generally circulated in the said district at least fourteen days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be that he shall be the proprietor, as defined by the said Act, and the Acts referred to therein or incorporated therewith, of not less than twenty acres of land situate within the area of the said district, or the land agent for time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district, and acting as receiver of the rents and profits of such lands.

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said last-mentioned Act: provided always, that no such elector shall be entitled to vote, or exercise any privilege as such, unless the land of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district.

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed, this twenty-ninth day of March one thousand eight hundred and sixty-six.

E. HORNSBY, (Seal.)

Office of Public Works, Dublin. Secretary.

#### CAP. LXII.

An Act to amend the Law relating to the Woods, Forests, and Land Revenues of the Crown.

[6th August, 1866.]

#### CAP. LXIII.

An Act to amend the Acts relating to the intended Courts of Justice.

[6th August, 1866.]

#### CAP. LXIV.

An Act to amend the Laws relating to the Inland Revenue.

[6th August, 1866.]

- Sec. 1. *Grant of drawback on consolidated worts exported to foreign ports.*
2. *The manufacture and exportation of solidified worts to be under such regulations as the commissioners of inland revenue may make, and under conditions specified in this section.*
3. *Solidified wort not to contain anything that shall not be produced by the mashing of malt and sugar.*
4. *Provisions of former Acts relating to the exportation of exciseable commodities to apply to the exportation of solidified wort.*
5. *So much of condition No. 1. in sect. 28 of 23 & 24 Vict. c. 113, as provides that malt to be exported shall not be blown or roasted, and of sect. 13 of 28 & 29 Vict. c. 66, repealed, and other provisions made.*
6. *Roasted malt to be exported only by roasters and dealers in roasted malt, and under same regulations as other malt.*
7. *Commissioners of inland revenue may authorize the use in distilleries of vessels, &c. in addition to those prescribed by law.*
8. *Methylated spirit not to be used as a beverage or as a medicine.*
9. *No alteration to be made in "finish" made from methylated spirit.*
10. *Penalty on the drivers of hackney carriages not licensed to be used on Sundays using the same on Sundays. Proceedings as in sect. 23 of 1 & 2 W. 4, c. 22.*
11. *Penalty on persons hawking goods without licence in the United Kingdom.*
12. *Sect. 7 of 50 G. 3, c. 41, prohibiting hawkers from selling goods by auction repealed.*
13. *Hawker's licences to expire on 31st March in every year.*
14. *Provision for renewal of hawker's licences granted before alteration in time of expiration.*
15. *As to drawback on exportation of plate from the United Kingdom.*
16. *20 & 21 Vict. cc. 77, 79. Letters of attorney and proxies filed in the Probate Courts declared exempt from stamp duty.*
17. *After assessments allowed to surveyor to certify increases thereto.*
18. *A penalty for neglect in delivering list or declaration may be imposed by commissioners.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this pre-

sent Parliament assembled, and by the authority of the same, as follows:

1. Whereas a drawback of excise is payable by law in respect of beer brewed or made by any entered and licensed brewer of beer for sale in the United Kingdom, and exported as merchandise from any port in the United Kingdom to foreign parts, and it is expedient to grant a drawback of excise in respect of worts made and solidified by any such brewer as aforesaid: Be it enacted, that there shall be paid and allowed in respect of worts made by any entered and licensed brewer of beer for sale in the United Kingdom from malt or sugar, or malt and sugar, on which the full duties of excise and customs respectively have been charged or paid, and solidified, and exported as merchandise from any port in the United Kingdom to foreign parts, a drawback at the rate of the duty payable on one bushel of malt, with the addition of the sum of three halfpence for every twenty-eight pounds avoirdupois of such wort made and solidified as aforesaid, which shall be manufactured, prepared, and exported in conformity with the provisions of this Act.

2. The manufacture, preparation, packing, and exportation of such wort shall be under and subject to such rules, regulations, and securities (by bond or otherwise), as the commissioners of inland revenue may from time to time make and require respectively in that behalf, and under and subject also to the following conditions; (that is to say,)

1. The wort shall not be evaporated until it has been boiled with hops in the proportion of at least one pound weight avoirdupois of hops to every bushel of malt, or twenty-five pounds weight avoirdupois of sugar used in making such wort:
2. The solidified wort shall be of such density that when dissolved in water in the proportion of twenty eight pounds weight avoirdupois of such wort to thirty-four gallons and one tenth part of a gallon of water it shall produce thirty-six gallons of liquid wort of a specific gravity not less than 1.027 degrees, such specific gravity to be ascertained in the manner directed by the seventy-second section of the Act passed in the twenty-third and twenty-fourth years of the reign of her Majesty, chapter one hundred and fourteen, or by means of the weighing bottle, as the said commissioners shall direct:
3. Solidified wort shall be packed only between the hours of six o'clock in the morning and six o'clock in the afternoon, and in the presence of the proper officer of excise, and in such cases or packages as shall be approved by the said commissioners, and such cases or packages shall be fastened and secured to the satisfaction of such officer:
4. The brewer shall give twenty-four hours notice of his intention to export solidified wort to the officer of excise in whose survey his brewery shall be situated, stating the quantity of such wort intended to be exported, the particular day and hour at which the same is

to be packed, and the name of the port from which it is to be exported:

5. The brewer shall provide just and sufficient scales and weights properly adapted for the weighing of solidified wort, and shall allow any officer of excise to use the same, and shall provide such officer with proper and sufficient assistance to enable him to weigh such wort.

3. If any solidified wort, packed or produced for exportation, shall have mixed therewith any substance, material, or thing other than such as shall be produced by the process of mashing from malt, or from such descriptions of sugar as may lawfully be employed in the brewing of beer, the brewer shall, over and above any other penalty to which he may be subject, forfeit the sum of two hundred pounds, and all such wort, and the packages in which the same may be contained, together with any drawback claimed thereon, shall be forfeited.

4. The drawback or allowance upon solidified wort exported under the provisions of this Act shall be paid by the commissioners of inland revenue, and the provisions of all Acts in force relating to the exportation of any exciseable commodities on drawback, and all fines, forfeitures, pains, and penalties imposed by the said Acts, shall (except as altered by this Act) extend to and shall be respectively applied, practised, and put in execution for and in respect of the said drawback or allowance upon solidified wort hereby granted upon the exportation thereof, in as full and ample a manner to all intents and purposes as if the said several provisions, fines, forfeitures, pains, and penalties were enacted and imposed in and by this Act.

5. So much of the condition numbered "one" in the twenty-eighth section of the Act of the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and thirteen, as provides that malt to be exported on drawback shall not be blown or roasted, is hereby repealed, and the thirteenth section of the Act of the twenty-eighth and twenty-ninth years of her Majesty's reign, chapter sixty-six, save so far as respects the appeal therein contained, is also hereby repealed; and the amount of drawback allowed by law upon the exportation of malt shall be calculated in the following manner; (that is to say,) when the malt shall weigh less than forty pounds avoirdupois *per* bushel, a drawback at the rate of the duty payable on one bushel of malt shall be allowed and paid in respect of every forty pounds avoirdupois of the malt exported; and when the malt shall weigh forty pounds avoirdupois or upwards *per* bushel, drawback shall be allowed and paid according to the quantity ascertained by measure, subject, however, in either case, to the deduction of seven and a half *per centum* upon the quantity ascertained as directed by the thirtieth section of the said Act of the twenty-third and twenty-fourth years of her Majesty's reign; provided that no malt shall be exported on drawback which, after having been screened and cleaned as directed in the said twenty-eighth sections of the said last-mentioned Act, shall be of greater weight than forty-four pounds avoirdupois *per* bushel, and that no malt (other than blown, roasted, and crystallized malt) shall be exported on drawback which, after

having been screened and cleaned as aforesaid, shall be of less weight than thirty-six pounds avoirdupois per bushel.

6. Roasted malt shall be exported on drawback by a licensed roaster of malt, or by a licensed dealer in roasted malt, and by no other person, and from the entered premises of such roaster or dealer; and all the provisions, fines, forfeitures, pains, and penalties contained in or incorporated by so much of sections twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, and thirty-three of the said Act of the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and thirteen, as is now in force, and not repealed by this Act, in relation to the exportation of malt from a malthouse, or to any Act, neglect, or omission of a malster, shall, so far as the same shall be applicable, extend and apply to the exportation of roasted malt, and to any act, neglect, or omission of a roaster of malt or dealer in roasted malt.

7. It shall be lawful for the commissioners of inland revenue to permit a licensed distiller, rectifier, or compounder to fix and use in his distillery or premises, subject to such regulations as they think fit, any vessel, utensil, cock, plug, pump, pipe, or fastening which shall be approved of by them, in addition to or in lieu of any vessel, utensil, cock, plug, pump, pipe, or fastening prescribed and required by the Act passed in the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter one hundred and fourteen, and also for the said commissioners to withdraw such permission whenever they shall think proper to do so; and every such vessel, utensil, cock, plug, pump, pipe, or fastening shall, so long as the same shall be used with the permission of the said commissioners, but no longer be deemed to be a vessel, utensil, cock, plug, pump, pipe, or fastening prescribed and required by the said Act; and all the provisions, penalties, and forfeitures contained in or imposed by the said Act, or any other Act in force relating to any vessel, utensil, cock, plug, pump, pipe, or fastening used by or on the premises of a distiller, rectifier, or compounder, shall, so far as the same shall be applicable, extend and apply to every vessel, utensil, cock, plug, pump, pipe, or fastening permitted to be fixed and used under the authority of this Act.

8. No person shall use methylated spirit or any derivative thereof in the manufacture, composition, or preparation of any article whatsoever capable of being used either wholly or partially as a beverage or internally as a medicine; and if any person shall use methylated spirit or any derivative thereof in the manufacture, composition, or preparation of any article as aforesaid, or shall sell or have in his possession any such article in the manufacture, composition, or preparation whereof any methylated spirit, or any derivative thereof shall have been used, he shall forfeit the sum of one hundred pounds, and such article shall be forfeited, together with the vessels or packages containing the same: provided always, that nothing herein contained shall apply to the use of methylated spirit, or any derivative thereof, in the manufacture, composition, or preparation of sulphuric ether or chloroform, or prevent the sale or possession of sulphuric ether or chloroform: provided also, that nothing

herein contained shall prejudice or affect the power of the commissioners of inland revenue to allow methylated spirit to be used by such persons as they may authorize in such branches of the arts and manufactures of the United Kingdom as the said commissioners may sanction or approve.

9. If any person shall, after any methylated spirit shall have been mixed with gum resin for forming the mixture known as "finish," or any like mixture, separate the gum resin from the said methylated spirit, or alter the said mixture in any manner except by adding thereto a further quantity of gum resin, or any article for the sole purpose of colouring the same, he shall forfeit the sum of two hundred pounds, and the said spirit and mixture respectively so separated or altered as aforesaid shall be forfeited, together with the vessels or other packages containing the same.

10. If any carriage, having fixed or placed thereon a numbered plate provided by the commissioners of inland revenue for a hackney carriage not authorized by licence to be used on *Sundays*, shall be used on any *Sunday* for the purpose of standing or plying for hire as a hackney carriage within the metropolitan police district of the city of *London*, such carriage shall be deemed to be a carriage not having the proper stamp office plate fixed thereon, and the driver of such carriage or other person plying for hire therewith, or having the care thereof, shall forfeit five pounds, and if such driver or other person shall be the proprietor or owner of such carriage he shall forfeit ten pounds; and such proceedings as are prescribed in the twenty-third section of the Act of the first and second *William* the Fourth, chapter twenty-two, shall be had and taken against such driver or other person for the recovery of the said penalties respectively, and the same directions shall be observed with respect to such carriage, and the horse or horses harnessed thereto or drawing the same, and the harness used therewith, and generally as are given and contained in the said section with respect to the carriage, horse or horses, and harness therein mentioned, and otherwise.

11. 'Whereas it is expedient to impose an uniform penalty throughout the United Kingdom upon persons hawking goods without licence: Be it enacted, that if any person shall, in the United Kingdom, trade or do any other act for which such person is required by the Acts in force in *Great Britain* and *Ireland* respectively to be licensed as a hawker, pedlar, or petty chapman, without having a proper licence in that behalf, or if any person who shall trade or do any such other act as aforesaid shall neglect or refuse to produce to any person who shall demand the same a proper licence granted to him as a hawker, pedlar, or petty chapman, and then in force, he shall forfeit the penalty of ten pounds, which shall be an excise penalty, and be over and above any other penalty to which such person may be liable to under any Act now in force; and it shall be lawful for any person to seize and detain the offender, and to deliver him to any officer of excise, or to any constable or police officer, who is hereby required to take such offender before a justice of the peace for the county or place wherein such offence shall have been committed, and such justice shall, on the confession of the party, or

upon due proof on oath made of the offence, convict such offender in the penalty aforesaid, or in some mitigated amount not less than one fourth part thereof; and if the penalty imposed be not immediately paid, the justice shall, by warrant under his hand, commit the offender to hard labour in the house of correction for the said county or place for the space of one calendar month (to be reckoned from the day of the commitment), unless the penalty shall be sooner paid: provided always, that where the person offending shall not be detained and proceeded against in the manner herein directed the said penalty of ten pounds may be recovered by information in the same manner as any other excise penalty.

12. 'Whereas by the seventh section of an Act passed in the fiftieth year of the reign of King George the Third, chapter forty-one, hawkers, pedlars, petty chapmen, and other trading persons therein mentioned are prohibited from selling goods, wares, or merchandise by any mode of sale by auction at any place in which they are not householders, or which is not an usual place of their abode, and it is expedient to remove such restriction:' be it enacted, that the said prohibition shall be and the same is hereby repealed, so far as regards the selling by auction by any trading or other person duly licensed as an auctioneer.

13. From and after the thirtieth day of *September* one thousand eight hundred and sixty-six, every licence which shall be granted in the United Kingdom to a hawker, pedlar, and petty chapman shall expire on the thirty-first day of *March* next following the grant of such licence; provided that it shall be lawful to grant a licence to a hawker, pedlar, and petty chapman after the thirtieth day of *September* one thousand eight hundred and sixty-six for a period not exceeding six months, on payment of one half only of the amount payable for a yearly licence, and such half-yearly licence shall continue in force until the thirty-first day of *March* or the thirtieth day of *September*, whichever shall next follow the day of granting the same.

14. It shall be lawful to grant to any person who shall be the holder of a hawker's licence expiring on the thirty-first day of *January* in the year one thousand eight hundred and sixty-seven a renewed licence, to expire on the thirty-first day of *March* or the thirtieth day of *September* then next following, upon payment of a proportionate part of the duty payable upon a yearly licence for two months or eight months, as the case may be; and it shall also be lawful to grant to any person who shall be the holder of a hawker's licence expiring on the thirty-first day of *July* in the year one thousand eight hundred and sixty-seven a renewed licence, which shall be made to expire on the thirty-first day of *March* then next following, upon payment of a proportionate part of the duty payable upon a yearly licence for eight months; and it shall also be lawful to grant to any person who shall be the holder of a hawker's licence in *Ireland* expiring on the fifth day of *January* in the year one thousand eight hundred and sixty-seven a renewed licence, to expire on the thirty-first day of *March* then next following on payment of a proportionate part of the duty upon a yearly licence for three months.

15. The drawback now payable on gold plate and silver plate of *British* manufacture exported from *Great Britain*, or of *Irish* manufacture exported from *Ireland*, shall, in like manner and upon the same terms and conditions, be paid on gold plate and silver plate of *British* manufacture exported from *Ireland*, or of *Irish* manufacture exported from *England*; and the bond or security required by law to be given by the exporter of any such plate from *Great Britain* or *Ireland* shall contain a condition that the plate so exported shall not be re-landed or brought again into any part of the United Kingdom.

16. 'Whereas by the Acts of Parliament establishing the Courts of Probate in *England* and *Ireland* respectively the jurisdiction and authority of all ecclesiastical courts in matters and causes testamentary were vested in her Majesty, to be exercised in her name in the said Courts of Probate: and whereas before and at the time appointed for the commencement of the said Acts respectively all letters or powers of attorney and proxies filed in any ecclesiastical court in *England* or *Ireland* were by law exempt from stamp duty: and whereas doubts have arisen whether the said exemption from stamp duty extends to letters or powers of attorney or proxies filed in the said Courts of Probate:' be it enacted and declared, that all letters or powers of attorney and proxies filed or to be filed in the said Courts of Probate respectively shall be deemed to have been and to be exempt from all stamp duty.

17. If after the commissioners executing the Acts relating to the duties of assessed taxes have signed and allowed any assessments of the said duties for any year, the surveyor or inspector shall discover upon his survey or examination, or otherwise, that any assessment is not such as to charge or to fully charge any house, person, article, matter, or thing with the duty which ought to be charged in respect thereof under the said Acts, it shall be lawful for the said surveyor or inspector at any time within the year to which the assessment relates to charge in respect of such house, person, article, matter or thing the full amount of single duty by which the assessment ought to be increased; and such charge shall be certified, determined, and recovered in the manner provided by the said Acts in relation to surcharges.

18. If any person who, under the provisions of the Acts relating to the duties of assessed taxes, ought to deliver any list or declaration, shall refuse or neglect so to do within the time limited by any general or particular notice affixed or delivered in pursuance of the said Acts, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given and proceedings thereupon shall be had before the commissioners for executing the said Acts, such person shall forfeit any sum not exceeding twenty pounds, and treble the duty at which he ought to be charged by virtue of the said Acts, such penalty and duties to be recovered as any like penalty and duties are recoverable under the said Acts.

#### CAP. LXV.

An Act to enable Her Majesty to declare Gold Coins to be issued from Her Majesty's Colonial Branch

Mints a legal Tender for Payments; and for other Purposes relating thereto. [6th August, 1866.]

56 G. 3, c. 68.

- Sec. 1. *Power to her Majesty to proclaim gold coins made at the branch mints a legal tender in the United Kingdom and colonies.*  
 2. *Power to her Majesty to impose a charge on coining gold.*  
 3. *Power to evoke proclamation.*  
 4. *Short title.*

‘WHEREAS by an Act of the fifty-sixth year of the reign of his late Majesty King George the Third, chapter sixty-eight, intituled *An Act to provide for a new Silver Coinage, and to regulate the Currency of the Gold and Silver Coins of this Realm*, it is amongst other things provided that after the date of the passing of that Act the gold coin of the realm should be the only legal tender for payment (except the silver coin of the realm to the extent of forty shillings) within the United Kingdom of *Great Britain and Ireland*:

‘And whereas by the same Act it is declared, that the gold coin of the realm should hold such weight and fineness as are proscribed by an indenture therein referred to, and made with his Majesty’s master and worker of the mint for making gold monies at his Majesty’s mint in *London*, and with such allowance called the remedy as is given to the said master by the said indenture, which weight and fineness are by the said Act declared to be the standard of the lawful gold coin of the realm, so far as relates to the gold coins of the denominations in use at the time of the passing of the said Act, and specified in the said indenture:

‘And whereas gold coins of the weight and fineness and of the denominations mentioned in the said Act and specified in the said indenture, have from the date of the said Act up to the present time continued to be issued from her Majesty’s mint in *London*, and to be a legal tender for payments as well in the United Kingdom as in divers of her Majesty’s possessions abroad:

‘And whereas her Majesty by proclamation hath established or may hereafter establish in divers of her Majesty’s said possessions branches of the Royal Mint, for making gold coins of the same weight and fineness and of the same denominations as the gold coin issued by her Majesty’s mint in *London*, and it is expedient that power should be given to her Majesty to declare the gold coin so made and issued by such colonial branch mints a legal tender for payments in any part of her Majesty’s dominions in which gold coin issued from her Majesty’s mint in *London* may from time to time be a legal tender:”

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for her Majesty, from time to time, by proclamation issued with the advice of her privy council, to declare that for such period and subject to such conditions as may be specified in such proclamation, gold coins made at any such colonial branch mint, of designs approved by her Majesty, and being of the

same weight and fineness as are required by law with respect to gold coins of the same denominations made at her Majesty’s mint in *London*, are to be a legal tender for payments within any part of her Majesty’s dominions to be specified in such proclamation in which gold coins issued from her Majesty’s mint in *London* shall at the date of the issue of such proclamation be a legal tender, and upon such proclamation being issued, gold coins made of such designs, and being of such weight and fineness as aforesaid, shall be a legal tender for payments accordingly.

2. It shall be lawful for her Majesty, by proclamation issued with such advice as aforesaid, from time to time to impose on the coinage of gold at any such branch colonial mint as aforesaid a charge sufficient to defray the expenses of coinage over and above the expenses of assay and refining; and it shall be incumbent on the deputy master of any such mint to coin gold at the charge so imposed.

3. Any proclamation issued under authority of this Act may be revoked by her Majesty, with the advice of her privy council.

4. This Act may be cited for all purposes as “The Colonial Branch Mint Act, 1866.”

#### CAP. LXVI.

An Act to provide for the Relief of the Poor in the *New Forest*. [6th August, 1866.]

#### CAP. LXVII.

An Act for the Union of the Colony of *Vancouver Island* with the Colony of *British Columbia*. [6th August 1866.]

#### CAP. LXVIII.

An Act to amend the Law relating to the granting of Pensions and Superannuation Allowances to Persons holding certain Offices connected with the Administration of Justice in *England*. [6th August, 1866.]

#### CAP. LXIX.

An Act for the Amendment of the Law with respect to the Carriage and Deposit of dangerous Goods. [6th August, 1866.]

- Sec. 1. *Nitro-glycerine to be deemed dangerous.*  
 2. *Other goods may be declared so by order in council.*  
 3. *Such goods to be marked, and notice to be given of their character.*  
 4. *Provision for case of absence of knowledge of nature of goods.*  
 5. *As to forfeiture of such goods.*  
 6. *Warehouse owners, &c. not bound to receive such goods.*  
 7. *Interpretation of “owner” and “carrier.”*  
 8. *Application of 25 & 26 Vict. c. 66 to nitro-glycerine.*  
 9. *Application of the same Act to other substances.*  
 10. *Short title.*

Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present

Parliament assembled, and by the authority of the same, as follows:

1. The goods or article commonly known as nitro-glycerine or glonoine oil shall be deemed to be specially dangerous within the meaning of this Act.

2. Her Majesty may from time to time, by order in council, declare that any goods named in any such order (other than nitro-glycerine or glonoine oil) are to be deemed specially dangerous within the meaning of this Act; and may from time to time amend or repeal any such order; and any goods which are by any such order declared to be specially dangerous shall, so long as such order is in force, be deemed to be specially dangerous within the meaning of this Act.

3. No person shall deliver any goods which are specially dangerous to any warehouse owner or carrier, or send or carry or cause to be sent or carried any such goods upon any railway or in any ship to or from any part of the United Kingdom, or in any other public conveyance, or deposit any such goods in or on any warehouse or quay, unless the true name or description of such goods, with the addition of the words "specially dangerous," is distinctly written, printed, or marked on the outside of the package, nor in the case of delivery to or deposit with any warehouse owner or carrier, without also giving notice in writing to him of the name or description of such goods, and of their being specially dangerous. And any person who commits a breach of this enactment shall be liable to a penalty not exceeding five hundred pounds, or at the discretion of the Court to imprisonment, with or without hard labour, for any term not exceeding two years.

4. Provided always, as follows:

(1.) Any person convicted of a breach of the last foregoing enactment shall not be liable to imprisonment, or to a penalty of more than two hundred pounds, if he shows to the satisfaction of the court and jury before whom he is convicted that he did not know the nature of the goods to which the indictment relates:

(2.) Any person accused of having committed a breach of the said enactment shall not be liable to be convicted thereof if he shows to the satisfaction of the court and jury before whom he is tried that he did not know the nature of the goods to which the indictment relates, and that he could not, with reasonable diligence, have obtained such knowledge.

5. Where goods are delivered, sent, carried, or deposited in contravention of the said enactment the same shall be forfeited, and shall be disposed of in such manners as the commissioners of her Majesty's treasury or (in case of importation) the commissioners of customs direct, whether any person is liable to be convicted of a breach of the said enactment or not.

6. No warehouse owner or carrier shall be bound to receive or carry any goods which are specially dangerous.

7. In construing this Act the term "warehouse owner" shall include all persons or bodies of persons owning or managing any warehouse, store, quay, or other premises in which goods are deposited; and

the word "carrier" shall include all persons or bodies of persons carrying goods or passengers for hire by land or water.

8. The Act of the session of the twenty-fifth and twenty-sixth years of her Majesty's reign, chapter sixty-six, "for the safe-keeping of petroleum," is hereby extended and applied to nitro-glycerine, and that Act shall be read and have effect as if throughout its provisions nitro-glycerine had been mentioned in addition to petroleum; save that so much of the said Act as specifies the maximum quantity of petroleum to be kept as therein mentioned without a licence shall not apply in the case of nitro-glycerine, and any quantity whatever of nitro-glycerine shall be deemed to be subject to the provisions of the said Act.

9. The said Act of the session of the twenty-fifth and twenty-sixth years of her Majesty's reign is also hereby extended and applied to any substance for the time being declared by any order in council under this Act to be specially dangerous, and that Act shall be read and have effect as if throughout its provisions the substance to which such order in council relates had been mentioned in addition to petroleum; save that the quantity of such substance which it shall not be lawful to keep as in the said Act mentioned without a licence shall, instead of the quantity specified in relation to petroleum in the said Act, be such quantity as is specified in that behalf in relation to any such substance in any such order in council.

10. This Act may be cited as The Carriage and Deposit of Dangerous Goods Act, 1866.

#### CAP. LXX.

An Act to extend the Provisions of the Acts for the Inclosure, Exchange, and Improvement of Land to certain Portions of the *Forest of Dean* called *Walmore Common* and *The Bearce Common*, and for authorizing Allotments in lieu of the Forestal Rights of her Majesty in and over such Commons. [6th August, 1866.]

#### CAP. LXXI.

An Act to facilitate the letting on Lease, feuing, or selling Glebe Land in *Scotland*. [6th August, 1866.]

#### CAP. LXXII.

An Act to authorize Advances of Money out of the Consolidated Fund for carrying on Public Works and Fisheries and for the Employment of the Poor; and for the Purposes of the Harbours and Passing Tolls Act, 1861, The Cattle Diseases Prevention Act, 1866, and the Labouring Classes Dwellings Act, 1866. [6th August, 1866.]

#### CAP. LXXIII.

An Act to authorize for a further Period the application of Money for the Purposes of Loans for carrying on Public Works in *Ireland*. [6th August, 1866.]

1 & 2 Will. 4, c. 33; 6 & 7 Will. 4, c. 108; 7 Will. 4, & 1 Vict. c. 21; 1 & 2 Vict. c. 88; 2 & 3 Vict. c. 50; 5 & 6 Vict. c. 9; 6 & 7 Vict. c. 44; 9 & 10 Vict. c. 1; 9 & 10 Vict. c. 85; 14 &

15 *Vict. c. 51*; 19 *Vict. c. 18*; 24 & 25 *Vict. c. 85*; 29 & 30 *Vict. c. 72*.

- Sec. 1. *Appointment of commissioners.*  
 2. *Treasury may out of the £360,000 per annum granted by 29 & 30 Vict. apply a sum not exceeding £15,000 per quarter for public works in Ireland.*  
 3. *A separate account to be continued in the books of the commissioners.*  
 4. *When treasury shall have sanctioned loans, commissioners of public works to certify amount of issue to commissioners for reduction of national debt. Upon certificate being produced, payment to be made. Approval of treasury of such issue to appear on certificate.*  
 5. *Order to be entered by the proper officer, countersigned by the actuary, and addressed to the cashiers of the Bank of England, who shall pay the same.*  
 6. *Commissioners for reduction of national debt to furnish an annual account for audit.*  
 7. *Appropriation and entry of repayments.*  
 8. *All sums paid into the Bank of Ireland to be carried and made part of the consolidated fund.*  
 9. *Commissioners for executing recited Acts and this Act to lay annual accounts before Parliament.*  
 10. *Powers of recited Acts as to advances to have the same force as if re-enacted in this Act.*

‘WHEREAS an Act was passed in the second year of the reign of his late Majesty King William the Fourth, chapter thirty-three:

‘And whereas another Act was passed in the seventh year of the same reign, chapter one hundred and eight:

‘And whereas another Act was passed in the first year of the reign of her present Majesty, chapter twenty one:

‘And whereas another Act was passed in the second year of the reign of her present Majesty, chapter eighty-eight:

‘And whereas another Act was passed in the third year of the reign of her present Majesty, chapter fifty:

‘And whereas another Act was passed in the second session of the fifth year of the reign of her present Majesty chapter nine:

‘And whereas another Act was passed in the seventh year of the reign of her present Majesty, chapter forty-four:

‘And whereas another Act was passed in the ninth year of the reign of her present Majesty, chapter one.

‘And whereas another Act was passed in the ninth and tenth years of the reign of her present Majesty, chapter eighty-five:

‘And whereas another Act was passed in the fourteenth and fifteenth-years of the reign of her present Majesty, chapter fifty-one:

‘And whereas another Act was passed in the nineteenth year of the reign of her present Majesty, chapter eighteen:

‘And whereas another Act was passed in the

twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter eighty-five:

‘And whereas by an Act passed in the present session of Parliament, intituled *An Act to authorize Advances of Money out of the Consolidated Fund for carrying on Public Works and Fisheries, and for the Employment of the Poor; and for the Purposes of the Harbour Passing Tolls Act, 1861, The Cattle Diseases Prevention Act, 1866, and The Labouring Classes Dwellings Act, 1866*, the commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland for the time being are empowered, by warrant under the hands of any two or more of them, to cause to be issued out of the consolidated fund of the United Kingdom of Great Britain and Ireland, or out of the growing produce thereof, to the account of the commissioners for the time being for the reduction of the national debt, until Parliament shall otherwise determine, a sum or sums of money not exceeding three hundred and sixty thousand pounds *per annum*, by quarterly instalments or issues not exceeding ninety thousand pounds *per quarter*, the first instalment thereof to become due and payable in the quarter ending the thirtieth day of June one thousand eight hundred and sixty-seven:

‘And whereas sundry advances or loans have been made by the commissioners of public works in Ireland under the said first-recited Act and the several Acts since passed for amending and extending the same, for the purposes in the said Acts specified, and great benefits have been derived therefrom, and further advances or loans are required for the like objects:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The commissioners of public works for the time being shall be commissioners for the execution of this Act.

2. The said commissioners of her Majesty's treasury, by warrant under the hands of any two or more of them, may direct from time to time, out of the sum not exceeding three hundred and sixty thousand pounds *per annum* which by the said Act of this present session of Parliament they are authorised to cause to be issued out of the consolidated fund of the United Kingdom of Great Britain and Ireland, or out of the growing produce thereof, to the account of the commissioners for the reduction of the national debt, by quarterly instalments or issues not exceeding ninety thousand pounds *per quarter* as aforesaid, there shall issue and be paid unto the said commissioners for the reduction of the national debt, a sum not exceeding fifteen thousand pounds *per quarter*, to be at the disposal of the said commissioners of public works as herein-after mentioned, the first instalment thereof to become due and payable in the quarter ending the thirtieth day of June one thousand eight hundred and sixty seven.

3. For the purpose of receiving the said quarterly instalments, the said commissioners for the reduction of the national debt shall continue or cause to be continued and kept in their office a book or books, in which all monies transferred to their account by virtue of this



Act and the said recited Act of the seventh year of the reign of her present Majesty shall be kept apart from all other monies; and such monies shall be by the same commissioners held subject to the disposal of the said commissioners of public works for the several purposes of the said first-recited Act and the other Acts amending the same and of this Act.

4. When the said commissioners of her Majesty's treasury shall have sanctioned any loan under this Act or any of the above-recited Acts, and the said commissioners of public works shall have ascertained that any sum of money is required to be issued on account of such loan, they shall forthwith certify the amount of such issue to the commissioners for the reduction of the national debt for the time being; and in every such certificate the loan in payment of which such issue is required, and the party or parties to whom such issue is intended to be made, shall be stated; and upon every such certificate being produced to the officer of the said commissioners for the reduction of the national debt the comptroller general or assistant comptroller, or chief clerk acting under the last-named commissioners, shall upon the back of such certificate endorse and sign an order for the payment of the sum mentioned in such certificate to the governor and company of the Bank of *England*, to be by them placed to the account of the governor and company of the Bank of *Ireland*, for the account and credit of her Majesty's paymaster general at the said bank, to be by him paid over on the warrants of the said commissioners of public works: provided always, that approval of such issue by the commissioners of her Majesty's treasury shall appear on such certificate under the hand of one of their secretaries, and that the amount of such issue shall not exceed the sum for the time being standing in the books of the said commissioners for the reduction of the national debt, subject to the disposal of the said commissioners of public works.

5. Every such order of the officer of the said commissioners for the reduction of the national debt, before the issuing thereof, shall be entered by the clerk or other proper officer, and shall be countersigned by the actuary or other chief officer acting under the said commissioners for the reduction of the national debt, and shall be addressed to the cashiers of the governor and company of the Bank of *England*; and such cashiers, or one of them, shall, upon the production of every such order, pay the sum mentioned therein to the governor and company of the Bank of *England*; and the signature of one of the cashiers of the said governor and company of the Bank of *England* shall be a sufficient discharge to the said commissioners for the reduction of the national debt.

6. The commissioners for the reduction of the national debt shall cause to be made up, for examination and audit, an annual account to the thirty-first day of *March* in each year of the receipts, payments, and balances on the said account so directed to be kept by them in respect of the said public works loan fund for *Ireland* as aforesaid, and shall deliver the same to the auditor general of public accounts.

7. As soon as any sum of money shall have been lodged to the credit of the account of the commissioners of public works at the Bank of *Ireland* on account of

the repayment of loans for public works, the said commissioners of public works shall cause the sum or sums so lodged to be entered in their books to the credit of the loan on account of which such repayment shall have been made, and shall cause receipt to be delivered to the party or person on whose account such repayment shall have been so made, and such receipt shall be a sufficient discharge to the party or person paying the same.

8. Every sum of money which shall be paid into the Bank of *Ireland* to the account of the said commissioners of public works, on account of the repayment of loans for public works under this or any of the aforesaid Acts, shall from time to time, at such period, and in such manner as the commissioners of her Majesty's treasury shall direct, be transferred by the said commissioners of public works to the account kept with her Majesty's exchequer, and when so transferred shall be carried to and made part of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland*.

9. The said commissioners for the execution of the said recited Acts and this Act shall cause to be made up an annual account to the thirty-first day of *March* in each year of the amounts placed at their disposal under the said recited Acts and this Act, the amounts advanced, and the amounts remaining unissued, also an account of the amount of the loans advanced by the said commissioners under the said recited Acts and this Act, the monies received on account thereof, and paid into the exchequer, and the balance of principal and interest outstanding, distinguishing each class of loans, and also showing the amounts advanced and repaid in respect of each such class during the year ending the thirty-first day of *March* immediately preceding the date of such account; and the said commissioners shall on or before the first day of *June* in each year cause such accounts and statements to be transmitted to the public works loan commissioners at their office in *London*; and such accounts and statements shall by the said last-mentioned commissioners be laid before both Houses of Parliament on or before the thirtieth day of the same month of *June*, if Parliament be sitting, or if Parliament be not sitting then within fourteen days after the next meeting of Parliament.

10. All the enactments contained in the said recited Act relating to public works in *Ireland*, or any of them, shall, except as is herein otherwise provided, extend to this Act, and to all things done or directed to be done by the said commissioners of her Majesty's treasury, or the said commissioners of public works, or their secretary for the time being, or any other persons or bodies corporate under the authority of the said recited Acts or this Act, or any of them, in such or the like manner as if they had been particularly and severally re-enacted in the body of this Act, or as near thereto as the difference of the circumstances will admit, except so far only as the same are amended or altered by any of the said Acts or by this Act.

#### CAP. LXXIV.

An Act to repeal Part of an Act intituled *An Act for the Government of New South Wales and Van Diemen's Land*. [6th August, 1866.]

## CAP. LXXV.

An Act to amend and explain the Act of the Twenty-fifth and Twenty-sixth Years of *Victoria*, Chapter Fifty-eight, relating to Parochial Buildings in *Scotland*.  
[6th August, 1866.]

## CAP. LXXVI.

An Act to provide for the Collection of Fees in Public Departments and Offices by means of Stamps.  
[6th August, 1866.]

Sec. 1. *Short title.*

2. *From and after the time appointed by the treasury fees payable in any public office to be collected by means of stamps.*

3. *Stamps to be impressed or adhesive.*

4. *Stamps to be affixed to or impressed on documents*

5. *Regulations to be made by treasury.*

6. *Nothing to interfere with powers regarding alteration of amount of fees.*

7. *Separate account to be kept of money received for stamps.*

8. *Accounts to be laid before Parliament.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as "The Public Offices Fees Act, 1866."

2. It shall be lawful for the commissioners of her Majesty's treasury, by notice published in the *London Gazette*, to declare and direct that from and after the time specified in such notice all or any of the fees for the time being payable in money in any public department or office connected with the public service, or to the officers thereof, shall be collected by means of stamps; and every such notice shall be in accordance with the form given in the Schedule to this Act, with such variations as circumstances may require; and from and after the time specified in any such notice the fees therein mentioned shall be received by stamps denoting the amount of fees payable, and not in money: provided always, that no such notice shall be published with respect to any fees payable in the offices of her Majesty's duchy or county palatine of *Lancaster*, or to any officer of the said duchy or county palatine, without the consent of the chancellor of the said duchy or county palatine: provided also, that this Act shall not extend to any fees payable in either House of Parliament.

3. All or any stamps to be used under this Act shall be impressed or adhesive as the commissioners of her Majesty's treasury from time to time direct.

4. When any fee comprised in any such notice is payable in respect of a document, the stamp denoting the amount of fee shall be affixed to or impressed on such document; and when any such fee is payable otherwise than in respect of a document the stamp denoting the amount of fee shall be affixed to or impressed on such document, as the commissioners of her Majesty's treasury may require to be used.

5. The commissioners of her Majesty's treasury may from time to time make such regulations as seem fit regarding—

The use of stamps under this Act:

The application of such stamps to documents in use or required to be used as aforesaid:

The cancellation of adhesive stamps.

6. Nothing in this Act shall interfere with the exercise by any authority of any power of altering or otherwise regulating the amount of any fees for the time being payable in any department or office, or to the officers thereof, or of any salaries or other charges for the time being payable thereout or charged thereon.

7. The commissioners of inland revenue shall keep separate account of the money received for stamps under this Act in respect of every department or office, and the money so received, subject to the deduction thereout of any expenses incurred by the commissioners of inland revenue in the execution of this Act, and to the payment or discharge thereout in such manner as the commissioners of her Majesty's treasury from time to time direct of salaries or other charges for the time being by law charged or made payable out of any fees so received by stamps, shall, under the direction of the commissioners of her Majesty's treasury, be carried to and shall form part of the consolidated fund.

8. Each account so kept by the commissioners of inland revenue for every year ending the thirty-first day of *March*, together with an account for every such year, prepared under the direction of the commissioners of her Majesty's treasury, showing the salaries and other charges for the time being charged on or payable out of the fees received by the stamps to which such account relates, shall be laid before both Houses of Parliament within one month after the termination of such year of account, if Parliament be then sitting, or if not then within one month next after the next meeting of Parliament.

## THE SCHEDULE.

## COMPANIES REGISTRATION OFFICE

(or as the case may be).

NOTICE under the "Public Offices Fees Act, 1866."

The lords commissioners of her Majesty's treasury, in pursuance of the provisions of the said Act, hereby declare and direct, that from and after the day of \_\_\_\_\_ the fees for the time being payable in the companies registration office (or as the case may be) or to the officers thereof, shall be collected by means of stamps.

## CAP. LXXVII.

An Act to amend the Act of the Seventh and Eight Years of *Victoria*, Chapter Forty-four relating to the Erection of new Parishes *quoad sacra* in *Scotland*.  
[6th August 1866.]

## CAP. LXXVIII.

An Act for removing Doubts respecting the Assessment of County Rates.  
[6th August 1866.]

## CAP. LXXIX.

An Act to confirm a Provisional Order under "The Local Government Act, 1858," relating to the Dis-

trict of *Ventnor*, and for the Repeal of the *South Wales Highway Act in Briton Ferry District*.  
[6th August 1866.]

## CAP. LXXX.

An Act to confirm a Provisional Order under "The Land Drainage Act, 1861." [6th August 1866.]

## CAP. LXXXI.

An Act to amend the Law respecting Leases by Ecclesiastical Corporations, as far as relates to the *Isle of Man*.  
[6th August 1866.]

## CAP. LXXXII.

An Act to amend the Acts relating to the Standard Weights and Measures and to the Standard Trial Pieces of the Coin of the Realm.

[6th August 1866.]

Sec. 1. *Transfer to board of trade of custody of imperial standards of weights and measures, &c.*

2. *Periodical comparison of imperial standards and of the three Parliamentary copies.*

3. *Working secondary standards to be called board of trade standards.*

4. *Periodical comparison of board of trade standards with imperial standards.*

5. *Definition of amount of error to be tolerated.*

6. *Authorization of further secondary standards by order in council.*

7. *Discontinuance of a board of trade standard.*

8. *Publication of orders in council.*

9. *Abolition of stamp duties and fees.*

10. *Standard weights and measures department of board of trade.*

11. *Comparison of standards, &c., in aid of scientific researches.*

12. *Annual report of warden of standards.*

13. *Transfer to treasury of custody of standard trial pieces for coinage, &c.*

14. *Enactments repealed.*

15. *Custody of exchequer records, &c., to remain.*

16. *Short title.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. The custody of the imperial standards of length and of weight, and of all secondary standards of weights and measures, and of all balances, apparatus, books, documents, and things used in connexion therewith or relating thereto, deposited in the office of the Exchequer at *Westminster*, or in the custody of the comptroller general of the exchequer, shall be and the same is hereby transferred to the board of trade, who shall have the charge thereof, and shall have and perform all such powers and duties relative thereto, or otherwise relative to standards of weights and measures, as are at the passing of this Act by law vested in or imposed on the commissioners of her Majesty's treasury, or in or on the comptroller general of the exchequer; and all things done by the board of trade or any of their officers, or at their office, in relation to

standards of weights and measures, in pursuance of this Act, shall be as valid and shall have the like effect and consequences as if the same had been done by the commissioners of her Majesty's treasury, or by the comptroller general or other officer of the exchequer, or at the office of the exchequer.

2. The board of trade shall once in every ten years after the passing of this Act cause the three Parliamentary copies of the imperial standards of length and of weight deposited at the royal mint, with the Royal Society of *London*, and in the Royal Observatory of *Greenwich*, respectively, to be compared with the imperial standards of length and of weight and with each other.

3. The secondary standards of length and of weight and of capacity, which before the passing of this Act have been in use in the office of the exchequer at *Westminster*, and have been known as the exchequer standards, and all legal secondary standards for the time being in use under the directions of the board of trade in pursuance of this Act, shall be called the board of trade standards.

4. As soon as conveniently may be after the passing of this Act, and afterwards once at least in every five years, the board of trade shall cause the board of trade standards for the time being in use to be compared with the imperial standards of length and of weight and with each other, and to be adjusted or renewed, if requisite.

5. It shall be lawful for her Majesty in council from time to time by order in council to define the amount of error to be tolerated in other secondary standards of length and of weight and of capacity when compared with the board of trade standards.

6. Where at any time any secondary standard of length or of weight or of capacity has been derived from the imperial standards of length and of weight respectively, and duly verified and authenticated by comparison therewith, it shall be lawful for her Majesty in council, by order in council, to declare the same to be a legal secondary standard of length or of weight or of capacity, as the case may be.

7. It shall be lawful for her Majesty in council from time to time by order in council to declare that any legal secondary standard of length or of weight or of capacity specified in such order shall cease to be such a standard.

8. All orders in council made under this Act, or made after the passing of this Act under any former Act relating to standard weights and measures, shall be published in the *London and Edinburgh and Dublin Gazette*, and laid before both Houses of Parliament.

9. From and after the passing of this Act an indenture of verification of any standard, or any indorsement on any such indenture, shall not be liable to stamp duty, nor shall any fee be payable on the verification or re-verification of any standard.

10. For the purposes of this Act, the board of trade shall constitute a department of their office, to be called the standard weights and measures department of the board of trade, and shall appoint as head of that department an officer to be styled the warden of the standards, and shall appoint and employ so many clerks and subordinate officers, and at such

salaries, as the commissioners of her Majesty's treasury from time to time approve.

11. In addition to the performance of the duties imposed on the board of trade by this Act, it shall be the duty of the warden of the standards to conduct all such comparisons, verifications, and other operations with reference to standards of length, weight, or capacity, in aid of scientific researches, or otherwise, as the board of trade from time to time authorise or direct.

12. The warden of the standards shall every year make a report to the board of trade on the proceedings and business of the standard weights and measures department, which report shall be laid before both Houses of Parliament.

13. The custody of the standard trial pieces of gold and silver used for determining the justness of the gold and silver coins of the realm issued from the royal mint, and of all books, documents, and things used in connexion therewith or relating thereto, deposited in the office of the exchequer at Westminster, or in the custody of the comptroller general of the exchequer, shall be and the same is hereby transferred to the commissioners of her Majesty's treasury, who shall have the charge thereof, and shall have and perform all such powers and duties relative thereto as are at the passing of this Act by law vested in or imposed on the comptroller general of the exchequer, and the same shall be deposited and kept in such place or places and in such manner as the commissioners of her Majesty's treasury from time to time by warrant direct.

14. The enactments described in the schedule to this Act are hereby repealed.

15. Notwithstanding anything in this Act, all books and documents at the passing of this Act in the custody of the comptroller general of the exchequer other than those in this Act expressly referred to shall remain and be in his custody, and he shall have the charge thereof, as if this Act had not been passed.

16. This Act may be cited as The Standards of Weights, Measures, and Coinage Act, 1866.

#### SCHEDULE.

##### ENACTMENTS REPEALED.

*The portions printed in Italics show the extent of repeal.*

5 Geo. 4, c. 74, in part.—An Act for ascertaining and establishing Uniformity of Weights and Measures.—*In part, namely—so much of the section twelve as relates to fees.*

4 & 5 Will. 4, c. 15, in part.—An Act to regulate the Office of the Receipt of His Majesty's Exchequer at Westminster.—*In part, namely—section seven.*

5 & 6 Will. 4, c. 63, in part.—An Act to repeal an Act of the Fourth and Fifth Year of His present Majesty, relating to Weights and Measures, and to make other Provisions instead thereof.—*In part, namely—so much of section five as relates to fees.*

18 & 19 Vict., c. 72, in part.—An Act for legalizing and preserving the restored Standards of Weights and Measures.—*In part, namely—section six.*

22 & 23 Vict. c. 66, in part.—An Act for regulating Measures used in Sales of Gas.—*In part, namely—so much of section six as relates to fees.*

#### CAP. LXXXIII.

An Act to provide for the Acquisition of a Site for the Enlargement of the National Gallery.

[6th August, 1866.]

#### CAP. LXXXIV.

An Act to amend the Laws for the Regulation of the Profession of Attorneys and Solicitors in Ireland, and to assimilate them to those in England.

[6th August, 1866.]

Sec. 1. *Interpretation of terms.*

2. *Short title.*

3. *No person to act as an attorney or solicitor unless admitted and enrolled.*

4. *No person to be admitted an attorney or solicitor unless he shall have served an apprenticeship of five years.*

5. *No attorney to take or retain any apprentice after discontinuing business, nor whilst clerk to another attorney.*

6. *In case attorney become bankrupt or insolvent or be imprisoned, indentures to be discharged or assigned.*

7. *Persons having taken degrees at certain universities may be admitted after three years service.*

8. *Persons having been at the bar may be admitted after three years service.*

9. *Persons attending certain lectures and passing certain examinations in faculty of law during two collegiate years may be admitted after four years service.*

10. *Persons having been bona fide clerks to attorneys or solicitors for ten years may be admitted after three years service.*

11. *Certain apprentices not required to keep terms.*

12. *Affidavit to be made and filed within six months of execution of articles, and the articles to be enrolled.*

13. *If not filed within six months the service to reckon from day of filing, unless, &c.*

14. *Affidavit to be produced on applying for admission.*

15. *Book to be kept for entering the substance of affidavits with the names, &c. of attorney and apprentice, &c., which may be searched.*

16. *Apprentices whose masters have died or left off practices may enter into fresh indentures for the residue of their term.*

17. *Power to courts and judges to order assignments under last section.*

18. *Apprentices before admission to make affidavit of having served.*

19. *Judges may require examination in general knowledge, either before indentures or before admission, with power to dispense therewith in special cases.*

20. *Judges may require an examination in legal knowledge during articles.*

21. *Persons on applying for admission as attorneys to be examined as to fitness and capacity. Oaths to be administered.*

22. *Examination before admission to extend to*

- all matters of business usually transacted or performed by attorneys or solicitors.
23. Where the three, four, or five years expire in any vacation, examination may take place in term preceding such vacation.
  24. Judges may appoint examiners.
  25. Judges may appoint professors.
  26. The proper officers filing affidavits of the execution of articles of clerkship, and for having the care of the rolls. Names of attorneys to be enrolled in alphabetical order. Names of solicitors to be enrolled in alphabetical order.
  27. Officers having custody of roll of attorneys and solicitors to transmit to registrars copies of enrolments at the end of each term.
  28. Appointment of incorporated law society as registrar of attorneys and solicitors.
  29. Indentures of apprenticeship to be produced to the registrar and entered within three months of enrolment.
  30. Commissioners of stamps not to grant any certificate until registrar has certified that the person applying is entitled thereto.
  31. On application for certificate a declaration to be signed in and entered in a book.
  32. Registrar's certificates to be made the stamped certificates of the commissioners of inland revenue.
  33. For determining amount of stamp duty, place of business to be deemed place of residence.
  34. The declaration on applying for the registrar's certificate to be in duplicate, and one copy to be left with the commissioners.
  35. On registrar's refusal application to be made to Court.
  36. In case of neglect to obtain a stamped certificate, application to be made to the court or judge.
  37. Persons practising without certificate incapable of recovering fees.
  38. Persons duly admitted in one court capable of practising in all other courts on signing rolls of other courts. Persons duly admitted in Chancery capable of practising in Bankruptcy and all inferior courts of equity.
  39. Defects in the service, &c., of attorneys not to disqualify persons who have served them.
  40. Applications for striking attorneys off the roll for defect in indentures, &c., to be made within twelve months of admission.
  41. Certificate to be entered with the registrar, the commissioners to supply particulars where stamped before 5th January in every year. Where stamped after 5th January, certificate to be produced by the party to be entered within a month.
  42. Where certificate to bear date and when to determine.
  43. In case of neglect for a year to renew certificate, order of court or judge necessary.
  44. Rule for striking attorneys off the roll to be entered with the registrar.
  45. An attorney struck off the roll of one of the

courts to be struck off the rolls of other courts.

46. Penalty for wrongfully acting as an attorney or solicitor.
47. Fees to be payable under this Act.
48. Not to prejudice power of courts, &c., to dispense with rules.
49. No fees to be payable by apprentices, &c., other than those authorized by Act.
50. Act not to extend to examination, &c. of solicitors of public departments.
51. To extend to Ireland only. Scale of fees to be payable under this Act.

‘WHEREAS it is expedient to amend, alter, and consolidate the laws relating to the admission and enrolment of attorneys and solicitors, and to the service of indentured apprentices to attorneys and solicitors in Ireland, and to establish a registrar of all such attorneys, solicitors, and apprentices:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the construction of this Act, unless there be something in the subject or context repugnant to such construction, the word “attorney” shall mean attorney of one or more of the superior courts of law at Dublin; the word “solicitor” shall mean solicitor of the high court of Chancery in Ireland; the word “registrar” shall mean the registrar of attorneys and solicitors; the expression “the roll of attorneys and solicitors kept by the registrar” shall mean the roll or book, rolls or books, of attorneys and solicitors, which by this Act the registrar is required to keep; and the expression “the incorporated law society” shall mean the society of the attorneys and solicitors of Ireland” acting under their present or any future charter.

2. This Act may be cited as “The Attorneys and Solicitors Act (Ireland), 1866.”

3 From and after the passing of this Act no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person or in his own name, in her Majesty's high court of Chancery in Ireland, or in the courts of Queen's Bench, Common Pleas, or Exchequer at Dublin, or in the Court of Bankruptcy and Insolvency in Ireland, or in her Majesty's court of Probate in Ireland, or in the Landed Estates Court in Ireland, or in the court of any chairman of any county or riding of a county, or in any court of civil or criminal jurisdiction, or in any other court of law or equity in that part of the United Kingdom of Great Britain and Ireland called Ireland, or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough, or place, or before any justice or justices, unless such person shall have been previously to the

passing of this Act admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this Act be admitted and enrolled and registered and otherwise duly qualified to act as an attorney or solicitor pursuant to directions and regulations of this Act, and unless such person shall continue to be so duly qualified and registered and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid, except as herein-after mentioned.

4. No person shall from and after the passing of this Act be capable of being admitted, enrolled, and registered as an attorney or solicitor save as herein-after provided, unless such person shall have been bound by indentures of apprenticeship to serve as an apprentice for and during the term of five years to a practising attorney or solicitor in *Ireland*, and shall have duly served under such indentures for and during the said term of five years, and also unless such person shall after the expiration of the said term of five years, have been examined in the manner herein-after directed and sworn as by the laws now in force required previously to such admission, enrolment, and registration.

5. No attorney or solicitor shall take, have, or retain any apprentice who shall be bound by indentures as aforesaid after such attorney or solicitor shall have discontinued or left off practising as or carrying on the business of an attorney or solicitor, nor whilst such attorney or solicitor shall be retained or employed as a writer or clerk by any other attorney or solicitor, and service by any apprentice under indentures to an attorney or solicitor for and during any part of the time that such attorney or solicitor shall be so employed as writer or clerk by any other attorney or solicitor shall not be deemed or accounted as good service under such indentures.

6. In case any attorney or solicitor to whom any apprentice shall be bound by indentures as aforesaid shall, before the end or determination of such contract, become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, or be imprisoned for debt and remain in prison for the space of twenty-one days, it shall be lawful for any of the said courts of law or equity wherein such attorney or solicitor is admitted as aforesaid, upon the application of such apprentice, to order and direct the said indentures to be discharged, or assigned to such person and upon such terms and in such manner as herein-after mentioned, or otherwise as the said court shall think fit.

7. Any person having taken the degree of bachelor of arts or bachelor of laws in the university of *Oxford*, *Cambridge*, *Dublin*, *Durham*, or *London*, or in the *Queen's University in Ireland*, or the degree of bachelor of arts, master of arts, bachelor of laws, or doctor of laws in any of the universities of *Scotland*, none of such degrees being honorary degrees, and who at any time after having taken such degree, and either before or after the passing of this Act, has been bound by and has duly served under indentures of apprenticeship to a practising attorney or solicitor for the term of three years, and has been examined and sworn in manner herein-after mentioned, and in accordance with the practice of the court of Chancery

or superior courts of law in *Ireland*, may be admitted and enrolled and registered as an attorney or solicitor; and where any person has, before the passing of this Act, and at any time after having taken such degree, been bound as aforesaid for any period exceeding three years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (endorsed on his indentures of apprenticeship) of the attorney or solicitor to whom he may be bound to the immediate determination of his indentures of apprenticeship, be admitted, enrolled, and registered as an attorney or solicitor; and where such consent is given as aforesaid, and acted upon under this provision by the person hereby made eligible to be admitted, enrolled and registered as aforesaid, the indentures of apprenticeship shall be deemed to have determined as if they had determined by effluxion of time.

8. Every person who either before or after the passing of this Act has been called to the degree of utter barrister in *Ireland*, and after ceasing to be a barrister has been bound by indenture to serve as an apprentice for any term exceeding three years to a practising attorney or solicitor, and has in either of the said cases continued in such service for the term of three years, and during the whole of such three years served in such manner as is herein-before required in the case of persons who have taken degrees in the said universities, and been examined and sworn as aforesaid, after the expiration of such term of three years, may be admitted, enrolled, and registered as an attorney and solicitor: provided always, that in the case of any such person as aforesaid who has been bound for a period exceeding three years, it shall be necessary for such term to be determined with consent as herein-before provided in the case of persons having taken degrees who may have been bound for a period exceeding three years before the passing of this Act.

9. Every person who, as a matriculated or as a non-matriculated student of the university of *Dublin* or of any of the *Queen's colleges in Ireland*, shall have attended or shall attend any prescribed lectures, and shall have passed or shall pass any prescribed examinations of the professors of the faculty of law in the said university of *Dublin* or in any of the said *Queen's colleges* for a period of two collegiate years, and who shall have duly served as an apprentice under indentures for the term of four years, in like manner as by this Act provided respecting the service for the term of five years, shall at any time after the expiration of five years from the commencement of such attendance on lectures, or of such period of service, which shall first happen, be qualified to be sworn and to be admitted as an attorney or solicitor respectively, according to the nature of his service, of the several and respective superior courts of law or equity in *Ireland*, as fully and effectually to all intents and purposes as any person having been bound and having served five years is qualified to be sworn and to be admitted or enrolled and registered an attorney or solicitor under or by virtue of this Act.

10. Any person who, either before or after the

passing of this Act, shall for the term of ten years have been a *bonâ fide* clerk to an attorney or solicitor, or attorneys or solicitors, and during that term shall have been *bonâ fide* engaged in the transaction and performance, under the direction and superintendence of such attorney or solicitor, or attorneys or solicitors, of such matters of business as are usually transacted and performed by attorneys and solicitors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who, after the expiration of the said term of ten years, and after having been examined as may have been or may be required for the time being of persons seeking to become apprentices to attorneys or solicitors, has been bound by and has duly served under indentures of apprenticeship to a practising attorney or solicitor for the term of three years, and has been examined and sworn in the manner for the time being required in the case of the admission of persons as attorneys and solicitors, may be admitted and enrolled as an attorney and solicitor; and where any such person has, before the passing of this Act, been bound for any period exceeding three years, he may, after having duly served three years of such term, in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (endorsed on his indentures of apprenticeship) of the attorney or solicitor to whom he may be bound to the immediate determination of his indentures of apprenticeship, be admitted and enrolled as an attorney and solicitor; and where such consent is given as aforesaid, and acted upon, under this provision, by the person hereby made eligible to be admitted and enrolled as aforesaid, the indentures of apprenticeship shall be deemed to have determined as if they had determined by effluxion of time.

11. No apprentice within the eighth section, and no apprentice within the tenth section, who shall have served two years or upwards of the said term of ten years in the *Dublin* office of an attorney or solicitor or firm of attorneys or solicitors, shall be required to attend lectures or keep terms in *Dublin* during his apprenticeship.

12. Whenever any person shall after the passing of this Act be bound by indentures to serve as an apprentice to any attorney or solicitor as aforesaid; the attorney or solicitor to whom such person shall be so bound as aforesaid shall, within six months after the date of every such indentures, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such indentures by him the said attorney or solicitor, and by the person so to be bound to serve him as an apprentice as aforesaid; and in every such affidavit shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day on which such indentures were actually executed; and every such affidavit shall be filed within six months next after the execution of the said indentures, with and by the officer appointed or to be appointed for that purpose as herein-after mentioned, who shall thereupon enrol and register the

said indentures, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit, and also upon the said indentures.

13. Provided always, that in case such affidavit be not filed within such six months, the same may be filed by the said officer after the expiration thereof; but the service of such apprentice shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said courts of law or equity shall otherwise order.

14. No person who shall from and after the passing of this Act become bound as aforesaid shall be admitted an attorney or solicitor before such affidavit so marked as aforesaid shall have been produced to the court or judge to whom such person shall apply to be admitted an attorney or solicitor in pursuance of the provisions herein-after contained, unless such Court or judge shall be satisfied that the same cannot be produced, and shall think fit to dispense with the production thereof.

15. The officer so appointed or to be appointed for filing such affidavits as aforesaid shall keep a book wherein shall be entered the substance of every affidavit which shall be so filed as aforesaid, specifying the name and place of abode of the attorney or solicitor to whom any person shall be bound to serve as an apprentice, and of the apprentice or person who shall be so bound as aforesaid, and of the person making such affidavit, with the date of the indentures in such affidavit mentioned or referred to, and the days of swearing and filing every such affidavit respectively; and such officer shall be at liberty to take, at the time of filing every such affidavit, the sum mentioned in the first schedule to this Act annexed, and no more, as a recompence for his trouble in filing such affidavits and preparing and keeping such books as aforesaid; and such books shall and may be searched in office hours by any person whomsoever without fee or reward.

16. If any attorney or solicitor to or with whom any such person shall be so bound shall happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor, or if such indentures shall by mutual consent of the parties be cancelled, or in case such apprentice shall be legally discharged before the expiration of such term by any rule or order of the Court wherein such attorney or solicitor shall have been admitted, such apprentice shall and may in any of the said cases be bound by other indentures or by an assignment of his former indentures to serve as apprentice to any other practising attorney or solicitor or attorneys or solicitors during the residue of the said term; and service under such second or other indentures or under such assignment in manner herein-after mentioned shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other indentures, or of such assignment, or of the making of any order under the next section of this Act, within the time and in the manner herein-before directed, and subject to the like regulations with respect to the original indentures and affidavit of the execution thereof, in so far as the same respectively are applicable thereto.



17. In the event of any apprentice requiring to have an assignment made of his indentures under the last preceding section, it shall be lawful for the Court of Chancery in *Ireland* or for the superior courts of common law at *Dublin*, or for any one of the judges of the said courts, upon application being duly made by or on behalf of such apprentice, and in case it shall be made to appear to the satisfaction of such court or judge that a difficulty exists in procuring such assignment to be executed from any cause whatsoever, to order that such indentures shall be so assigned to such person as to the court or judge may seem fit, and upon the making of any such order the said indentures shall be deemed and taken to be absolutely assigned in as full and ample a manner as if an assignment thereof had been duly executed by some person or persons legally entitled to assign the same.

18. Every person who shall have been or shall be bound as an apprentice as aforesaid shall, before he be admitted an attorney or solicitor according to this Act, prove by an affidavit of himself and of the attorney or solicitor to whom he was bound as aforesaid, to be duly made and filed with the proper officer herein-before mentioned, that he had actually and really served and been employed by such practising attorney or solicitor, and that he has not held any office or engaged in any employment whatsoever other than the employment of apprentice to such attorney or solicitor and his partner and partners in the business, practice, and employment of an attorney and solicitor during the whole time and in the manner required by the provisions of this Act; and such affidavit may be in the form to be approved by the judges of the court wherein such person shall apply to be admitted.

19. The Lord Chancellor, Lords Chief Justices of the courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, and the Master of the Rolls in *Ireland*, or any three or more of them, shall from time to time make regulations for the examination in such branches of general knowledge as they may deem proper, of all persons hereafter becoming bound under indentures of apprenticeship to attorneys or solicitors, and the said judges by such regulations shall require such examinations to be passed both before persons so become bound, and also before such persons shall apply to be admitted attorneys or solicitors, as to the said judges may seem fit, and the said judges or any three of them may from time to time revoke or alter any such regulations as they think fit for conducting such examination as aforesaid; and no person required to pass such examination shall be capable of being bound as aforesaid, where such examination is required to be passed before being bound, or of being admitted as an attorney or solicitor where such examination is required to be passed at any time before admission, unless before being bound or before being admitted (as the case may require) he obtain from the examiner a certificate of having satisfactorily passed such examination: Provided always, that the said judges or any three or more of them may, where under special circumstances they see fit so to do, dispense with compliance with such regulations entirely or partially, or subject to any such conditions as to them or him may seem fit.

20. The Lords Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer in *Ireland*, jointly with the Lord Chancellor and the Master of the Rolls in *Ireland*, or any three or more of them, may from time to time, if they see fit, make regulations for the examination of persons hereafter becoming bound under indentures of apprenticeship as aforesaid, at such times or periods of their service under such indentures, as the said judges may think fit and direct, in order to ascertain the progress made by such persons in acquiring the knowledge necessary for rendering them fit and capable to act as attorneys or solicitors, and such examination shall be conducted by the examiners to be appointed as hereinafter mentioned in this behalf; and the said judges may by such regulations, in the case of persons who fail to pass such examination to the satisfaction of the examiners, postpone either for a definite time or such time as the said examiners may in each case think proper, and either conditionally or otherwise, the examination required to be passed at the expiration of the term of service under indentures and before admission.

21. It shall be lawful for the Chief Justices of the said Courts of Queen's Bench and Common Pleas, and the Chief Baron of the Court of Exchequer in *Ireland*, and for the Lord Chancellor and the Master of the Rolls in *Ireland*, or any three or more of them, and he and they is and are hereby authorized and required, before any person shall be admitted an attorney or solicitor, as the case may be, to examine and inquire by such ways and means as he or they shall think proper touching the apprenticeship and service and the fitness and capacity of such person to act as an attorney or solicitor, and if the judges or Lord Chancellor and Master of the Rolls as aforesaid shall be satisfied by such examination, or by the certificate of such examiners as herein-after mentioned, that such person is duly qualified and fit and competent to act as an attorney and solicitor, as the case may be, then, and not otherwise, the said judge or judges, Lord Chancellor, and Master of the Rolls shall and he and they is and are hereby authorized and required to administer or cause to be administered to such person the oath now by law required to be taken by persons requiring to be admitted as attorneys and solicitors, and after such oaths taken to cause him to be admitted an attorney or solicitor of such court, and his name to be enrolled as an attorney or solicitor of such court, and registered, which admission shall be written on parchment, and signed by such judge or judges, Chancellor, or Master of the Rolls respectively, or any three or more of them.

22. The examination which under this Act is authorized and required touching the fitness and capacity of a person to act as an attorney or as a solicitor (as the case may be) after the expiration of the term of his service under indentures and before his admission as an attorney or solicitor, shall be deemed to include such examination touching his fitness and capacity to act in matters of business usually transacted or performed by attorneys or solicitors as the examiners for the time being deem proper, subject nevertheless to any rules, orders, or regulations for conducting the said examination to be from time to time made in manner herein provided:

23. Whenever any of the periods of three years four years, and five years mentioned in this Act (whether the same period shall have commenced before or after the passing of this Act) shall expire in any vacation, then and in such case any person whose period of apprenticeship shall so expire shall be at liberty to pass his examination at the term immediately preceding the said vacation; and at any time in or after such vacation, and after the said period of apprenticeship shall have expired, the Lord Chancellor of *Ireland* or the Master of the Rolls as to the Court of Chancery in *Ireland*, and any one of the judges as to the courts of common law at *Dublin* on being satisfied by affidavit or otherwise that the period of apprenticeship of such person has expired, may proceed to administer to him the oath or oaths usually taken in *Ireland* by apprentices before being admitted, and may do all other acts necessary for or towards the admission, enrolment, and registration of such person as an attorney and solicitor.

24. For the purpose of facilitating the inquiries and examinations aforesaid it shall be lawful for the Lord Chancellor of *Ireland*, the Master of the Rolls in *Ireland*, and the three chief judges of the Court of Queen's Bench, Common Pleas, and Exchequer in *Ireland* (or any three or more of them) from time to time to appoint such person or persons to be examiner or examiners for the purposes aforesaid as to the said judges shall seem fit, such examiner or examiners to be selected from persons who shall have been nominated in writing to them by the Incorporated Law Society.

25. It shall be lawful for the Lord Chancellor of *Ireland*, the Master of the Rolls, the Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Chief Baron of the Court of Exchequer in *Ireland*, or any three or more of them, from time to time to institute and appoint a professorship or professorships for the benefit of persons seeking to be admitted as attorneys and solicitors, and such professorship or professorships shall be filled by a barrister or barristers of not less than six years standing, who shall hold office for such period as the said judges shall direct, and the said judges shall and are hereby required to make such rules and regulations with respect to lectures to be delivered by the said professor or professors, and to the attendance of indentured apprentices upon such lectures of the said professor or professors, and the subjects upon which such lectures shall be delivered, and with respect to the several examinations aforesaid, as to them shall seem fitting; and every person seeking to be admitted as such apprentice shall, upon his admission, in addition to any other fees by this Act required to be paid, and in case in the opinion of such judges any such payment shall be necessary, pay to the Incorporated Law Society such fees as in the opinion of the said judges shall be sufficient to create a fund for the payment of the salary of the said professor or professors, and as they shall by any rule or order direct and require; and the salary of such professor or professors and of all examiners to be appointed as herein-before provided shall be paid by the said Incorporated Law Society out of the fees to be received by them under the provisions of this Act; and the said society shall render an ac-

count of all such fees as herein-after provided in reference to the other fees by this Act authorized to be paid to them.

26. From and after the passing of this Act the masters of the several courts of law in *Dublin*, or such other person or persons as the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer in *Ireland* shall for that purpose severally and respectively appoint, shall be deemed and taken to be proper officers for filing such affidavits as aforesaid in the said respective courts, and they shall have the custody and care of the rolls or books wherein persons are at present enrolled as attorneys in the said respective courts, and shall and they are hereby respectively required from time to time to enrol the name of every person who shall be admitted an attorney in the said respective courts pursuant to the directions in this Act, and the time when admitted, in alphabetical order in rolls or books to be provided and kept for that purpose in their several and respective offices; and also that the registrars of the Court of Chancery in *Ireland*, or such other person or persons as the Master of the Rolls shall for that purpose appoint, shall have the custody and care of the rolls or books wherein persons are at present enrolled as solicitors, and which said registrars or such other person or persons as shall be appointed as last-mentioned shall be deemed and taken as the proper officer or officers for filing such affidavits as herein-before mentioned in the Court of Chancery; and he and they is and are hereby also respectively required from time to time, without fee or reward, to enrol the name of every person who shall be admitted a solicitor pursuant to the directions in this Act, and the time when admitted, in alphabetical order in rolls or books to be kept for that purpose, to which rolls or books in the said courts of law or equity respectively all persons shall and may have free access without fee or reward.

27. The masters or other officers having respectively the custody of the rolls or books kept for the enrolment of attorneys or solicitors in the superior courts of law at *Dublin*, and the registrars of the Court of Chancery in *Ireland*, shall within seven days after the end of every term transmit to the registrar, at the expense of such registrar, a copy, under the hands of such masters and of the registrars of the Court of Chancery or one of them respectively, or under the seals of their respective courts, of such rolls or books, so far as the same relate to attorneys or solicitors enrolled within such term.

28. From and after the passing of this Act there shall be a registrar of attorneys and solicitors, and it shall be the duty of such registrar to keep an alphabetical roll or book or rolls or books of all attorneys and solicitors, to be called the register of attorneys and solicitors, and to issue certificates of persons who have been admitted and enrolled as attorneys or solicitors when required so to do; and it shall be lawful to and for the Lord Chancellor, the Lord Chief Justice of her Majesty's Court of Queen's Bench, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer in *Ireland* (or any three

or more of them, of whom the Lord Chancellor or Master of the Rolls shall be one), to make such orders, directions, and regulations touching the performance and execution of the duties aforesaid as they shall think proper: and such registrar or some person duly appointed by him shall have free access to and shall be at liberty from time to time to examine and take copies or extracts, without fee or reward, of all rolls or books kept for the enrolment of attorneys and solicitors in any of her Majesty's courts of law at *Dublin*, and the office of such registrar shall be vested in "the Incorporated Society of the Attorneys and Solicitors of *Ireland*," either under their present or any future charter of incorporation.

29. The indentures whereby any person shall be bound to serve as an apprentice to any attorney or solicitor, and also any assignment thereof, shall, within three months after the same has or have been respectively enrolled and registered pursuant to this Act, be produced to the registrar, who shall enter the names of the parties to and the date of such indenture, and also of such assignment, if any, and the term of service, in a book to be kept for that purpose, and the registrar shall mark such indentures and such assignment, if any, as having been so produced and entered, with the date thereof, and such book shall be open to public inspection during office hours without fee or reward; and in case such indentures and such assignment, if any, be not so produced to and entered by the registrar as aforesaid within such three months as aforesaid, the service of the apprentice shall be reckoned to commence from the date of such production and entry, unless upon an application, of which notice shall be given to the registrar, one of the superior courts of law at *Dublin*, or a judge thereof, or the Court of Chancery, shall otherwise order.

30. From and after the first day of *January* one thousand eight hundred and sixty-seven, it shall not be lawful for the commissioners of inland revenue or any of their officers, save as next herein-after mentioned, to grant or issue to any person any stamp upon a certificate authorizing such person to practise as an attorney or solicitor, but every person desiring to obtain such stamped certificate shall deliver to the said commissioners or their proper officer at the head office of inland revenue in *Dublin*, a certificate from such registrar as aforesaid that such person is an attorney or solicitor, and entitled to a stamped certificate, and such registrar's certificate shall be thereupon stamped with the proper amount of duty payable thereon, and shall have the same force and effect as the stamped certificate heretofore issued authorising persons to practise as such attorneys and solicitors.

31. For the purpose of obtaining such registrar's certificate as aforesaid a declaration in writing, signed by such attorney or solicitor or by his partner, or in case such attorney or solicitor shall reside more than twenty miles from *Dublin*, then by his *Dublin* agent, being an attorney or solicitor, on his behalf, containing his name and place of residence, and the court or one of the courts of which he is then admitted an attorney or solicitor, together with the term and year in or as of which he was so admitted, shall be delivered to the said registrar, who shall cause all the particulars in such declaration to be entered in a

proper book to be kept for that purpose, which shall be open to the inspection and examination of all persons without fee or reward; and the said registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attorneys or solicitors) deliver to the said attorney or solicitor, or to his agent as aforesaid, on demand, a certificate in the form set forth in the third schedule to this Act annexed, and which last-mentioned certificate to the commissioners of inland revenue as herein-before directed, for the purpose of being stamped.

32. The stamp duties chargeable on such certificates shall be denoted upon the registrar's certificates, and upon any such certificate being stamped accordingly, and the date of the payment of the duty certified by the proper officer by writing under his hand, or by other sufficient means, the same shall be and be deemed the proper stamped certificate required by law to be taken out by the attorney or solicitor named therein.

33. For determining the rate of stamp duty payable on the certificate, the place or places where the attorney or solicitor shall carry on his business shall be deemed to be the place or places of his residence within the meaning of the Acts relating to the stamp duties on certificates; and after the sixth day of *January* one thousand eight hundred and sixty-seven the declaration required to be delivered to the registrar for the purpose of obtaining his certificate, and also the certificate to be granted thereon, shall accordingly specify the place or places where the attorney or solicitor by or for whom the certificate is required so carries on his business, and shall respectively be in the Forms (A.) and (B.) contained in the Second Schedule to this Act.

34. The declaration required to be made for the purpose of obtaining the registrar's certificate shall be made out and signed in duplicate, and one of such duplicates shall be delivered to and left with the registrar, and the other produced to him, and the duplicate so produced, together with the certificate granted on such declaration, shall be left with the commissioners or their proper officer on applying to have the certificate stamped, and shall be and be deemed the note in writing required by law to be delivered to the commissioners or their officer to entitle the attorney or solicitor to a stamped certificate; and for every such certificate issued by the registrar, and the previous requisite search and inquiry, there shall be paid to the registrar the sum of five shillings by such attorney or solicitor.

35. In case the said registrar shall decline to issue such certificate as he is herein-before directed, and required to give, the party so applying for the same, if an attorney, shall and may apply to any of the said courts of law at *Dublin*, or to any judge thereof, or, if a solicitor, to the Lord Chancellor or the Master of the Rolls, who are hereby respectively authorized to make such order in the matter as shall be just, and to order payment of costs by and to either of the parties, if they shall see fit.

36. If any attorney or solicitor shall neglect to

procure an annual stamped certificate authorizing him to practise as such within the time by law appointed for that purpose, then and in such case the said registrar shall not afterwards grant a certificate to such attorney or solicitor without the order of the Lord Chancellor or the Master of the Rolls in the case of a solicitor, or of one of the Courts of Queen's Bench, Common Pleas, or Exchequer in *Ireland*, or of one of the judges thereof, in the case of an attorney, authorizing such registrar to issue such certificate; and it shall be lawful for the Lord Chancellor or the Master of the Rolls, or for such court or judge, to make such order upon such terms and conditions as he or they shall think fit.

37. No person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid.

38. Every person who shall have been duly admitted an attorney of any one of the superior courts of law at *Dublin* shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the said courts, or in any inferior court of law in *Ireland*, upon signing the roll of such other court, where any such roll exists, but not otherwise, and shall thereupon be entitled to practise as an attorney therein in like manner as if he had been sworn in and admitted an attorney of such court; provided always, that no additional fee besides those payable by virtue of this Act shall be demanded or paid; and that every person who shall have been duly admitted a solicitor of the High Court of Chancery shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as a solicitor in the Court of Bankruptcy and Insolvency in *Ireland*, and shall be entitled to practise as a solicitor therein in like manner as if he had been sworn in and admitted a solicitor of such court; provided also, that no additional fee besides those payable by virtue of this Act shall be demanded or paid.

39. No person who shall have duly served his apprenticeship under indentures pursuant to the provisions of this Act shall be prevented or disqualified from being admitted and enrolled as an attorney or solicitor, nor liable to be struck off the roll if admitted, by reason or in consequence of the attorney or solicitor to whom he may have been bound by such indentures having been after such service struck off the roll, provided that such apprentice or person be otherwise entitled to be admitted and enrolled according to the provisions herein-before contained.

40. No person who has been admitted and enrolled shall be liable to be struck off the roll for or on account of any defect in the indentures of apprenticeship, or in the registry thereof, or in his service under such indentures, or in his admission and enrolment, unless

the application for striking him off the roll be made within twelve months from the time of his admission and enrolment, provided that such indentures, registration, service, admission, or enrolment be without fraud.

41. For enabling the registrar to enter upon the roll of attorneys and solicitors kept by him a note or minute of the time of stamping every certificate, the commissioners shall, whenever the same shall be required after the sixth day of *February* in every year, furnish to the registrar an account of the certificates issued between the sixth day of *February* and the fifth day of *January* preceding, for which during the same period the stamp duties have been paid, specifying the names and places of business of the parties respectively to or for whom the same have been issued, and the dates of payment of the stamp duties; or in lieu of such account the commissioners at their option shall return to the registrar the aforesaid duplicate declarations to which such certificates relate, with a note or memorandum on each of them specifying the date of payment of the stamp duty for the certificate, and the registrar shall, upon such account being furnished, or such duplicate declarations being returned to him as aforesaid, enter such note or minute as aforesaid; and in order to such entry being made in respect of certificates stamped at any other time, every such last-mentioned certificate shall, within a month of the payment of the duty, be produced to the registrar, who shall thereupon make such entry, and signify the same by a note or memorandum upon the certificate; and every such last-mentioned certificate which shall not be so produced within the said period shall have effect only as a qualification to practise from the time when it shall be produced: provided that it shall be lawful for the Lord Chancellor or the Master of the Rolls in the case of a solicitor, or one of the superior courts of law at *Dublin* or one of the judges thereof in the case of an attorney, at any time to make an order directing that any certificate not so produced shall have effect upon and from the time of stamping the same or any subsequent period.

42. Every certificate issued by the registrar between the fifth day of *January* and the sixth day of *February* in any year, shall bear date on the sixth day of *January*, and shall take effect on that day for all purposes, provided it be stamped before the sixth day of *February*, and in every such case the fifth day of *January* shall, for the purpose of this Act, be deemed to be the date of the payment of the duty; but if such certificate be not so stamped it shall take effect, as regards the qualification to practise, on the day on which it is stamped; and every certificate issued at any other time shall bear date on the day on which it is issued, and, subject to the provisions herein contained relating to certificates stamped after the fifth day of *January* in any year, and not produced within a month to be entered by the registrar, shall take effect as regards such qualification on the day on which it is stamped; and every certificate shall be and continue in force from the day on which it shall take effect as aforesaid until the fifth day of *January* next following inclusive, and no longer.

43. If any attorney or solicitor, after having at any time taken out a stamped certificate, shall for the

space of a whole year from and after the expiration thereof have neglected to renew the same for the following year, the registrar shall not afterwards grant a certificate to such attorney or solicitor, except under an order of the Lord Chancellor or the Master of the Rolls in the case of a solicitor, or of one of the superior courts of law at *Dublin* or of one of the judges thereof in the case of an attorney, and it shall be lawful for the Lord Chancellor, or the Master of the Rolls, or such court or judge, to direct the registrar to issue a certificate to such person upon such terms and conditions as he or they shall think fit.

44. Where the name of any attorney or solicitor is ordered to be struck off the roll of attorneys or solicitors of any court on his own application or on the application of any other person, the rule or order for that purpose shall forthwith, and before the same is acted upon, be produced to the registrar, and the registrar shall enter a note or minute of such rule or order in connexion with the name of such attorney or solicitor on the roll of attorneys and solicitors kept by the registrar, and shall strike such name off such roll, and shall mark such rule or order as having been entered.

45. The name of every person hereafter struck off the roll of attorneys of any of the superior courts of law at *Dublin*, or suspended for a time from practising therein by the rule of any of such courts, or off the roll of solicitors of the Court of Chancery by order of any judge of that Court, shall, upon production of an office copy of such rule or order, and an affidavit of the identity of the person named therein, to the proper officer of every or any other of the said courts of which such person is an attorney or solicitor, be struck off the roll of such court, or suspended for the time mentioned in said order from practising therein; and in case any such person be at any time thereafter restored to the roll, or permitted to resume practising therein, by the rule of the court, or order of any judge of the court, by the rule of which or by the order of a judge of which his name was struck off such roll or suspended from practising, he shall, upon production of an office copy of the rule or order so restoring him, with an affidavit of the identity of the person named therein, to the proper officer of every or any such other court, be restored to the roll thereof, or permitted to resume practising therein, without payment of any fee or fine whatsoever.

46. Every person who acts as an attorney or solicitor contrary to the enactments herein-before mentioned, or who in his own name or in the name of any other person in anywise acts as proctor in or with respect to any proceeding in the Court of Probate or any ecclesiastical court without being duly qualified so to act, shall be deemed guilty of a contempt of the court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture, and to any disability to which he may be subject, forfeit and pay for every such offence the sum of fifty pounds, to be recovered, with

full costs of suit, by action, brought with the sanction of her Majesty's attorney general, in the name of the Incorporated Law Society, in any of the superior courts of law at *Dublin*; and such penalty shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable.

47. The several fees specified in the First Schedule hereto annexed shall be paid to the registrar appointed by this Act in respect of the several matters therein mentioned, and the said registrar shall yearly render an account of all sums of money so received by virtue of this Act, and of the application of the same, to the Lord Chancellor of *Ireland*, the Master of the Rolls, the Lords Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer in *Ireland*, and the said Lord Chancellor, Master of the Rolls, and Lords Chief Justices and Lord Chief Baron, or any three or more of them, by order under their hands, may from time to time fix and regulate the fees to be taken for the several lectures and examinations by this Act authorized to be instituted, and may increase or diminish such fees from time to time: provided always that a copy of such account so rendered as aforesaid shall be open to the inspection of any attorney or solicitor at the office of the registrar.

48. Nothing in this Act contained shall prejudice or take away any right or power now possessed by any court of law or equity or by any of the judges of such courts to dispense in any particular case and under special circumstances with any of the rules or conditions relating to the admission or examination of attorneys or solicitors, or apprentices.

49. From and after the passing of this Act no fees other than those authorized to be paid and received shall be payable by any person seeking to be bound as an indentured apprentice as aforesaid, or by any person seeking to be admitted and enrolled as an attorney or solicitor in any court of law or equity in *Ireland*.

50. This Act shall not extend or be construed to extend to the examination, swearing, admission, or enrolment, or any rights or privileges, of any persons appointed to be solicitors to the treasury, customs, inland revenue, post office, or any other branch of her Majesty's revenue, or to the solicitor to the board of admiralty, or to the solicitor to the war department.

51. This Act shall extend to *Ireland* only.

#### FIRST SCHEDULE to which this Act refers.

	£	s.	d.
Fee to be paid to the Incorporated Law Society by each candidate on applying for permission to attend preliminary examination . . . . .	5	0	0
Fee to be paid to said society by each apprentice on applying for permission to attend final examination for admission as an attorney . . . . .	10	0	0

#### SECOND SCHEDULE to which this Act refers.

##### FORM (A.)

##### Form of Registrar's Certificate.

Pursuant to an Act passed in the session of Parlia-

ment holden in the                      and                      years of the reign of Queen Victoria, intituled (*Title of this Act*), the Incorporated Law Society, as the registrar of attorneys and solicitors appointed under the said Act, hereby certify that attorney at law (or solicitor in Chancery, as the case may be), whose place (or places), of business is (or are) at                      hath this day delivered and left with the secretary of the said society (or the said, the name of the registrar for the time being) a declaration in writing signed by the said attorney (or solicitor) (or by his partner, or by his Dublin agent on his behalf, as the case may be), containing his name and place or places of business, and the court or one of the courts of which he is admitted an attorney or solicitor, together with the term and year in or as of which he was so admitted; and the said society (as the registrar) hereby further certify, that the said attorney (or solicitor) is duly enrolled in the Court of Queen's Bench at Dublin (or as the case may be), (or a solicitor in the High Court of Chancery in Ireland), and is entitled to practise as such attorney or solicitor, upon this certificate being duly stamped as required by law.

Given under the hand of the Secretary of the Incorporated Law Society (as such registrar),  
this                      day of                      18                      .

} Secretary's Signature.

#### FORM (B.)

#### Form of Annual Declaration for obtaining the Registrar's Certificate.

No.

I hereby declare, that I (or A.B.) was admitted an attorney (or solicitor, as the case may be,) of the Court of                      in                      term, in the year                      and that my (or his) place or places of business are as follow:

Dated this                      18                      .

A.B. (or C.D. partner  
(or Dublin agent) of the said A.B.)

To

The Registrar of Attorneys and Solicitors in Ireland.

#### CAP. LXXXV.

An Act to facilitate the Establishment, Improvement, and Maintenance of Oyster and Mussel Fisheries in Great Britain. [6th August, 1866.]

#### CAP. LXXXVI.

An Act for vesting the Glebe Lands of the Vicarage of Rochdale in the County of Lancaster in the Ecclesiastical Commissioners for England, and for making Provision for the Endowment of the said Vicarage in lieu thereof; and for the Promotion of other Ecclesiastical Purposes connected therewith. [6th August, 1866.]

#### CAP. LXXXVII.

An Act to amend the Foreign Jurisdiction Act. [6th August, 1866.]

#### CAP. LXXXVIII.

An Act to validate certain Licences granted in Ireland for the Establishment of Oyster Beds.

[6th August, 1866.]

5 & 6 Vict. c. 106.

- Sec. 1. Declaration as to licences heretofore granted.  
2. Penalties for injuring oyster beds.  
3. Power to commissioners to revoke licence in certain cases.  
4. Certified copy of licence to be evidence.  
5. This Act to be read together with former Act.  
6. Sect. 18 of 8 & 9 Vict. c. 108, and sect. 42 of 13 & 14 Vict. c. 88, repealed.

‘WHEREAS an Act was passed in the session of Parliament held in the fifth and sixth years of the reign of her present Majesty, intituled *An Act to regulate the Irish Fisheries*, and which Act has since been amended by a certain Act of the session held in the eighth and ninth years of the reign of her said Majesty, chapter one hundred and eight, and by a certain other Act of the session held in the thirteenth and fourteenth years of the same reign, chapter eighty-eight, and by other Acts, and by the said Acts provision is made for the protection and regulation of the oyster fisheries in Ireland, and for the granting of licences to owners and occupiers of lands and others to plant and form oyster beds and layings:

‘And whereas, under and by virtue of the provisions of the said Acts, licences have heretofore been granted to divers persons to form oyster beds in Ireland, and many of such beds have been formed accordingly, and doubts have arisen as to the operation of such licences, and the extent of the rights acquired under them, and it is expedient to declare the right of persons claiming under such licences:’

Be it declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every licence heretofore granted by the commissioners for executing the aforesaid Acts to any person or persons shall be deemed to be effectual to vest in such licensee, his heirs and assigns, the exclusive right of laying and planting oysters and fishing for oysters in the oyster bed or laying by such licence authorized to be formed, according to the tenor and effect of such licence, free from all prior or other rights, titles, estates, or interests whatsoever.

2. It shall not be lawful for any person other than the licensee or their assigns, their agents, servants, and workmen, within the limits of any oyster bed or laying, knowingly to do any of the following things:—

To use any implement of fishing, except a line and hook or a net adapted solely for catching floating fish, and so used as not to disturb or injure in any manner any oyster bed or oysters, or the oyster fishery:

To dredge for any ballast or other substance except under a lawful authority for improving the navigation:

To deposit any ballast, rubbish, or other substance:

To place any implement, apparatus, or thing in the opinion of the commissioners prejudicial or likely to be prejudicial to any oyster bed or oysters, or brood or spawn thereof, or to the oyster fishery, except for a lawful purpose of navigation or anchorage:

To disturb or injure in any manner, except as last aforesaid, any oyster bed or oysters, or brood or spawn thereof, or the oyster fishery:

To interfere with or take away any of the oysters from such bed, without the consent of the licencees or owners or occupiers of such bed:

And if any person does any Act in contravention of this section he shall on summary conviction be liable to the following penalty, namely,—to a penalty not exceeding two pounds for the first offence, and not exceeding five pounds for the second offence, and not exceeding ten pounds for the third and every subsequent offence; and every such person shall also be liable to make full compensation to the licencees for all damage sustained by them by reason of his unlawful act, and in default of payment the same may be recovered from him by the grantees by proceedings in any court of competent jurisdiction, whether he has been prosecuted for or convicted of an offence against this section or not.

3. In any case where any such licence has been granted by the said commissioners if it shall appear to the said commissioners that the licencee under such licence, or his assigns, within the period of three years after the passing of this Act has not taken proper steps to form the oyster bed or laying in such licence mentioned, then and in such case it shall be lawful for the said commissioners or any two of them, by an order in writing under their hands, to revoke such licence, and thereupon all the rights and privileges by such licence shall cease and determine: provided always, that previously to the making of such order the said commissioners shall cause a notice in writing stating their intention to make such order, to be served upon the person for the time being entitled to such licence, or in case such person cannot be found, the commissioners shall cause such notice to be inserted as an advertisement three times at least in some newspaper circulating in the district; and no such order shall be made till after the expiration of one month from the service of such notice, or from the date of the last of such advertisement, which shall last happen.

4. A copy of the licence, certified by the commissioners or their secretary, shall be received as evidence of the original licence, and shall be of the same effect as if the original licence were produced.

5. This Act shall be read together and construed as one Act with the said Acts now in force for the regulation of the fisheries in Ireland.

6. From and after the passing of this Act the eighteenth section of the eight and ninth *Victoria*, chapter one hundred and eight, and the forty-second section of the thirteenth and fourteenth *Victoria*, chapter eighty-eight, shall be and the same are hereby repealed.

#### CAP. LXXXIX.

An Act for vesting in the Conservators of the River

*Thames* the Conservancy of the *Thames* and *Isle* from *Staines* in the County of *Middlesex* to *Cricklade* in the County of *Wills*; and for other Purposes connected therewith. [6th August, 1866.]

#### CAP. XC.

An Act to amend the Law relating to the Public Health. [7th August, 1866.]

Sec. 1. *Short title of Act.*

2. *Definition of "sewer authority:" "Lord Lieutenant in council."*

2. *This part to be construed with 28 & 29 Vict. c. 75.*

4. *Power to sewer authority to form committee of its own members and others.*

5. *Formation of special drainage district.*

6. *Appeal against constitution of special drainage district.*

7. *Evidence of formation of special drainage district.*

8. *Power to drain into sewers of sewer authority.*

9. *Use of sewers by persons beyond district.*

10. *As to the drainage of houses.*

11. *Supply of water to district of sewer authority.*

12. *Expenses of sewer authority in supplying water.*

13. *Wells, &c. belonging to any place vested in sewer authority, &c. 23 & 24 Vict. c. 77, s. 7.*

14. *Definition of "Nuisances Removal Acts."*

15. *Definition of "nuisance authority."*

16. *Power of police with respect to nuisances.*

17. *Sect. 3 of 23 & 24 Vict. c. 77, repealed. 18 & 19 Vict. c. 120.*

18. *Requisition of ten inhabitants equivalent to certificate of medical officer.*

19. *Addition to definition of nuisance.*

20. *Duties of nuisance authorities as to inspection of nuisances, &c.*

21. *As to proceedings of nuisance authority under sect. 12 of 18 & 19 Vict. c. 121.*

22. *Power to cause premises to be cleaned or otherwise disinfected.*

23. *Power to provide means of disinfection.*

24. *Nuisance authorities may provide carriages for conveying infected persons.*

25. *Penalty on person suffering from infectious disorder entering public conveyance without notifying to driver that he is so suffering.*

26. *Removal of persons sick of infectious disorders, and without proper lodging, in any district.*

27. *Place for the reception of dead bodies may be provided at the public expense.*

28. *Places for reception of dead bodies during time required for post-mortem examination may be provided.*

29. *Power to remove to hospital sick persons brought by ships.*

30. *Provision as to district of nuisance authority extending to places where ships are lying.*

31. *Power of entry to nuisance authority or their officer under sect. 11 of 18 & 19 Vict. c. 121.*



32. *Provision as to ships within the jurisdiction of nuisance authority.*
33. *Provision for raising money in divided parishes.*
34. *Nuisance authority may require payment of costs or expenses from owner or occupier, and occupier paying to deduct from rent.*
35. *In cities, boroughs, or towns, secretary of state, on application of nuisance authority, may empower them to make regulations as to lodging houses.*
36. *Cases in which two convictions have occurred within three months.*
37. *Power to provide hospitals.*
38. *Penalty on any person, with infectious disorder, exposing himself, or on any person in charge of such sufferer causing such exposure.*
39. *Penalty on persons letting houses in which infected persons have been lodging.*
40. *Guardians, &c. to be the local authorities for executing Diseases Prevention Act.*
41. *Evidence of family in case of overcrowded houses.*
42. *Extension to the whole of England and Ireland of sect. 67 of 11 & 12 Vict. c. 63.*
43. *Local board in certain cases may adopt Baths and Wash-houses Acts.*
44. *Power to burial boards in certain cases to transfer their powers to local board.*
45. *Penalty for wilful damage of works.*
46. *Incorporation of sanitary authorities.*
47. *Extent of authority to make provisional orders respecting lands under sect. 75 of 21 & 22 Vict. c. 98.*
48. *Appearance of local authorities in legal proceedings.*
49. *Mode of proceeding where sewer authority has made default in providing sufficient sewers, &c.*
50. *Recovery of certain expenses of water supply.*
51. *Power to reduce penalties imposed by 6 G. 4, c. 78.*
52. *Description of vessels within provisions of 6 G. 4, c. 78.*
53. *Periodical removal of manure in mews, &c.*
54. *Recovery of penalties.*
55. *Powers of Act cumulative.*
56. *Modifications necessary for application of Part I. to Ireland.*
57. *Modifications necessary for application of Part II. to Ireland.*
58. *How expenses to be defrayed in Ireland when nuisance authority not a board of guardians.*
59. *When board of guardians is nuisance authority, how expenses to be defrayed in Ireland.*
60. *Recovery of penalties in Ireland.*
61. *Modifications necessary for application of Part III. to Ireland.*
62. *Modifications necessary for application of Disease Prevention Act to Ireland.*
63. *Committees and officers under Dispensaries Act to aid local authority in execution of this Act.*

64. *The provisions of 14 & 15 Vict. c. 68; as to duties and appointment of medical inspectors in Ireland incorporated with this Act.*
65. *Remuneration to medical practitioners for services under the directions and regulations of the poor law commissioners in Ireland.*
66. *Poor law commissioners to make inquiries as to public health in Ireland.*
67. *Publication in Ireland to be in Dublin Gazette.*
68. *Powers in secretary of state in England to be exercised in Ireland by the Lord Lieutenant in council.*
69. *Repeal of statutes applicable to Ireland.*

WHEREAS it is expedient to amend the law relating to public health: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

#### *Preliminary.*

1. This Act may be cited for all purposes as The Sanitary Act, 1866.

#### PART I

##### *Amendment of the Sewage Utilization Act, 1865.*

2. "Sewer authority" in this Act shall have the same meaning as it has in The Sewage Utilization Act, 1865.

The words "Lord Lieutenant in council" shall mean in this Act the Lord Lieutenant or any chief governor or chief governors in Ireland acting by and with the consent of her Majesty's privy council in Ireland.

3. This part of this Act shall be construed as one with The Sewage Utilization Act, 1865, and the expression "The Sewage Utilization Act, 1865, as used in this or any other Act of Parliament or other document, shall mean the said Sewage Utilization Act, 1865, as amended by this Act.

4. Any sewer authority may from time to time, at any meeting specially convened for the purpose, form one or more committee or committees consisting wholly of its own members, or partly of its own members and partly of such other persons contributing to the rate or fund out of which the expenses incurred by such authority are paid, and qualified in such other manner as the sewer authority may determine, and may delegate, with or without conditions or restrictions, to any committee so formed, all or any powers of such sewer authority, and may from time to time revoke, add to, or alter any powers so given to a committee.

A committee may elect a chairman of its meetings. If no chairman is elected, or if the chairman elected is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting. A committee may meet and adjourn as it thinks proper. The quorum of a committee shall consist of such number of members as may be prescribed by the sewer authority that appointed it, or, if no number be prescribed, of three members. Every question at a meeting shall be

determined by a majority of votes of the members present, and voting on that question; and in case of an equal division of votes the chairman shall have a second or casting vote.

The proceedings of a committee shall not be invalidated by any vacancy or vacancies amongst its members.

A sewer authority may from time to time add to or diminish the number of the members or otherwise alter the constitution of any committee formed by it, or dissolve any committee.

A committee of the sewer authority shall be deemed to be the agents of that authority, and the appointment of such committee shall not relieve the sewer authority from any obligation imposed on it by Act of Parliament or otherwise.

5. Where the sewer authority of a district is a vestry, select vestry, or other body of persons acting by virtue of any Act of Parliament, prescription, custom, or otherwise as or instead of a vestry or select vestry, it may, by resolution at any meeting convened for the purpose after twenty-one clear days notice affixed to the places where parochial notice are usually affixed in its district, form any part of such district into a special drainage district for the purposes of the Sewage Utilization Act, and thereupon such special drainage district shall, for the purposes of The Sewage Utilization Act, 1865, and the powers therein conferred, be deemed to be a parish in which a rate is levied for the maintenance of the poor, and of which a vestry is the sewer authority, subject, as respects any meeting of the inhabitants thereof in vestry, to the Act of the fifty-eighth year of the reign of King George the Third, chapter sixty-nine, and the Acts amending the same; and any officer or officers who may from time to time be appointed by the sewer authority of such special drainage district for the purpose shall have within that district all the powers of levying a rate for the purpose of defraying the expense of carrying the said Sewage Utilization Act into effect that they would have if such district were such parish as aforesaid, and such rate were a rate for the relief of the poor, and they were duly appointed overseers of such parish.

6. Where the sewer authority of any place has formed a special drainage district in pursuance of this Act, if any number of the inhabitants of such place, not being less than twenty, feel aggrieved by the formation of such district, or desire any modification in its boundaries, they may, by petition in writing under their hands, bring their case under the consideration of one of her Majesty's principal secretaries of state, and said secretary of state may after due investigation annul the formation of the special drainage district or modify its boundaries as he thinks just.

7. A copy of the resolution of a sewer authority forming a special drainage district shall be published by affixing a notice thereof to the church door of the parish in which the district is situate, or of the adjoining parish if there be no church in the said parish, and by advertising notice thereof in some newspaper published or circulating in the county in which such district is situate; and the production of a newspaper containing such advertisement, or a certificate under the hand of the clerk or other officer performing the

duties of clerk for the time being of the sewer authority which passed the resolution forming the district, shall be evidence of the formation of such district, and after the expiration of three months from the date of the resolution forming the district such district shall be presumed to have been duly formed, and no objection to the formation thereof shall be entertained in any legal proceedings whatever.

8. Any owner or occupier of premises within the district of a sewer authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the sewer authority to superintend the making of such communications; but any person causing any drain to empty into any sewer of a sewer authority without complying with the provisions of this section shall incur a penalty not exceeding twenty pounds, and it shall be lawful for the sewer authority to close any communication between a drain and sewer made in contravention of this section, and to recover in a summary manner from the person offending any expenses incurred by them under this section.

9. Any owner or occupier of premises beyond the limits of the district of a sewer authority may cause any sewer or drain from such premises to communicate with any sewer of the sewer authority upon such terms and conditions as may be agreed upon between such owner or occupier and such sewer authority, or in case of dispute may, at the option of the owner or occupier, be settled by two justices or by arbitration in manner provided by The Public Health Act, 1848, in respect of matters by that Act authorized or directed to be settled by arbitration.

10. If a dwelling house within the district of a sewer authority is without a drain or without such drain as is sufficient for effectual drainage, the sewer authority may by notice require the owner of such house within a reasonable time therein specified to make a sufficient drain emptying into any sewer which the sewer authority is entitled to use, and with which the owner is entitled to make a communication, so that such sewer be not more than one hundred feet from the site of the house of such owner; but if no such means of drainage are within that distance then emptying into such covered cesspool or other place not being under any house, as the sewer authority directs; and if the person on whom such notice is served fails to comply with the same, the sewer authority may itself, at the expiration of the time specified in the notice, do the work required, and the expenses incurred in it by so doing may be recovered from such owner in a summary manner.

11. A sewer authority within its district shall have the same powers in relation to the supply of water that a local board has within its district, and the provisions of the sections herein-after mentioned shall apply accordingly in the same manner as if in such provisions "sewer authority" were substituted for "local board of health" or "local board," and the district in such provisions mentioned were the district

of the sewer authority and not the district of the local board; that is to say, the sections numbered from seventy-five to eighty, both inclusive, of the Public Health Act, 1848, sections fifty-one, fifty-two, and fifty-three of the Local Government Act, 1858, and section twenty of the Local Government Act, 1858, Amendment Act, 1861.

The sewer authority may, if it think it expedient so to do, provide a supply of water for the use of the inhabitants of the district, by

- (1.) Digging wells;
- (2.) Making and maintaining reservoirs;
- (3.) Doing other necessary acts;

and they may themselves furnish the same, or contract with any other persons or companies to furnish the same: provided always, that no land be purchased or taken under this clause except by agreement or in manner provided by the Local Government Act, 1858.

12. Any expense incurred by a sewer authority in or about the supply of water to its district, and in carrying into effect the provisions herein-before in that behalf mentioned, shall be deemed to be expenses incurred by that authority in carrying into effect The Sewage Utilization Act, 1865, and be payable accordingly.

13. All property in wells, fountains, and pumps, and powers in relation thereto vested in the nuisance authority by the seventh section of the Act passed in the session of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter seventy-seven, shall vest in the sewer authority where the sewer authority supplies water to its district.

## PART II.

### *Amendment of the Nuisances Removal Act.*

14. The expression "Nuisances Removal Acts" shall mean the Acts passed in the years following of the reign of her present Majesty, that is to say, the one in the session of the eighteenth and nineteenth years, chapter one hundred and twenty-one, and the other in the session of the twenty-third and twenty-fourth years, chapter seventy-seven, as amended by this part of this Act; and this part of this Act shall be construed as one with the said Acts, and all expenses incurred by a nuisance authority in carrying into effect any of the provisions of this part of this Act shall be deemed to be expenses incurred by it in carrying into effect the Nuisances Removal Acts.

15. "Nuisance authority" shall mean any authority empowered to execute the Nuisances Removal Acts.

16. In any place within the jurisdiction of a nuisance authority the chief officer of police within that place, by and under the directions of one of her Majesty's principal secretaries of state, on its being proved to his satisfaction that the nuisance authority has made default in doing its duty, may institute any proceeding which the nuisance authority of such place might institute with respect to the removal of nuisances: provided always, that no officer of police shall be at liberty to enter any house or part of a house used as the dwelling of any person without such person's consent, or without the warrant of a justice of the peace, for the purpose of carrying into effect this Act.

17. The third section of the said Act of the session of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter seventy-seven, shall be repealed, and all powers vested in any highway board or "nuisance removal committee" under the Nuisances Removal Acts shall determine, and all property belonging to them for the purposes of the said Nuisances Removal Acts shall, subject to any debts or liabilities affecting the same, be transferred to or vested in the nuisance authority under the said Acts: provided always, that this section shall not extend to any vestry or district board, under the Act of the session of eighteenth and nineteenth years of the reign of her present Majesty, chapter one hundred and twenty, intituled *An Act for the better Local Management of the Metropolis*, or to any committee appointed by such vestry or district board for the purpose of carrying into effect the Nuisances Removal Acts or any of them.

18. A requisition in writing under the hands of any ten inhabitants of a place shall for the purposes of the twenty-seventh section of "The Nuisances Removal Act for England, 1855," be deemed to be equivalent to the certificate of the medical officer or medical practitioners therein mentioned, and the said section shall be enforced accordingly.

19. The word "nuisances" under the Nuisance Removal Acts shall include,

1. Any house or part of a house so overcrowded as to be dangerous or prejudicial to the health of the inmates:

2. Any factory, workshop or workplace not already under the operation of any general Act for the regulation of factories or bakehouses, not kept in a cleanly state, or not ventilated in such a manner as to render harmless as far as practicable any gases, vapours, dust, or other impurities generated in the course of the work carried on therein, that are a nuisance or injurious or dangerous to health, or so overcrowded while work is carried on as to be dangerous or prejudicial to the health of those employed therein:

3. Any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used in such fireplace or furnace, and is used within the district of a nuisance authority for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufactory or trade process whatsoever:

Any chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance:

Provided, first, that in places where at the time of the passing of this Act no enactment is in force compelling fireplaces or furnaces to consume their own smoke, the foregoing enactment as to fireplaces and furnaces consuming their own smoke shall not come into operation until the expiration of one year from the date of the passing of this Act:

Secondly, that where a person is summoned before the justices in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the justices may hold that no nuisance is created within the meaning of

this Act, and dismiss the complaint, if they are satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.

20. It shall be the duty of the nuisance authority to make from time to time, either by itself or its officers, inspection of the district, with a view to ascertain what nuisances exist calling for abatement under the powers of the Nuisance Removal Acts, and to enforce the provisions of the said Acts in order to cause the abatement thereof, also to enforce the provisions of any Act that may be in force within its district requiring fireplaces and furnaces to consume their own smoke; and any justice upon complaint upon oath may make an order to admit the nuisance authority or their officers for these purposes, as well as to ground proceedings under the eleventh section of the Nuisances Removal Act, 1855.

21. The nuisance authority or chief officer of police shall, previous to taking proceedings before a justice under the twelfth section of the Nuisances Removal Act, 1855, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found or ascertained, on the owner or occupier of the premises on which the nuisance arises, to abate the same, and for that purpose to execute such works and to do all such things as may be necessary within a time to be specified in the notice: provided,

First, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner:

Secondly, that where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, then the nuisance authority may itself abate the same without further order, and the cost of so doing shall be part of the costs of executing the Nuisances Removal Acts, and borne accordingly.

22. If the nuisance authority shall be of opinion, upon the certificate of any legally qualified medical practitioner that the cleansing and disinfecting of any house or part thereof, and of any articles therein likely to retain infection, would tend to prevent or check infectious or contagious disease, it shall be the duty of the nuisance authority to give notice in writing requiring the owner or occupier of such house or part thereof to cleanse and disinfect the same, as the case may require; and if the person to whom notice is so given fail to comply therewith within the time specified in the notice he shall be liable to a penalty of not less than one shilling and not exceeding ten shillings for every day during which he continues to make default; and the nuisance authority shall cause such house or part thereof to be cleansed and disinfected, and may recover the expenses incurred from the owner or occupier in default in a summary manner; when

the owner or occupier of any such house or part thereof as is referred to in this section is from poverty or otherwise unable, in the opinion of the nuisance authority, effectually to carry out the requirements of this section, such authority may, without enforcing such requirements on such owner or occupier, with his consent, at its own expense, cleanse and disinfect such house or part thereof and any articles therein likely to retain infection.

23. The nuisance authority in each district may provide a proper place, with all necessary apparatus and attendance, for the disinfection of woollen articles, clothing, or bedding which have become infected, and they may cause any articles brought for disinfection to be disinfected free of charge.

24. It shall be lawful at all times for the nuisance authority to provide and maintain a carriage or carriages suitable for the conveyance of persons suffering under any contagious or infectious disease, and to pay the expense of conveying any person therein to a hospital or place for the reception of the sick or to his own home.

25. If any person suffering from any dangerous infectious disorder shall enter any public conveyance without previously notifying to the owner or driver thereof that he is so suffering, he shall on conviction thereof before any justice be liable to a penalty not exceeding five pounds, and shall also be ordered by such justice to pay to such owner and driver all the losses and expenses they may suffer in carrying into effect the provisions of this Act; and no owner or driver of any public conveyance shall be required to convey any person so suffering until they shall have been first paid a sum sufficient to cover all such losses and expenses.

26. Where a hospital or place for the reception of the sick is provided within the district of a nuisance authority, any justice may, with the consent of the superintending body of such hospital or place, by order on a certificate signed by a legally qualified medical practitioner, direct the removal to such hospital or place for the reception of the sick, at the cost of the nuisance authority, of any person suffering from any dangerous contagious or infectious disorder, being without proper lodging or accommodation, or lodged in a room occupied by more than one family, or being on board any ship or vessel.

27. Any nuisance authority may provide a proper place for the reception of dead bodies, and where any such place has been provided and any dead body of one who has died of any infectious disease is retained in a room in which persons live or sleep, or any dead body which is in such a state as to endanger the health of the inmates of the same house or room is retained in such house or room, any justice may, on a certificate signed by a legally qualified medical practitioner, order the body to be removed to such proper place of reception, at the cost of the nuisance authority, and direct the same to be buried within a time to be limited in such order; and unless the friends or relations of the deceased undertake to bury the body within the time so limited, and do bury the same, it shall be the duty of the relieving officer to bury such body at the expense of the poor rate, but any expense so incurred may be recovered by the re-

lieving officer in a summary manner from any person legally liable to pay the expense of such burial.

28. Any nuisance authority may provide a proper place (otherwise than at a workhouse or at a mortuary house as lastly herein-before provided for) for the reception of dead bodies for and during the time required to conduct any *post-mortem* examination ordered by the coroner of the district or other constituted authority, and may make such regulations as they may deem fit for the maintenance, support, and management of such place; and where any such place has been provided, any coroner or other constituted authority may order the removal of the body for carrying out such *post-mortem* examination and the re-removal of such body, such costs of removal and re-removal to be paid in the same manner and out of the same fund as the cost and fees for *post-mortem* examinations when ordered by the coroner.

29. Any nuisance authority may, with the sanction of the privy council, signified in manner provided by "The Public Health Act, 1858," lay down rules for the removal to any hospital to which such authority is entitled to remove patients, and for keeping in such hospital so long as may be necessary any persons brought within their district by any ship or boat who are infected with a dangerous and infectious disorder, and they may by such rules impose any penalty not exceeding five pounds on any person committing any offence against the same.

30. For the purposes of this Act, any ship, vessel, or boat that is in a place not within the district of a nuisance authority shall be deemed to be within the district of such nuisance authority as may be prescribed by the privy council, and until a nuisance authority has been prescribed then of the nuisance authority whose district nearest adjoins the place where such ship, vessel, or boat is lying, the distance being measured in a straight line, but nothing in this Act contained shall enable any nuisance authority to interfere with any ship, vessel, or boat that is not in *British waters*.

31. The power of entry given to the authorities by the eleventh section of the Nuisances Removal Act, 1855, may be exercised at any hour when the business in respect of which the nuisances arises is in progress or is usually carried on.

And any justice's order once issued under the said section shall continue in force until the nuisance has been abated, or the work for which the entry was necessary has been done.

32. Any ship or vessel lying in any river, harbour, or other water shall be subject to the jurisdiction of the nuisance authority of the district within which such river, harbour, or other water is, and be within the provisions of the Nuisances Removal Acts, in the same manner as if it were a house within such jurisdiction, and the master or other officer in charge of such ship shall be deemed for the purposes of the Nuisances Removal Acts to be the occupier of such ship or vessel; but this section shall not apply to any ship or vessel belonging to her Majesty or to any foreign government.

33. Where the guardians are the nuisance authority for part of any parish only, and shall require to expend money on account of such part in execution of

the provisions of the said Acts, the overseers of the parish shall, upon receipt of an order from the said guardians, raise the requisite amount from the persons liable to be assessed to the poor rate therein by a rate to be made in like manner as a poor rate, and shall have all the same powers of making and recovering the same, and of paying the expense of collecting the rate when made, and shall account to the auditor of the district for receipt and disbursement of the same, in like manner, and with the same consequences, as in the case of the poor rate made by them.

34. That it shall be lawful for the nuisance authority, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said Nuisances Removal Acts or this Act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the Nuisance Removal Acts, and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent: provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application made to him for that purpose by or on behalf of the nuisance authority, truly to disclose the amount of his rent and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier; provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner or occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay or discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord or tenant.

### PART III.

#### *Miscellaneous.*

35. On application to one of her Majesty's principal secretaries of state by the nuisance authority of the city of *London*, or any district or parish included within the Act for the better local government of the metropolis, or of any municipal borough, or of any place under the Local Government Act, 1858, or any local improvement Act, or of any city or town containing, according to the census for the time being in force, a population of not less than five thousand inhabitants, the secretary of state may, as he may think fit, by notice to be published in the *London Gazette*, declare the following enactment to be in force in the district of such nuisance authority, and from and after the publication of such notice the nuisance authority shall

be empowered to make regulations for the following matters; that is to say,

1. For fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family:
2. For the registration of houses thus let or occupied in lodgings:
3. For the inspection of such houses, and the keeping the same in a cleanly and wholesome state:
4. For enforcing therein the provision of privy accommodation and other appliances and means of cleanliness in proportion to the number of lodgings and occupiers, and the cleansing and ventilation of the common passages and staircases:
5. For the cleansing and lime-whiting at stated times of such premises:

The nuisance authority may provide for the enforcement of the above regulations by penalties not exceeding forty shillings for any one offence, with an additional penalty not exceeding twenty shillings for every day during which a default in obeying such regulations may continue; but such regulations shall not be of any validity unless and until they shall have been confirmed by the secretary of state.

But this section shall not apply to common lodging houses within the provisions of the Common Lodging Houses Act, 1851, or any Act amending the same.

36. Where two convictions against the provisions of any Act relating to the overcrowding of a house, or the occupation of a cellar as a separate dwelling place, shall have taken place within the period of three months, whether the persons so convicted were or were not the same, it shall be lawful for any two justices to direct the closing of such premises for such time as they may deem necessary, and, in the case of cellars occupied as aforesaid, to empower the nuisance authority to permanently close the same, in such manner as they may deem fit, at their own cost.

37. The sewer authority, or in the metropolis the nuisance authority, may provide for the use of the inhabitants with its district hospitals or temporary places for the reception of the sick.

Such authority may itself build such hospitals or places of reception, or make contracts for the use of any existing hospital or part of a hospital, or for the temporary use of any place for the reception of the sick.

It may enter into any agreement with any person or body of persons having the management of any hospital for the reception of the sick inhabitants of its district, on payment by the sewer authority of such annual or other sum as may be agreed upon.

The carrying into effect this section shall in the case of a sewer authority be deemed to be one of the purposes of the said Sewage Utilization Act, 1865, and all the provisions of the said Act shall apply accordingly.

Two or more authorities having respectively the power to provide separate hospitals may combine in providing a common hospital, and all expenses incurred by such authorities in providing such hospital shall be deemed to be expenses incurred by them re-

spectively in carrying into effect the purposes of this Act.

38. Any person suffering from any dangerous infectious disorder who wilfully exposes himself, without proper precaution against spreading the said disorder, in any street, public place, or public conveyance, and any person in charge of one so suffering who so exposes the sufferer, and any owner or driver of a public conveyance who does not immediately provide for the disinfection of his conveyance after it has, with the knowledge of such owner or driver, conveyed any such sufferer, and any person who without previous disinfection gives, lends, sells, transmits, or exposes any bedding, clothing, rags, or other things which have been exposed to infection from such disorders, shall, on conviction of such offence before any justice, be liable to a penalty not exceeding five pounds: provided that no proceedings under this section shall be taken against persons transmitting with proper precautions any such bedding, clothing, rags, or other things for the purpose of having the same disinfected.

39. If any person knowingly lets any house, room, or part of a house in which any person suffering from any dangerous infectious disorder has been to any other person without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a qualified medical practitioner as testified by a certificate given by him, such person shall be liable to a penalty not exceeding twenty pounds. For the purposes of this section the keeper of an inn shall be deemed to let part of a house to any person admitted as a guest into such inn.

40. Where in any place two or more boards of guardians of local authorities have jurisdiction, the privy council may, by any order made under The Diseases Prevention Act, 1855, authorize or require such boards to act together for the purposes of that Act, and may prescribe the mode of such joint action and of defraying the costs thereof.

41. In any proceedings under the Common Lodging Houses Act, 1851, if the inmates of a house or part of a house allege that they are members of the same family, the burden of proving such allegation shall lie on the persons making it.

42. The sixty-seventh section of The Public Health Act, 1848, relating to cellar dwellings, shall apply to every place in *England* and *Ireland* where such dwellings are not regulated by any other Act of Parliament, and in applying that section to places where it is not in force at the time of the passing of this Act the expression "this Act" shall be construed to mean the "Sanitary Act, 1866," and not the said Public Health Act, 1848. In construing the said sixty-seventh section as applied by this Act, nuisance authority shall be substituted for the local board.

43. Local boards acting in execution of The Local Government Act, 1858, may adopt the Act to encourage the establishment of public baths and wash-houses, and any Act amending the same, for districts in which those Acts are not already in force, and when they have adopted the said Acts they shall have all the powers, duties, and rights of commissioners under the said Acts; and all expenses incurred by any local board in carrying into execution the Acts

referred to in this section shall be defrayed out of the general district rates, and all receipts by them under the said Acts shall be carried to the district fund account.

44. When the district of a burial board is contiguous with the district of a local board of health, the burial board may, by resolution of the vestry, and by agreement of the burial board and local board, transfer to the local board all their estate, property, rights, powers, duties, and liabilities, and from and after such transfer the local board shall have all such estate, property, rights, powers, duties, and liabilities as if the local board had been appointed a burial board by order in council under the fourth section of the Act of the session of the twentieth and twenty-first years of the reign of her present Majesty, chapter eighty-one.

45. If any person wilfully damages any works or property belonging to any local board, sewer authority, or nuisance authority, he shall be liable to a penalty not exceeding five pounds.

46. The following bodies, that is to say, local boards, sewer authorities, and nuisance authorities, if not already incorporated, shall respectively be bodies corporate designated by such names as they may usually bear or adopt, with power to sue and be sued in such names, and to hold lands for the purposes of the several Acts conferring powers on such bodies respectively in their several characters of local boards, sewer authorities, or nuisance authorities.

47. The authority conferred on one of her Majesty's principal secretaries of state by section seventy-five of the Local Government Act, 1858, to empower by provisional order a local board to put in force, with reference to the land referred to in such order, the powers of The Lands Clauses Consolidation Act, 1845, with respect to the purchase and taking of lands otherwise than by agreement, shall extend and apply and shall be deemed to have always extended and applied to every case in which, by The Public Health Act, 1848, and The Local Government Act, 1858, or either of them, or any Act extending or amending those Acts, or either of them, a local board are authorized to purchase, provide, use, or take lands or premises for any of the purposes of the said Acts, or either of them, or of any such Act as aforesaid; and sections seventy-three and eighty-four of the Public Health Act, 1848, shall be construed as if the words "by agreement" therein respectively used had been expressly repealed by section seventy-five of the Local Government Act, 1858.

48. Any local board, sewer authority, or nuisance authority may appear before any justice or justices, or in any legal proceeding, by its clerk or by any officer or member authorized generally or in respect of any special proceeding by resolution of such board or authority, and such person being so authorized shall be at liberty to institute and carry on any proceeding which the nuisance authority is authorized to institute and carry on under the Nuisance Removal Acts or this Act.

49. Where complaint is made to one of her Majesty's principal secretaries of state that a sewer authority or local board of health has made default in providing its district with sufficient sewers, or in the

maintenance of existing sewers, or in providing its district with a supply of water in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost, or that a nuisance authority has made default in enforcing the provisions of the Nuisance Removal Acts, or that a local board has made default in enforcing the provisions of the Local Government Act, the said secretary of state, if satisfied after due inquiry made by him that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of its duty in the matter of such complaint; and if such duty is not performed by the time limited in the order, the said secretary of state shall appoint some person to perform the same, and shall by order direct that the expenses of performing the same, together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the authority in default; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench, and be enforced in the same manner as if the same were an order of such Court.

50. All expenses incurred by a sewer authority or local board in giving a supply of water to premises under the provisions of the seventy-sixth section of The Public Health Act, 1848, or the fifty-first section of The Local Government Act, 1858, and recoverable from the owners of the premises supplied, may be recovered in a summary manner.

51. All penalties imposed by the Act of the sixth year of George the Fourth, chapter seventy-eight, intitled *An Act to repeal the several Laws relating to Quarantine, and to make other provisions in lieu thereof*, may be reduced by the justices or court having jurisdiction in respect of such penalties to such sum as the justices or court think just.

52. Every vessel having on board any person affected with a dangerous or infectious disorder shall be deemed to be within the provisions of the Act of the sixth year of King George the Fourth, chapter seventy-eight, although such vessel has not commenced her voyage, or has come from or is bound for some place in the United Kingdom; and the lords and others of her Majesty's most honourable privy council, or any three or more of them (the lord president of the council or one of her Majesty's principal secretaries of state being one), may, by order or orders to be by them from time to time made, make such rules, orders, and regulations as to them shall seem fit, and every such order shall be certified under the hand of the clerk in ordinary of her Majesty's privy council, and shall be published in the *London Gazette*, and such publication shall be conclusive evidence of such order to all intents and purposes; and such orders shall be binding and be carried into effect as soon as the same shall have been so published, or at such other time as shall be fixed by such orders, with a view to the treatment of persons affected with cholera and epidemic, endemic, and contagious disease, and preventing the spread of cholera and such other diseases as well on the seas, rivers, and waters of the United



Kingdom, and on the high seas within three miles of the coasts thereof, as on land; and to declare and determine by what nuisance authority or authorities such orders, rules, and regulations shall be enforced and executed; and any expenses incurred by such nuisance authority or authorities shall be deemed to be expenses incurred by it or them in carrying into effect the Nuisances Removal Act.

53. Where notice has been given by the nuisance authority, or their officer or officers, for the periodical removal of manure or other refuse matter from mews, stables, or other premises (whether such notice shall be by public announcement in the locality or otherwise), and subsequent to such notice, the person or persons to whom the manure or other refuse matter belongs shall not so remove the same, or shall permit a further accumulation, and shall not continue such periodical removal at such intervals as the nuisance authority, or their officer or officers, shall direct, he or they shall be liable, without further notice, to a penalty of twenty shillings *per day* for every day during which such manure or other refuse matter shall be permitted to accumulate, such penalty to be recovered in a summary manner: Provided always, that this section shall not apply to any place where the board of guardians or overseers of the poor are the nuisance authority.

54. Penalties under this Act, and expenses directed to be recovered in a summary manner, may be recovered before two justices in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen Victoria, chapter forty-three, intituled, *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*, or any Act amending the same.

55. All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred on any local authority by Act of Parliament, law, or custom, and such authority may exercise such other powers in the same manner as if this Act had not passed.

#### PART IV.

##### *Application of Act to Ireland.*

56. In applying the first part of this Act to *Ireland* the following changes shall be observed:

- (1.) The provisions of the sections numbered from seventy-five to eighty, both included, of The Public Health Act, 1848, and sections fifty-one, fifty-two, and fifty-three of the Local Government Act, 1858, and section twenty of The Local Government Act, 1858, Amendment Act, 1861, referred to in the First Part of this Act, shall for all purposes connected with the execution of this Act be extended to *Ireland*:
- (2.) The Sewage Utilization Act, 1865, shall be amended by substituting in *Ireland* the sewer authority, as defined by the First Schedule to this Act, for the sewers authority as defined by said Act.

57. The Nuisance Removal Acts as amended by

the Second Part of this Act shall apply to *Ireland*; provided, however, that in such application the following changes shall be observed:

- (1.) Sewer authority as defined by the Sewage Utilization Act, 1865, and amended by this Act, shall in *Ireland* be the nuisance authority for executing the Nuisance Removal Acts:
- (2.) The expenses of executing the Nuisance Removal Acts shall be defrayed out of the funds herein-after provided:
- (3.) The penalties shall be recovered in the manner herein-after provided:
- (4.) The expressions "mayor, aldermen, and burgesses," "council," "borough rate," "borough fund," and "town rate," shall in the First Schedule hereto have respectively the same meaning as in the Acts for the regulation of municipal corporations in *Ireland*:
- (5.) For the purposes of the twenty-second section of The Nuisance Removal Act, 1855, the nuisance authority shall in *Ireland* have the power of entering land conferred by the Sewage Utilization Act, 1865, and shall have the same power of levying assessments under the said section that they have of levying any other rates they are authorized by law to impose.

58. In *Ireland* the nuisance authority, not being the guardians of the poor, shall pay all expenses incurred by them in carrying the Nuisance Removal Acts into effect out of the fund in the First Schedule in that behalf mentioned, and where such fund arises wholly or in part from rates shall have, in addition to their existing powers of rating, all such powers for making and levying any extra rate, if necessary, respectively, as in the case of any rate authorized to be made under the provisions of the respective Acts of Parliament under which the nuisance authorities are constituted or authorized to levy rates; and all provisions of such Acts respectively shall be applicable in respect thereof; provided that when the rates to be assessed by such authority are limited by law to a certain rateable amount, such limitation shall not apply or extend to expenses incurred in carrying this Act into execution; and it shall be lawful for such authority to assess the expenses under this Act in addition to such limited assessment.

59. In *Ireland*, a nuisance authority, being guardians of the poor, shall pay all expenses incurred by them in carrying this Act into effect out of the poor rates of the union, and charge the same to the union, or any electoral division or electoral divisions thereof, in such manner as the poor law commissioners shall from time to time, by general orders applicable to classes of cases, or by order in any particular case, direct.

60. In *Ireland*, penalties under this Act and expenses or compensation directed to be recovered in a summary manner, and nuisances and other offences liable to be prosecuted summarily, shall be recovered and prosecuted in manner directed by the Petty Sessions (*Ireland*) Act, 1851, or any Act amending the same; and all penalties recovered by any authority under this Act shall be paid to them respectively, and

by them applied in aid of their expenses under this Act.

Any order authorized to be made by justices under this Act shall be deemed to be an order made upon a complaint on which justices are authorized to make orders under the last-mentioned Act.

61. In applying the provisions of Part III. of this Act to *Ireland* the following changes shall be observed:

- (1.) Application for power to make regulations as to lodging houses may be made by any nuisance authority, except a board of guardians, and shall be made to the Lord Lieutenant in council, and the said Lord Lieutenant in council shall have the power of declaring the enactments as to lodging houses in the Third Part of this Act to be in force in any nuisance district:
- (2.) The said Lord Lieutenant in council shall have and exercise the power, in respect of boards of guardians acting together, vested in the privy council by the said Third Part of this Act:
- (3.) In *Ireland*, any nuisance authority, except a board of guardians, may exercise the powers conferred on local boards acting in the execution of The Local Government Act, 1858, by the said Third Part of this Act:
- (4.) Sewer and nuisance authorities in *Ireland* shall be incorporated for the purposes of this Act by the names set forth in the said First Schedule hereto; and such sewer or nuisance authorities may hold lands by such names for the purposes of the burial ground (*Ireland*) Act, 1856:
- (5.) The penalties under the Third Part of this Act shall be recovered in like manner as hereinbefore provided with respect to penalties under the Second Part of this Act.

62. The Diseases Prevention Act, 1855, as amended by the Nuisance Removal and Disease Prevention Amendment Act, 1860, and this Act, shall extend to *Ireland*: provided, however, that in such application the following changes shall be observed:

- (1.) The Lord Lieutenant in council shall have the power with respect to *Ireland* which the privy council has under such provisions for the prevention of disease in *England*:
- (2.) The commissioners for administering the laws for the relief of the poor in *Ireland*, hereinafter called the poor law commissioners, shall be the authority in *Ireland* for issuing regulations to carry the provisions of said Act into effect:
- (3.) The regulations of the poor law commissioners shall be authenticated in like manner as orders of theirs under the Dispensary Act, 1851, stat. 14 & 15 *Vict.* c. 68, sect. 8:
- (4.) In defraying the expenses of the prevention of disease out of the poor rate of the union under this Act the guardians of the poor shall charge the same to the union, or any dispensary district or electoral division or divisions thereof, in such manner as the poor law commissioners shall from time to

time, by general orders applicable to classes of cases, or by orders in particular cases, direct.

63. In *Ireland*, all committees, inspectors, medical officers, and other persons appointed or employed under the powers of statute fourteenth and fifteenth *Victoria*, chapter sixty-eight, (the Dispensaries Act, 1851,) shall and they are hereby required within their respective districts to aid the local authority, and such officers or persons as they shall appoint or employ, in the superintendence and execution of any directions and regulations which may at any time be issued by the poor law commissioners for the time being under the authority and by virtue of this Act.

64. In *Ireland*, the provisions of The Dispensary Act, 1851 (statute 14 & 15 *Vict.* c. 68), with respect to the duties and appointment of medical inspectors, shall be incorporated with this Act, and the prevention of disease and inquiry into public health under this Act shall be deemed one of the purposes for which such medical inspectors have been or may be appointed, in like manner as if its provisions had been referred to in the said Act of 1851, instead of the provisions of the said Nuisance Removal and Diseases Prevention Act of 1848.

65. In *Ireland*, whenever in compliance with any direction or regulation of the poor law commissioners which they may be empowered to make under the laws for the time being as to the public health, any medical officer of a union or dispensary district, or any other medical practitioner specially employed by the guardians for the purpose, shall perform any extra medical service in any union or part of a union, it shall and may be lawful for the guardians of the union to determine, subject to the approval of the said commissioners, and if they shall not approve the amount determined by the guardians, for the said commissioners to fix by order under their seal, such remuneration, proportioned to the nature and extent of such services as aforesaid, as to them shall appear just and reasonable; and the amount of such remuneration shall be paid to such medical officer or other medical practitioner by the guardians of the union out of the rates raised for the relief of the poor, and shall be charged either to the union at large, or to such part or parts of the union according to the nature of the case, as the said commissioners shall in each case direct.

66. The Lord Lieutenant in council may from time to time direct the poor law commissioners to cause to be made such inquiries as the Lord Lieutenant in council see fit in relation to any matters concerning the public health in any place or places in *Ireland*, and the poor law commissioners shall report the result of such inquiries to the Lord Lieutenant in council.

67. Publication shall be made in the *Dublin Gazette* in any case in *Ireland* where publication in the *London Gazette* is required in *England*.

68. All powers relating to the execution of this Act in *England*, and by this Act vested in one of her Majesty's principal secretaries of state, shall with regard to the execution of this Act in *Ireland*, in all cases not herein-before expressly provided for, be vested in the Lord Lieutenant or other chief governor or governors of *Ireland*; and all powers relating to the execution of this Act in *England*, and by this

Act vested in the privy council in *England*, shall, with regard to the execution of this Act in *Ireland*, in all cases not herein-before expressly provided for, be vested in the Lord Lieutenant in council in *Ireland*.

69. From and after the passing of this Act the Acts set forth in the Second Schedule hereto shall be re-

pealed, so far as they are still in force: provided always that all proceedings commenced or taken under the said Acts and not yet completed may be proceeded with under said Acts, and that all contracts and works undertaken by virtue of said Acts shall continue and be effective as if said Acts had not been repealed.

## SCHEDULES.

### FIRST SCHEDULE.

#### APPLICATION TO IRELAND.

Description of Sewers and Nuisance Authority in Ireland.	Description of Sewers and Nuisance District in Ireland.	Corporate Name for the Purpose of suing or being sued, or holding Property under the Provisions of this Act.	Rate or Fund out of which Expenses incurred by Sewers or Nuisance Authority under this Act to be defrayed.
The Right Honorable the Lord Mayor, Aldermen, and Burgesses, acting by the Town Council.	The City of Dublin	The Right Honorable the Lord Mayor, Aldermen, and Burgesses of the City of Dublin.	The Borough Rate or Borough Fund.
The Mayor, Aldermen, and Burgesses, acting by the Town Council.	Towns Corporate, with exception of Dublin	The Mayor, Aldermen, and Burgesses of the City or Town of —	The Borough Rate or Borough Fund.
The Town Commissioners	Towns having Town Commissioners, under the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 118), or under any Local Act.	The Town Commissioners of —	Any Rate levied by the Commissioners.
The Township Commissioners	Townships having Commissioners under Local Acts.	The Township Commissioners of —	
The Commissioners appointed by virtue of an Act made in the 9th Year of the Reign of George the Fourth, intituled "An Act to make Provision for the lighting, cleansing, and watching of Cities and Towns Corporate and Market Towns in Ireland in certain Cases."	Towns under such Commissioners.	The Lighting and Cleansing Commissioners of the Town of —	
The Municipal Commissioners	Towns having Municipal Commissioners, under 3 & 4 Vict. c. 108.	The Municipal Commissioners of —	The Town Fund.
The Guardians of the Poor of each Union.	Such Part of each Union as is not under another Sewer or Nuisance Authority.	The Guardians of the Poor of the — Union.	The Poor Rate of Union.

### SECOND SCHEDULE.

#### Statutes repealed.

Local Boards of Health Act for Ireland, 1818; statute 58 Geo. 3, c. 47, ss. 10 to 15, inclusive.

Officers of Health Act for Ireland, 1819; statute 59 Geo. 3, c. 41.

Nuisance Removal and Disease Prevention Act, 1848.

Nuisance Removal and Disease Prevention Act, 1849.

#### CAP. XCI.

An Act to apply a sum out of the Consolidated Fund and the Surplus of Ways and Means to the Service

of the Year ending Thirty-first *March* One thousand eight hundred and sixty-seven, and to appropriate the Supplies granted in this Session of Parliament. [10th August 1866.]

#### CAP. XCII.

An Act to confirm certain Provisional Orders made under an Act of the Fifteenth Years of Her present Majesty, to facilitate arrangements for the Relief of Turnpike Trusts. [10th August, 1866.]

#### CAP. XCIII.

An Act to confirm a Provisional Order under "The

General Police and Improvement (*Scotland*) Act, 1862," relating to the Burgh of *Aberdeen*.

[10th August 1866.]

CAP. XCIV.

An Act to authorize the Inclosure of certain Lands in pursuance of a Report from the Inclosure Commissioners for *England* and *Wales*.

[10th August 1866.]

CAP. XCV.

An Act to enable the Public Works Loan Commissioners to make temporary Advances to Railway Companies in *Ireland*.

[10th August, 1866.]

Sec. 1. *Short title.*

2. *Power to charge not exceeding £500,000 upon the consolidated fund for purposes of this Act, and to be at the disposal of the public works loan commissioners.*
3. *Powers of Public Works Loans Acts extended to this Act.*
4. *Power to make advances of money to railway companies in Ireland.*
5. *Power to appoint receiver in default of payment for six months.*
6. *In default of payment for twelve months undertaking vested in secretary of public works loan commissioners.*
7. *Application of moneys recovered under last preceding section.*
8. *Securities under this Act declared valid.*
9. *Exemption from stamp duty.*

WHEREAS in the present state of the monetary affairs of the kingdom it is expedient that provision should be made for authorizing loans for short periods to railway companies in *Ireland* :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as The Railway Companies (*Ireland*) Temporary Advances Act, 1866.

2. For the purposes of loans under this Act, the commissioners of her Majesty's treasury may from time to time, by warrant under the hands of two or more of them, cause to be issued out of the consolidated fund of the United Kingdom, or the growing produce thereof, to the account of the commissioners for the reduction of the national debt, any sum or sums of money not exceeding in the whole five hundred thousand pounds, such money to be applied exclusively under this Act, and to be at the disposal of the public works loan commissioners (herein-after called "the commissioners") in like manner in all respects as money placed at their disposal under the Act of the session of the twenty-fourth and twenty-fifth years of her Majesty (chapter eighty), and the Acts therein recited, subject nevertheless to the provisions of this Act, which provisions shall have full effect notwithstanding anything in the Public Works Loan Act, 1853, or any Act therein mentioned, to the contrary contained.

3. All the several clauses, powers, authorities, pro-

visoes, enactments, directions, regulations, restrictions, privileges, priorities, advantages, penalties, and forfeitures contained in and conferred and imposed by the said Acts or any of them, so far as the same may be made applicable and are not varied by this Act, shall be taken to extend to this Act, and to everything to be done in pursuance of this Act, as if the same were herein repeated and set forth.

4. The commissioners may, out of the money for the time being at their disposal under this Act, from time to time lend to any railway company in *Ireland*, and any such railway company may from time to time borrow from the commissioners, such sums as may be agreed upon, subject and according to the following provisions :

1. Every loan shall be made either for the purpose of discharging the principal of money temporarily borrowed and actually applied within three calendar months before the passing of this Act in discharging principal money secured by any debentures or other securities of the company duly issued before the passing of this Act pursuant to the Acts relating to the company; or for the purpose of discharging the principal money secured on any such debentures or other securities due at the time of the passing of this Act, or falling due within three calendar months afterwards, or within such further period not exceeding twelve calendar months from the passing of this Act as the commissioners of her Majesty's treasury may from time to time direct :
2. The interest made payable on each loan shall be at such rate as the commissioners of her Majesty's treasury shall from time to time direct, but not less than four pounds *per cent. per annum*, nor less than the rate of interest payable on the principal money in discharge whereof the loan is applied: provided that under special circumstances the commissioners of her Majesty's treasury may by warrant under their hands direct interest to be payable at a rate lower than such last-mentioned rate, but in such case a copy of each warrant shall be laid before Parliament :
3. The repayment of every loan, with the interest thereon, at a time not later than twelve calendar months from the date of the advance, shall be secured by a debenture or other security issued under the Acts of Parliament regulating the company to which the loan is made, and such payment may be further secured in any mode to be agreed on between the company and the commissioners, but it shall not be obligatory on the commissioners to require any other security besides the debenture :
4. The commissioners shall not be bound to make any loan under this Act unless the security offered is in their opinion sufficient and proper.
5. If any principal money or interest secured by any debenture or other security given under this Act shall remain unpaid at the expiration of six months after the same shall have become due, the commissioners may, by order in writing under the hands of

any three of them, appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest or such principal and interest, as the case may be, together with all costs and expenses incurred by the commissioners, including the expenses of receiving the tolls or sums aforesaid, be fully paid, and upon such appointment being made all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed, and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such receiver shall cease.

6. If any principal money or interest secured by any debenture or other security given under this Act shall remain unpaid at the expiration of one year after the same shall have become due, then the whole undertaking of the company by whom such debenture or security was given, and all their lands, works, rolling stock, and other property and effects of every kind, shall, immediately on the expiration of such one year, become vested in the secretary of the public works loan commissioners, freed from all mortgages, charges, or incumbrances whatsoever affecting the same, but by way of mortgage for securing payment of the principal monies and interest due and to become due under all debentures or other securities duly issued and registered by the company before the mortgage under this section takes effect, in the same order and priority, and with the same benefit of special security (if any) duly given, as may be then subsisting, and by virtue of the mortgage effected under this section the commissioners shall, under their several acts, have, as against the company, all the same powers, rights, and privileges as if such mortgage had formed the first charge on the property of the company, and had been originally made under the several Acts relating to the commissioners, for securing the amount of a loan advanced under those Acts, and default had been made in payment of the principal and interest due in respect of such loan.

7. The moneys recovered or received by the commissioners in respect of any mortgage which shall take effect under the last preceding section shall be applied as follows:

1. In payment of all costs, charges, and expenses incurred in executing or putting in force any powers or rights conferred by the mortgage, or in realizing the property mortgaged, or in the recovery, application, or distribution of the money received or secured thereunder, or otherwise in reference thereto;
2. In payment of the amounts due under all debentures or other securities duly issued and registered by the company before the mortgage took effect, in the same order and priority, and with the same benefit of special security (if any) duly given, and in the same manner in all respects in which such amounts would be payable out of the assets of the company in case no mortgage had been effected, under the last preceding section;
3. The surplus may be paid to the company, or may be paid by the secretary of the commis-

sioners into the Bank of Ireland, to the credit of the accountant-general of the Court of Chancery in Ireland, "The account of the surplus capital of the company (naming the company)," pursuant to the provisions of the Act of the eleventh and twelfth years of her Majesty, chapter sixty-eight, intituled *An Act for extending to Ireland an Act passed in the last Session of Parliament, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees,"* and for the purpose of any such payment into court the secretary of the commissioners shall be deemed a trustee of such surplus within the meaning of the said Act:

4. Such orders as shall seem fit shall from time to time be made by the Court of Chancery in Ireland, under the said last-mentioned Act, for payment and distribution of such surplus or any part thereof to the company, or to or among any companies or persons entitled to such surplus or any part thereof.

8. Every debenture or other security given by any company for a loan under this Act shall be deemed to be a debenture or security issued in accordance with the Acts regulating the company, and shall not be rendered invalid by any want of compliance with the provisions of such Acts, or by any other omission or informality whatever.

9. No debenture or other security executed for securing payment of any loan under this Act shall be liable to any stamp duty whatever.

#### CAP. XCVI.

An Act to amend the Bills of Sale Act, 1854.

[10th August, 1866.]

#### CAP. XCVII.

An Act further to promote the Cultivation of Oysters in Ireland, and to amend the Acts for that Purpose.

[10th August, 1866.]

Recital of 5 & 6 Vict. c. 106, amended by 8 & 9 Vict. c. 108, 13 & 14 Vict. c. 88, &c.

Sec. 1. *Repeal of so much of the said Acts as relates to the granting of licences.*

2. *Short title.*

3. *Construction of terms.*

4. *Power to commissioners to grant licences.*

5. *Such licences to be in writing under hands of commissioners.*

6. *Notice to be given previously to the granting of such licences. No licences to be granted where a public right of fishing exists.*

7. *Notice to be given of the granting of such licence. A copy of licence to be lodged with clerk of the peace, &c.*

8. *Appeal to the Lord Lieutenant in council.*

9. *Effect of such licences.*

10. *Licence may be determinable by certificate of the commissioners.*

11. *Offenders to be prosecuted at petty sessions.*

12. *A copy of licence certified by clerk of the peace to be evidence.*

13. *Penalties for injuring oyster beds.*
14. *Power to the commissioners to revoke licences in certain cases.*
15. *Power to alter licences heretofore granted so as to give effect to any agreements.*
16. *This Act to be read together with former Acts.*

WHEREAS an Act was passed in the session of Parliament held in the fifth and sixth years of the reign of her present Majesty, intituled *An Act to regulate the Irish Fisheries*, and which said Act has since been amended by a certain Act of the session held in the eighth and ninth years of the reign of her said Majesty, chapter one hundred and eight, and by a certain other Act of the session held in the thirteenth and fourteenth years of the same reign, chapter eighty-eight, and by other Acts; and by the said Acts provision is made for the protection and regulation of the oyster fisheries in *Ireland*, and for the granting of licences to owners and occupiers of lands and others to plant and form oyster beds and layings:

And whereas it is expedient to promote the cultivation of oysters in all places where no substantially profitable public right of fishing for oysters exists, and to amend the said statutory enactments in force in *Ireland*, so far as and the such oyster fisheries and oyster beds and layings, and the formation, encouragement, and protection of the same:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act so much of the aforesaid Acts of Parliament, and of any Act amending or extending the same as relates to the granting of licences to form oyster beds or layings, shall be and the same is hereby repealed: provided always, that as to all acts done, rights conferred, or penalties or liabilities incurred by virtue of the said statutes before the passing of this Act, the said enactment so hereby repealed shall be deemed to continue in full force and effect.

2. This Act may be cited for all purposes as the "*Oyster Fishery (Ireland) Amendment Act, 1866.*"

3. In the construction of this Act the term "commissioners" shall mean the commissioners of public works in *Ireland* as commissioners of fisheries, together with the inspecting commissioners of fisheries in *Ireland* for the time being associated with them for the purpose of executing the said acts, or any one or more of them; the term "owner of lands" shall mean any person entitled to the possession or receipt of the rents and profits of lands for an estate for his own life, or for years determinable on his own life, or for any greater estate, exclusive of any person entitled to such lands by virtue of any lease for lives or years at a rackrent.

4. It shall be lawful for the commissioners to grant a licence to the owner of any land bordering on the sea, or any estuary, or to any person or persons, with the consent of such owner, to form or plant any oyster bed or laying, whether above or below low water-mark: provided always, that the forming and planting of such oyster beds shall not give any exclusive

right or title to the occupancy of the shore, except for the purposes aforesaid.

5. Every such licence shall be in writing and under the hands of the said commissioners, or any two of them, and shall, by reference to a map or otherwise, as to the commissioners shall seem best, define the position and limits of such oyster bed or laying, and may be made subject to such conditions and limitations, and may be perpetual or terminable, as to the said commissioners shall seem proper.

6. Previously to the granting any such licence as aforesaid, the said commissioners shall cause a notice, stating the application for such licence, to be inserted in some newspaper circulating in or near the district within which such licence may be applied for; and such notice shall also state the time and place (not sooner than three weeks from the date of such notice) when and where the said commissioners, or any inspector appointed by them, shall hold a public inquiry in the said district as to the expediency of granting the same; and every such notice shall be given at least three times in some newspaper circulating in such district, and also posted at or near the nearest police station; and no such licence shall be granted in any place where the said commissioners shall be of opinion that the public exercise and enjoy *bona fide* a substantially profitable fishing for oysters, nor within the limits of any oyster bed or oyster fishery the property of any private person.

7. When any such licence shall be granted notice thereof shall be given in like manner as aforesaid in respect to the application for any such licence, and a true copy of every such licence so granted by the said commissioners, signed by the secretary of the said commissioners, shall be lodged with the clerk of the peace of the county within which such licence shall operate; and a copy of such licence, certified under the hand of such clerk of the peace, shall be admitted in evidence in all courts of justice, in the same manner as if the said copy was the original licence of which it shall purport to be a copy.

8. At any time within the period of one month after the granting of such licence it shall be lawful for any person or persons dissatisfied with the same to apply by way of memorial to the Lord Lieutenant in council that such licence may be vacated; and notice of every such memorial, by way of appeal, shall be given to the licensee and to the commissioners; and the Lord Lieutenant in council shall adjudicate upon the matter of such memorial, and either confirm or vacate such licence as to him shall appear expedient.

9. Every such licence so granted as aforesaid, if unappealed from as aforesaid, or if confirmed on such appeal, shall be binding and conclusive on all persons whomsoever, including the Queen's most excellent Majesty, and shall operate to vest in the licensee or licensees, and their heirs, executors, administrators, and assigns, such rights and privileges as shall be thereby given according to the tenor of the same, free from all prior or other rights, titles, estates, or interests whatsoever.

10. That notwithstanding anything in any licence heretofore granted or hereafter to be granted by the commissioners, the same shall be determinable by a certificate of the commissioners (which certificate they

are hereby empowered to make) certifying to the effect that the commissioners are not satisfied that the licensee is not properly cultivating the oyster ground within the limits of such licence; and on any such certificate being made the right by such licence conferred shall by virtue of this Act, and of the certificate as aforesaid, be absolutely determined, and all the provisions of the Acts herein-before recited and referred to, or of this Act, shall cease to operate in relation to such licence as an oyster fishery, or otherwise; and for the purposes of this provision the commissioners may from time with respect to such licence or oyster fishery, make such inquiries and examinations by an inspector, or otherwise, and require from such licensee such information as the commissioners may think necessary or proper; and the licensee shall afford all facilities for such inquiries and examinations, and give such information accordingly.

11. In all cases where any person shall commit any offence against any Act of Parliament, or any section of any Act of Parliament, for the protection of or relating to oyster fisheries in *Ireland*, such person may be prosecuted in a summary way before any justice of the peace sitting in petty sessions; and all the provisions of the "Petty Sessions Act, *Ireland*, 1861," and of the Summary Jurisdiction Act, 1851, shall apply to such offences, and to the jurisdiction of such justices to adjudicate on the same: provided always, that nothing herein contained shall be construed or taken to repeal or affect the provisions contained in the Act first herein before recited, and relating to offences against the said Act, or any of the Acts amending the same.

12. The production of a copy of any such licence certified under the hand of any such clerk of the peace shall be evidence in all courts of law and equity that the licence of which the same may purport to be a copy was duly granted by the said commissioners, and that all matters and things by this Act required to be done previously to the granting of such licence have been duly done and performed.

13. It shall not be lawful for any person other than the licensees or their assigns, their agents, servants, and workmen, within the limits of any oyster bed or laying, knowingly to do any of the following things:—

To use any implement of fishing except a line and hook or a net adapted solely for catching floating fish, and so used as not to disturb or injure in any manner any oyster bed or oysters, or the oyster fishery:

To dredge for any ballast or other substance except under a lawful authority for improving the navigation:

To deposit any stone, ballast, rubbish, or other substance:

To place any implement, apparatus, or thing prejudicial or likely to be prejudicial to any oyster bed or oysters, or brood or spawn thereof, or to the oyster fishery, except for a lawful purpose of navigation or anchorage:

To disturb or injure in any manner, except as last aforesaid, any oyster bed or oysters, or brood or spawn thereof, or the oyster fishery:

To interfere with or take away any of the oys-

ters from such bed, without the consent of the licensees or owners or occupiers of such bed:

And if any person does any act in contravention of this section he shall on summary conviction be liable to the following penalty, namely, to a penalty not exceeding two pounds for the first offence, and not exceeding five pounds for the second offence, and not exceeding ten pounds for the third and every subsequent offence; and every such person shall also be liable to make full compensation to the licensees for all damage sustained by them by reason of his unlawful act, and in default of payment the same may be recovered from him by the licensees by proceedings in any court of competent jurisdiction, whether he has been prosecuted for or convicted of an offence against this section or not.

14. That in any case where any such licence shall be granted by the said commissioners, if it shall appear to them that the licensee under such licence, or his assigns, within the period of three years from the date of such licence has not taken steps proper in their opinion to form the oyster bed or laying in such licence mentioned, then and in such case it shall be lawful for the said commissioners, or any two of them, by an order in writing under their hands, to revoke such licence, and thereupon all the rights and privileges by such licence shall cease and determine: provided always, that previously to the making of such order the said commissioners shall cause a notice in writing stating their intention to make such order to be served upon the person for the time being entitled to such licence, or in case such person cannot be found, the commissioners shall cause such notice to be inserted as an advertisement three times at least in some newspaper circulating in such district; and no such order shall be made till after the expiration of one month from the service of such notice, or from the date of the last of such advertisements, which shall last happen.

15. That notwithstanding anything in any Act to the contrary, it may be lawful for the commissioners to alter any licence heretofore granted by them, or to grant a new licence in lieu thereof, to the licensee or his representative, so as to give effect to any agreement or undertaking which may have been given or entered into by or on behalf of any such licensee with any person or body subsequently to the date of any such licence.

16. This Act shall be read together and construed as one Act with the said Acts now in force for the regulation of the sea fisheries in *Ireland*.

#### CAP. XCVIII.

An Act to extend the Duration of The Dockyard Extensions Act (1865). [10th August, 1866.]

#### CAP. XCIX.

An Act to reduce the Number of Judges in the Landed Estates Court in *Ireland*, and to reduce the Duties payable under the Record of Title and Land Debentures Acts. [10th August, 1866.]

21 & 22 Vict. c. 72; 24 & 25 Vict. c. 123; 28 & 29 Vict. c. 88, and 28 & 29 Vict. c. 101.



- Sec. 1. *Judges of the court to be two only.*
2. *Salaries of judges.*
3. *In event of difference of opinion between the judges, rules, &c. signed by Lord Chancellor and one judge to be valid.*
4. *Rates of duty on certain estates reduced.*
5. *Sect. 29 of 28 & 29 Vict. c. 101, as to stamp duty on land debentures repealed.*
6. *Appointment of recording examiner.*
7. *Salary of recording examiner.*
8. *Future appointment of recording examiner.*
9. *Removal, &c. of recording examiner.*
10. *Recording examiners may act for each other.*
11. *Chief and other clerks to transact such business as the judges may direct.*
12. *Power to consolidate the offices of registrar and recording examiner.*
13. *Messengers, &c. to hold during pleasure.*
14. *Short title. Construction of Act.*

WHEREAS an Act was passed in the session of Parliament holden in the twenty-first and twenty-second years of the reign of her present Majesty, intituled *An Act to facilitate the Sale and Transfer of Land in Ireland*, whereby it was enacted that there should be three judges of the Landed Estates Court thereby constituted:

‘And whereas a vacancy has arisen in consequence of the demise of *Charles James Hargreave*, one of the said judges, and it is not expedient, having regard to the state of the judicial business of the court, that such vacancy should be filled up:

‘And whereas an Act was passed in the session of Parliament holden in the twenty-fourth and twenty-fifth years of the reign of her Majesty, intituled *An Act to reduce and alter the Rate of Duty payable on Proceedings under the Statute of the twenty-first and Twenty-second Years of Victoria, Chapter Seventy-two, Section Eighty-eight, and for other Purposes*; and it is expedient further to reduce the rates of duty payable in respect of the larger estates, and in respect of partitions, exchanges, and divisions of land:

‘And whereas two Acts were passed in the last session of Parliament, intituled respectively, the “Record of Title Act (*Ireland*), 1865,” and the Land Debentures (*Ireland*) Act, 1865,” and it is expedient to reduce the stamp duty payable in respect of land debentures, and to make better provision for carrying out the said Acts of the last session of Parliament:

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. There shall be two judges only of the Landed Estates Court, and all powers and authorities which might by law be exercised by three judges may be exercised by the two existing judges of the court, and by their successors in office.

2. There shall be paid to each judge a salary of three thousand pounds a year. Such salary shall be in lieu of the salary provided by the first-mentioned Act, charged upon and payable out of the consolidated fund in the same manner in all respects as the

salaries provided by the first-mentioned Act. The provisions of the said Act with respect to the retiring pensions of the judges therein mentioned shall be applicable to the judges of the said court as constituted by this Act.

3. In the event of any difference of opinion arising between the judges of the court as to any proposed rule, regulation, order, or direction (excepting for the removal of any officer) in which their concurrence may be required, it shall be lawful for the Lord Chancellor of Ireland, on such matter being submitted to him, to determine the same; and every rule, regulation, order, or direction (except as aforesaid), when signed by the Lord Chancellor and by one of the said judges, shall thereupon be as valid and binding for all purposes as though such rule, regulation, order, or direction had been signed by both of the said judges.

4. The several duties set out in the Schedule hereto shall be levied and paid in lieu of those now payable; and so much of the said recited Act of the twenty-fourth and twenty-fifth years of the reign of her Majesty as imposes higher rates of duty than those set out in the Schedule hereto is hereby repealed.

5. The twenty-ninth section of “The Land Debentures (*Ireland*) Act, 1865,” is hereby repealed, and no certificate under that Act shall be deemed to be a deed within the meaning of the Stamp Acts. A debenture under the said Act shall be deemed to be a mortgage for the amount of the principal money thereby secured, and a transfer of a debenture shall be deemed to be a transfer of a mortgage, and the court shall frame and promulgate such rules and directions as it shall consider expedient for securing the payment of the transfer duty: provided that where on the original making and issuing of any debenture the same shall be stamped with a duty of four shillings for every hundred pounds and also for any fractional part of one hundred pounds of the principal money thereby secured, then every transfer thereafter made of such debenture shall be exempt from the stamp duty which would otherwise be payable in respect of the transfer.

6. ‘And whereas by section sixty-two of the Record of Title Act (*Ireland*), one thousand eight hundred and sixty-five, it is enacted that the record shall be under the management of the following principal officers of the Landed Estates Court; *videlicet*, the examiners and the registrar, or of such one of them as the judges shall from time to time direct, and in case of his absence the judges shall appoint one other of the said officers to supply his place; and the judges shall adjust the duties now performed by the said officers in such manner as may appear expedient for the purposes aforesaid, and shall so arrange the same that some one of the said officers shall be in attendance daily (except as aforesaid) throughout the year:’ be it enacted, that *Richard Denny Urlin*, barrister-at-law, the examiner of the late Judge *Hargreave*, deceased, shall, so long as he shall continue to be an examiner of the court, be employed under and by the judges of the court in the management of the record of title and of the record of title office, and shall be styled “the recording examiner” of the court.

7. There shall be paid to the recording examiner

of the court, in addition to his salary as one of the examiners of the court, and as a compensation for his increased duty during vacations, a sum of two hundred pounds a year, payable out of the fund to be provided by Parliament for the expenses of the court.

8. When any vacancy shall occur in the office of recording examiner, it shall be lawful for the Lord Lieutenant of *Ireland* by warrant on the joint recommendation of the judges of the court, or in default of such joint recommendation at his own discretion, to appoint thereto a fit person, being a barrister-at-law or solicitor of at least ten years standing, or having filled some office or offices in the Landed Estates Court for ten years.

9. The said *Richard Denny Urtin*, and every recording examiner hereafter to be appointed, shall be removeable in the same manner and for the same cause, and shall be entitled to the like retiring allowance, and upon the same conditions and payable out of the same funds, as the registrar or taxing officer of the court under the said first-mentioned Act.

10. The recording examiner shall, either for the purpose of winding up the business now pending in the chambers of the said *Charles James Hargreave*, or otherwise, discharge the ordinary duties of an examiner when directed by the judges of the court; and it shall be lawful for any examiner to act in the place of the recording examiner during his absence in vacation or otherwise.

11. The chief clerk, second clerk, and junior clerk now attached to the court and chambers of the said Judge *Hargreave* (deceased) shall be employed as the judges may direct in the business of the court, and any or either of them may be transferred to the record of title office, or to some other suitable office in the court, but no such employment or transfer shall involve any decrease of annual salary to the said officers or either of them.

12. When any vacancy shall occur in the office of registrar of the court, or in the office of recording examiner, if it shall appear to the Lord Lieutenant on communication with the judges that such offices can be conveniently united, the Lord Lieutenant may thereupon by his warrant unite the said offices, and thenceforward the said offices shall be filled by the same person at the salary of the recording examiner.

13. Every tipstaff, crier, or messenger in the Landed Estates Court shall hold his situation at pleasure, subject to be dismissed by order of the judges.

14. This Act may be cited for all purposes as the "Landed Estates Court Act, 1866," and in construing it the same meanings shall be assigned to words as were assigned to them by the said recited Act of the twenty-first and twenty-second years of the reign of her Majesty.

**SCHEDULE of DUTIES to be payable in respect of SALES, DECLARATIONS of TITLE, PARTITIONS, EXCHANGES, and DIVISIONS of LAND to be made by ORDER of the LANDED ESTATES COURT.**

1. If the value of the estate sold, or of which the title shall be judicially declared, do not exceed £10,000, then for every £100 of value a duty (at the present rate) of . 10 0

2. If the value exceed £10,000, and does not exceed £25,000, then for the first £10,000 after the rate aforesaid, and for every subsequent £100 of value a duty of . 5 0

3. If the value exceed £25,000, then for the first £10,000 a duty for every £100 of value of 10s., and for every £100 in value between £10,000 and £25,000 a duty of 5s., and for every subsequent £100 of value a duty of . . . . . 2 6

4. For every partition, exchange, or division made by order of the court, where there is no sale of land, an uniform duty in respect of every £100 of value of . . . . . 2 6

### CAP. C.

An Act for the Amendment of the Laws relating to Prisons. [10th August, 1866.]

### CAP. CL

An Act to make further Provision respecting the Fees payable in the Superior Courts of Law at *Westminster*, and in the Offices belonging thereto, and respecting the Salaries of certain Officers of those Courts. [10th August, 1866.]

### CAP. CIL

An Act to continue various expiring Acts. [10th August, 1866.]

Sec. 1. *Short title.*

2. *Continuance of Acts in Schedule.*

'WHEREAS the several Acts mentioned in the first column of the Schedule hereto are wholly or as to certain provisions thereof, limited to expire at the times specified in respect of such Acts in the fourth column of the said Schedule: and whereas it is expedient to continue such Acts, in so far as they are temporary in their duration, for the times mentioned in respect of such Acts respectively in the fifth column of the said Schedule: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the "Expiring Laws Continuance Act, 1866."

2. The Acts mentioned in column one of the said Schedule, and the Acts, if any, amending the same, shall, in so far as such Acts or any provisions thereof are temporary in their duration, be continued until the times respectively specified in respect of such Acts or provisions in the fifth column of the said Schedule.

## SCHEDULE.

1 Original Acts.	2 Amending Acts.	3 How far temporary.	4 Time of Expiration of temporary Provisions.	5 Continued until.
3 & 4 Vict. c. 89. Poor Rates, Stock in Trade Exemption.	. . . . .	Whole Act.	1st October 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	1st October 1867, and end of then next ses- sion.
4 & 5 Vict. c. 30. Survey of Great Bri- tain.	19 & 20 Vict. c. 61.	Whole Act.	31st December 1866. (24 & 25 Vict. c. 65.)	31st December 1867.
5 & 6 Vict. c. 123. Lunatic Asylums, (Ireland).	. . . . .	Whole Act.	1st August 1866, and end of then next ses- sion. (24 & 25 Vict. c. 57.)	1st August 1867, and end of then next ses- sion.
10 Vict. c. 32. Landed Property Improvement (Ire- land).	13 & 14 Vict. c. 31.	As to Powers of Com- missioners.	1st January 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	1st January 1867, and end of then next ses- sion.
10 & 11 Vict. c. 90. Poor Laws (Ireland).	14 & 15 Vict. c. 68.	As to Appointment of Commissioners, &c.	23d July, 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	23d July 1867, and end of then next session.
10 & 11 Vict. c. 109. Poor Law.	. . . . .	As to Appointment of Commissioners, &c.	23d July 1866, and end of then next ses- sion. (28 & 29 Vict. c. 105.)	23d July 1867, and end of then next session.
11 & 12 Vict. c. 32. County Cess (Ire- land)	20 & 21 Vict. c. 7.	Whole Act.	1st August 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	1st August, 1867, and end of then next ses- sion.
11 & 12 Vict. c. 107. Sheep and Cattle diseased	16 & 17 Vict. c. 62. 29 Vict. c. 15.	Whole Act.	1st August 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	1st August 1867, and end of then next ses- sion.
14 & 15 Vict. c. 104. Episcopal and Capi- tular Estates Ma- nagement	17 & 18 Vict. c. 116. 23 & 23 Vict. c. 46. 23 & 24 Vict. c. 124.	Whole Act	1st January 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	1st January 1867, and end of then next ses- sion.
19 & 20 Vict. c. 86. Preservation of the Peace (Ireland).	23 & 24 Vict. c. 138. 28 & 29 Vict. c. 118.	Whole Act.	1st July 1866, and end of then next ses- sion. (28 & 29 Vict. c. 118.)	1st July 1867, and end of then next session.
24 & 25 Vict. c. 109. Salmon Fishery (Eng- land) Act.	. . . . . 28 & 29 Vict. c. 121.	As to Appointment of Inspectors, &c. 31.  As to Appointment of the Special Commis- sioners for English Fisheries.	1st October 1866. (28 & 29 Vict. c. 119.)  5th July 1867, and end of then next ses- sion.	1st October 1867, and end of then next ses- sion.
25 & 26 Vict. c. 97. Salmon Fisheries (Scotland) Act.	26 & 27 Vict. c. 50. 27 & 28 Vict. c. 118.	As to Powers of Com- missioners, &c.	1st January, 1867. (28 & 29 Vict. c. 119.)	1st January 1868, and end of then next ses- sion.
26 & 27 Vict. c. 105. Promissory Notes.	. . . . .	Whole Act.	28 July 1866, and end of then next ses- sion. (26 & 27 Vict. c. 105.)	28th July 1867, and end of then next session.
26 & 27 Vict. c. 114. Salmon Fisheries (Ireland).	. . . . .	As to Duration of Office of the Special Commissioners for Irish Fisheries, and all Powers, Rights, and Privileges pertaining thereto.	28th July 1866, and end of then next ses- sion. (28 & 29 Vict. c. 119.)	28th July 1867, and end of then next session.
27 & 28 Vict. c. 30. Promissory Notes and Bills of Ex- change (Ireland).	. . . . .	Whole Act.	18th May 1866, and end of then next ses- sion. (27 & 28 Vict. c. 20.)	18th May 1867 and end of then next session.
27 & 28 Vict. c. 92. Public Schools.	. . . . .	Whole Act.	1st August, 1866. (28 & 29 Vict. c. 119.)	1st August 1867, and end of then next ses- sion.
28 & 29 Vict. c. 46. Militia Ballot Sus- pension.	. . . . .	Whole Act.	1st October 1866. (28 & 29 Vict. c. 46.)	1st October 1867.

## CAP. CIII.

An Act to amend an Act to consolidate the Laws relating to the Constabulary Force in Ireland.

[10th August, 1866.]

Sec. 1. *Interpretation of terms.*

2. *Power to Lord Lieutenant to fix revised salaries for constabulary force. Long-service allowances to be discontinued.*
3. *Deduction of £2 per cent. for superannuation fund to cease.*
4. *Power to Lord Lieutenant to superannuate head and other constables. Power to treasury, on recommendation of Lord Lieutenant to superannuate officers of force. Scale of superannuation.*
5. *Conditions of superannuation.*
6. *Pension liable to be forfeited for misconduct.*
7. *Saving the rights of the officers and men of the constabulary force in Ireland appointed before the passing of this Act.*
8. *Increase of deduction for reward fund.*
9. *Application of reward fund.*
10. *Additional pay of mounted men, and of those performing duty in Belfast.*
11. *Town inspector of Belfast to receive additional pay.*
12. *Rates of charge on counties, boroughs, and towns for extra constabulary force.*
13. *Rate of charge upon public companies for constabulary protection.*
14. *Extra force, how to be charged. Reduction of charge in case of vacancies.*
15. *Provision in case of abolition of office of constabulary receiver.*

‘WHEREAS it is expedient further to amend the laws relating to the constabulary force in Ireland:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

*Preliminary.*

1. The following terms in this Act have the meanings herein-after assigned to them; (that is to say,)

“Lord Lieutenant” means the Lord Lieutenant or other chief governor or governors of Ireland:

“Members of the constabulary force” means inspector general, deputy inspector general, assistant inspectors general, commandant of the depot, surgeon, and every county inspector, sub-inspector, barrack master of the depot, head constable, constable, acting constable, and sub-constable of constabulary in Ireland:

“Head and other constables” means every head constable, constable, acting constable, and sub-constable of constabulary in Ireland:

2. It shall be lawful for the Lord Lieutenant to fix and appoint such revised annual salaries as to him may from time to time seem proper, not exceeding the several sums herein-after specified, to be paid in such manner and subject to such regulations and pro-

visions as he may direct, to the several persons herein-after mentioned; (that is to say,)

1. To each county inspector of the first class, an annual salary not exceeding three hundred pounds:
2. To each county inspector of the second class an annual salary not exceeding two hundred and seventy pounds:
3. To each sub-inspector of the first class, an annual salary not exceeding two hundred pounds:
4. To each sub-inspector of the second class an annual salary not exceeding one hundred and fifty pounds:
5. To each sub-inspector of the third class, an annual salary not exceeding one hundred and twenty-five pounds:
6. To each head constable major, an annual salary not exceeding eighty pounds four shillings:
7. To the head constable of the first class an annual salary not exceeding seventy pounds four shillings:
8. To twelve head constables of the first class, of long service or superior merit, but ineligible for further promotion, an addition to their respective salaries of ten pounds *per annum* each, making their total salaries respectively eighty pounds four shillings *per annum* each:
9. To each head constable of the second class, an annual salary not exceeding sixty one pounds two shillings:
10. To twelve head constables of the second class, of long service or superior merit, but ineligible for further promotion, and addition of ten pounds *per annum*, making their total salaries respectively seventy-one pounds two shillings *per annum*:
11. To each constable, an annual salary not exceeding forty-nine pounds eight shillings:
12. To fifteen constables, of long service or superior merit, but ineligible for promotion, an addition of four pounds *per annum* each, making their total salaries fifty-three pounds eight shillings *per annum* each:
13. To each acting constable, an annual salary not exceeding forty-four pounds four shillings:
14. To each sub-constable under six months service, an annual salary not exceeding thirty-one pounds four shillings:
15. To each sub-constable of six months and under six years service, an annual salary not exceeding thirty-six pounds eight shillings:
16. To each sub-constable of six years and under twelve years service, an annual salary of thirty nine pounds:
17. To each sub-constable of twelve years and under twenty years service, an annual salary of forty-one pounds twelve shillings:
18. To each sub-constable of twenty years service and upwards, an annual salary of forty-two pounds eighteen shillings:

Such increased salaries to take effect from and after the first day of April one thousand eight hundred and sixty-six, and to be in addition to the good-service pay at present authorised, *viz.*, to five county inspectors, fifty pounds *per annum* each; to six sub-inspect-

tors of the first class, thirty pounds *per annum* each; and to twenty-three sub-inspectors, whether of the second or third class, twelve pounds *per annum* each; such increased salaries to be payable to such persons only as had not ceased to be members of the constabulary force before the first day of *August* one thousand eight hundred and sixty-six:

Provided always, that from the date at which payments at the rates herein-before mentioned shall take effect, all long-service allowances received before the passing of this Act by any member of the constabulary force shall be discontinued, with the exception of the sub-inspectors of the second class transferred from the revenue police to the constabulary, or any other sub-inspectors of the second class at any time in receipt of thirty-six pounds *per annum* long-service pay, who shall be paid at the rate of their present salaries with their present long-service pay, until promoted to the rank of sub-inspector of the first class, when they shall be paid at the same rate as the other sub-inspectors of that class are authorized to be paid under this Act.

3. 'And whereas by an Act passed in the tenth and eleventh years of the reign of her present Majesty (chapter one hundred), regulations were made for the formation of a superannuation fund for the constabulary force by a deduction of two pounds *per centum per annum* from the salary of each member of such force:' be it enacted, that from and after the passing of this Act such deduction for such superannuation fund shall cease to be made.

4. 'And whereas it is expedient that the existing system of superannuation allowances to the constabulary force should be revised, so far as relates to members of the said force appointed after the passing of this Act:' be it enacted, that it shall be lawful for the Lord Lieutenant, under the conditions herein-after mentioned, to direct that any head or other constable so appointed may be superannuated, and receive a gratuity or yearly pension, not exceeding the proportion of his salary stated in the scale herein-after mentioned; and it shall be lawful for the lords commissioners of her Majesty's treasury, or any three or more of them, upon the recommendation of the Lord Lieutenant to direct that any officer of the constabulary force, that is to say, any inspector-general, deputy inspector general, assistant inspector general, commandant of the depot, surgeon, county inspector, barrack master of the depot, or sub-inspector appointed after the passing of this Act, may be superannuated, and may receive a gratuity or yearly pension, not exceeding the proportion of his salary stated in the scale herein-after mentioned; that is to say,

1. A gratuity of one month's pay for each year's service after five years and less than fifteen years:
2. On completion of fifteen years service an annual pension of fifteen fiftieths of the pay may be granted, and an increase of one fiftieth for each successive year up to thirty years service completed:
3. After thirty years service, or after the person to be superannuated has attained the age of sixty years, the pension to be equal to thirty fifti-

eths of the pay, or a larger proportion in cases of extraordinary merit or good conduct:

4. For injuries received at any time in the actual performance of duty a pension for life may be granted of an amount in proportion to the injury received, but not exceeding the full pay; the grounds of disability to be carefully investigated and fully set forth in the authority granting the pension.

5. No such pension, retiring allowance, or gratuity shall be granted in any case, except on the certificate of the surgeon of the force, or such other competent medical officer or officers as the Lord Lieutenant shall name for the purpose, that the party is, from mental or bodily incapacity, unable to perform his duty any longer, and the certificate of the inspector general (or in the case of the inspector general's superannuation, then on the certificate of the chief secretary to the Lord Lieutenant,) that he has served with diligence and fidelity; provided that any member of the force who shall have attained the age of sixty years or upwards may, upon his petition, be superannuated without such medical certificate.

6. Such pension or retiring allowance shall be granted only upon the condition that it becomes forfeited, and may be withdrawn by the Lord Lieutenant in any of the following cases:

1. On conviction of the grantee for any indictable offence:
2. On his knowingly associating with suspected persons, thieves, or other offenders:
3. On his refusing to give information and assistance to the police whenever in his power for the detection and apprehension of criminals, and for the suppression of any disturbance of the public peace:
4. If he enter into or continue to carry on any business, occupation, or employment which shall be, in the opinion of the Lord Lieutenant, disgraceful or injurious to the public, or in which he shall make use of the fact of his former employment in the police force in a manner which the Lord Lieutenant considers to be discreditable and improper:

Provided always, that nothing herein contained shall entitle any member of the constabulary force absolutely to any superannuation allowance, nor prevent him from being dismissed or discharged for misconduct or other sufficient cause without superannuation allowance.

7. 'And whereas it is expedient that the present members of the constabulary force should continue to be entitled to receive retiring allowances calculated upon the scale of superannuation and rates of pay existing before the passing of this Act:' be it therefore enacted that the provisions of an Act passed in the tenth and eleventh years of her present Majesty, chapter one hundred, intituled *An Act to regulate the Superannuation Allowances of the Constabulary Force in Ireland and the Dublin Metropolitan Police*, shall apply to the members of the constabulary force in Ireland appointed before the passing of this Act as fully and effectually as if this Act had not been passed.

8. 'And whereas by an Act passed in the sixth year

of the reign of King *William* the Fourth, a fund was established called "The Police Reward Fund," to be raised in part by a deduction of ten shillings *per cent.* on the salary of each member of the force: be it enacted, that from and after the passing of this Act the said deduction shall be increased to thirty shillings *per cent.* on such salaries, and a deduction not exceeding twenty shillings *per cent.* shall also be made on the pensions of all members of the force superannuated after the passing of this Act, who, on their retirement from active service, shall give notice to the receiver of their desire to keep up their subscription to the said reward fund for the benefit of their widows and children; all such deductions to be paid to the said police reward fund, and form part thereof.

9. And whereas by the seventh section of an Act passed in the tenth and eleventh years of her present Majesty, chapter one hundred, the lords commissioners of her Majesty's treasury, or any three or more of them, are empowered to direct the application of any surplus of the reward fund to the payment of pensions, superannuations, and allowances to members of the constabulary force: be it enacted, that any surplus now remaining of the said fund, or which may thersunto hereafter accrue, shall not be applied in the manner aforesaid, anything in the said section to the contrary notwithstanding; and the said reward fund shall be available for the reward of meritorious members of the constabulary force, and also for the relief of the widows and children of the members of such force, under such regulations as the Lord Lieutenant may from time to time make.

10. And be it enacted, that it shall be lawful for the Lord Lieutenant (if he shall so think fit), to order and direct that one shilling per week shall be added to the pay of the mounted men of the constabulary force, and also to the pay of the head and other constables stationed at *Belfast*, with a view to meet the extra expense for lodging and living to which the men serving in that town are exposed as compared with the remainder of the force.

11. And be it enacted, that from and after the passing of this Act the town inspector of *Belfast* shall receive in lieu of long-service pay discontinued by this Act a sum of fifty pounds a year in addition to the salary which under the Constabulary (*Ireland*) Amendment Act, 1865, is to be paid by the borough of *Belfast*, making his total salary from both sources four hundred and fifty pounds *per annum*.

12. Section four of an Act passed in the eleventh and twelfth years of her present Majesty, chapter seventy-two, is hereby repealed; and from and after the passing of this Act, in all cases where one moiety of the costs and expenses of any constabulary force is chargeable to any county, or any part or district of a county, or any county of a city or county of a town, or borough of a town, in *Ireland*, there shall be charged to each such county, or part or district thereof, or county of a city or county of a town, or any such borough or town, *per annum*,

For each sub-inspector one moiety of the sum of one hundred and sixty seven pounds nine shillings and threepence:

For each head constable one moiety of the sum of seventy-nine pounds fifteen shillings and sevenpence:

Provided always, that it shall be lawful for the Lord Lieutenant, with the approval of the commissioners of her Majesty's treasury, from time to time to fix and determine the further rates of charge to be paid by every such county or part of district thereof, or county of a city or county of a town, or borough or town, on an average of the entire force of constables, acting constables, and sub-constables in *Ireland*, regard being had to the increased rates of pay sanctioned by this Act, and to the cost of clothing, medical attendance, barrack accommodation, and extra pay of such constables and other constables when absent from quarters.

And in all cases where, under the laws now in force, the whole of the costs and expenses of any constabulary force is chargeable to any county, or any part or district of a county, or any county of a city or county of town, or any borough or town, in *Ireland*, there shall be charged to each such county, or part or district of such county, or county of a city, county of a town, borough, or town, *per annum*, the full cost of such constabulary force, calculated in the manner last mentioned.

13. From and after the passing of this Act, in all cases where members of the constabulary force shall be required to keep the peace in the neighbourhood of railway works or other public works in *Ireland*, the costs and expenses of such members, calculated in the manner herein-before mentioned, shall be charged upon the company or other parties carrying on such railway or other public works.

14. From and after the passing of this Act, in all cases where under the laws now in force, the quota of men fixed for any county, county of a city, county of a town, or borough by "The Constabulary (*Ireland*) Amendment Act, 1865," shall be increased by an extra force, whether as a permanent augmentation or as a temporary addition thereto, one moiety of the costs and expenses of such extra force, ascertained in the manner herein provided, shall be charged to and be payable by such county, county of a city, county of a town, or borough: provided always, that in case vacancies shall occur in the said force so augmented, there shall be deducted from the number of such extra force to be charged as aforesaid as many constables as shall bear the same proportion to the whole number of vacancies in the said augmented force that the extra force bears to the whole number of such augmented force.

15. It shall be lawful for the commissioners of her Majesty's treasury to make such arrangements for the regulation or abolition of the office of receiver of the constabulary, and for the transfer of the powers vested in him, and for the transfer and regulation of the duties assigned to him by virtue of an Act passed in the sixth year of the reign of King *William* the Fourth, chapter thirteen, and of subsequent Acts, as they shall from time to time consider expedient, anything in the said Act or subsequent Acts to the contrary notwithstanding.

#### CAP. CIV.

An Act to guarantee the Liquidation of Bonds issued for the Repayment of Advances made out of Public Funds for the Service of the Colony of *New Zealand*.  
[10th August, 1866.]

## CAP. CV.

An Act to continue certain Turnpike Acts in *Great Britain*, and to make further Provision concerning Turnpike Roads. [10th August, 1866.]

## CAP. CVI.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *West Hartlepool, Tormoham, Harrogate, St. Leonard, Wednesfield, Aberdare, Bristol, Derby, Shrewsbury, Netherthong, Hove, New Windsor, Hanley, Burnley, and Accrington*; and for other Purposes relative to certain Districts under the said Act. [10th August, 1866.]

## CAP. CVII.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Ramsgate, Leominster, Stalybridge, Lincoln, Maidstone, Banbury, Tunbridge Wells, Bedford, and Southampton*; and for other Purposes relative to Districts under the said Act. [10th August, 1866.]

## CAP. CVIII.

An Act to amend the Law relating to Securities issued by Railway Companies. [10th August, 1866.]

Sec. 1. *Short title.*

2. *Interpretation of terms.* 27 & 28 Vict. cc. 120, 121.

3. *Company to have registered officer.*

4. *Half years for purposes of Act.*

5. *Loan capital accounts to be made half-yearly.*

6. *Form of half-yearly account.*

7. *Account to be open to shareholders, &c.*

8. *Deposit of copy of account.*

9. *Deposit in Scotland and Ireland.*

10. *Prohibition against borrowing before registration of Act giving the borrowing power.*

11. *Penalty on company failing to register, &c.*

12. *Power to inspect documents on payment of a fee.*

13. *Fees on registration of name of officer, &c.*

14. *Declaration by directors, &c. on mortgage deed, &c.*

15. *Penalty on company, &c., if declaration omitted.*

16. *Penalty on registered officer.*

17. *Punishment for offences against Act.*

18. *Nothing to affect liability of company, &c.*

19. *Account, &c. not to be evidence for company.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Railway Companies Securities Act, 1866.

2. In this Act—

The term "railway" includes a tramway authorized by Act of Parliament incorporating The Companies Clauses Consolidation Act, 1845, but not any other tramway:

the term "railway company" includes every company authorized by Act of Parliament to raise any loan capital for the construction or working of a railway, or for any purposes connected with the conveyance by such company of traffic on a railway, either alone or in conjunction with other purposes:

The term "debenture stock" includes mortgage preference stock and funded debt, and any stock or shares representing loan capital of a railway company, by whatever name called:

The term "Act of Parliament" includes a certificate of the board of trade made under The Railways Construction Facilities Act, 1864, or The Railways Companies Powers Act, 1864, or any other Act of Parliament.

3. Every railway company shall, on or before the fifteenth day of *January* one thousand eight hundred and sixty-seven, register, and shall always thereafter keep registered, at the office of the registrar of joint stock companies in *England*, the name of their secretary, accountant, treasurer, or chief cashier for the time being authorized by them to sign instruments under this Act, or, if they think fit, the names of two or more such officers of the company so authorised (and the officer so registered for the time being, and any one of the officers so registered if more than one, is in this Act referred to as the company's registered officer).

4. Half years shall, for the purposes of this Act, be deemed to end on the thirtieth day of *June* and the thirty-first day of *December*; and the first half year to which this Act applies shall be that ending on the thirty-first day of *December* one thousand eight hundred and sixty-six; but the board of trade, on the application of any railway company, may (by writing under the hand of one of their secretaries or assistant secretaries, which shall be registered by the railway company at the office of the said registrar) appoint, with respect to that company, other days for the ending of half years (including the first).

5. Within fourteen days after the end of each half year every railway company shall make an account of their loan capital authorized to be raised and actually raised up to the end of that half year, specifying the particulars described in the First Schedule to this Act, Part I. (which account for each half year is in this Act referred to as the loan capital half-yearly account).

6. The board of trade may from time to time, by notice published in the *London, Edinburgh, and Dublin Gazettes*, prescribe the form in which the loan capital half-yearly account is to be made.

7. The loan capital half-yearly account of each company may be perused at all reasonable times, without payment, by any shareholder, stockholder, mortgagee, bond creditor or holder of debenture stock of the company, or any person interested in any mortgage, bond, or debenture stock of the company.

8. Within twenty-one days after the end of each half year every railway company shall deposit with the registrar of joint stock companies in *England* a copy, certified and signed by the company's registered officer as a true copy, of their loan capital half-yearly account.



9. A railway company may also, if they think fit, deposit with the registrar of joint stock companies in *Scotland*, or with the assistant registrar of joint stock companies in *Ireland*, or with each, a like copy of any loan capital half-yearly account of the company.

10. It shall not be lawful for any railway company at any time to borrow any money on mortgage or bond, or to issue any debenture stock, under any Act of the present session or passed after the end of the half year to which their then last registered loan capital half yearly account relates, unless and until they have first deposited with the registrar of joint stock companies in *England* a statement, certified and signed by the company's registered officer as a true statement, specifying the particulars described in the First Schedule to this Act, Part II.

The board of trade may from time to time, by notice published in the *London, Edinburgh, and Dublin Gazettes*, prescribe the form in which such statement is to be made.

A railway company may also, if they think fit, deposit with the registrar of joint stock companies in *Scotland*, or with the assistant registrar of joint stock companies in *Ireland*, or with each, a like copy of any such statement.

11. If at any time any railway company fail to register or keep registered as aforesaid the name of their secretary, accountant, treasurer, or chief cashier, or to deposit with the registrar of joint stock companies in *England*, within the time required by this Act, such a copy as aforesaid of any loan capital half-yearly account, or borrow any money on mortgage or bond, or issue any debenture stock without having first deposited with the registrar of joint stock companies in *England* such a statement as they are by this Act required to deposit, in any case where they are so required, then and in every such case they shall be deemed guilty of an offence against this Act, and shall for every such offence be liable, on summary conviction, to a penalty not exceeding twenty pounds, and in case of a continuing offence to a further penalty not exceeding five pounds for every day during which the same continues after the day on which the first penalty is incurred.

12. Every person may inspect the documents kept by any registrar or assistant registrar under this Act on paying a fee of one shilling for each inspection as regards each railway company; and any person may require a copy or extract of any of those documents to be certified by the registrar or assistant registrar on paying for such certified copy or extract a fee of sixpence and a further fee of sixpence for every two hundred words or fractional part of two hundred words after the first two hundred words.

13. Every railway company on registering the name or names of any officer or officers, or depositing any account or statement, under this Act, shall pay the like fee as is for the time being payable under The Companies Act, 1862, on registration of any document other than a memorandum of association.

14. There shall be put (by indorsement or otherwise) on every mortgage deed or bond made or given after the twenty-first day of *January* one thousand eight hundred and sixty-seven by a railway company

for securing money borrowed by the company, and on every certificate given after that day by a railway company for any sum of debenture stock issued by the company, a declaration in the Form given in the Second Schedule to this Act, or to the like effect, with such variations as circumstances require.

Every such declaration shall be signed by two directors of the company specially authorized and appointed by the board of directors to sign such declaration, and by the company's registered officer.

15. If after the expiration of the time specified in the last preceding section any railway company deliver any such mortgage deed, bond, or certificate without such a declaration being first put thereon and signed as aforesaid, they shall be deemed guilty of an offence against this Act, and shall for every such offence be liable, on summary conviction, to a penalty not exceeding twenty pounds; and if any director or officer of any railway company knowingly authorizes or permits the delivery of any such mortgage deed, bond, or certificate without such a declaration being first put thereon and signed as aforesaid, every such person shall be deemed guilty of an offence against this Act.

16. If any director or registered officer of a company signs any declaration, account, or statement under this Act knowing the same to be false in any particular he shall be deemed guilty of an offence against this Act.

17. If any director or officer of a railway company is guilty of an offence against this Act, he shall be liable, on conviction thereof on indictment, to fine or imprisonment, or on summary conviction thereof to a penalty not exceeding ten pounds.

18. Nothing in this Act, or in any account, statement, or declaration under it, shall affect in any action or suit any question respecting any loan, debt, liability, mortgage, bond, or debenture stock as between a railway company or any director or officer of a railway company on the one side, and any person or class of persons on the other side.

19. Any account, statement, or declaration under this Act shall not be admissible as evidence in favour of a railway company of the truth of any matter therein stated.

## SCHEDULES.

### THE FIRST SCHEDULE.

#### PART I.

#### *Particulars to be specified in Loan Capital Half-yearly Account.*

##### A. Every half-yearly account to show—

- (1.) The Act or Acts of Parliament under the powers of which the company have contracted any mortgage or bond debt existing at the end of the half year, or having issued any debenture stock then existing, or the Act or Acts of Parliament by or under which any mortgage or bond debt or debenture stock of the company then existing has been confirmed, and the Act or Acts of Parliament under which the company have any

An Act to consolidate and amend the Acts relating  
to Reformatory Schools in *Great Britain*.  
[10th August, 1866.]

## CAP. CXVIII.

An Act to consolidate and amend the Acts relating to Industrial Schools in Great Britain.

[10th August, 1866.]

## CAP. CXIX.

An Act to continue the Act of the Twenty-ninth Year of the Reign of Her present Majesty, Chapter One, intituled *An Act to empower the Lord Lieutenant or other Chief Governor or Governors of Ireland to apprehend and detain for a limited Time such Persons as he or they shall suspect of conspiring against Her Majesty's Person and Government.*

[10th August, 1866.]

29 & 30 Vict. c. 1.

Sec. 1. Continuation of 29 & 30 Vict. c. 1.

‘WHEREAS the Act of the present session of Parliament, chapter one, intituled *An Act to empower the Lord Lieutenant or other Chief Governor or Governors of Ireland to apprehend and detain for a limited Time such Persons as he or they shall suspect of conspiring against Her Majesty's Person and Government*, expires on the first day of September one thousand eight hundred and sixty-six, and it is expedient to continue the same for a further limited period:’

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The said Act shall continue in force until the expiration of twenty-one days after the commencement of the session of Parliament immediately succeeding the present session; and the said Act shall be construed as if the words “until the expiration of twenty-one days after the commencement of the session immediately succeeding the present session” were throughout the said Act substituted for the words “until the first of September one thousand eight hundred and sixty-six.”

## CAP. CXX.

An Act to make Provision for the Administration of the Patriotic Fund. [10th August, 1866.]

Sec. 1. Power to her Majesty to direct application of patriotic fund for purposes herein described.

2. Short title.

‘WHEREAS the fund called the patriotic fund is administered under a commission issued by her Majesty the Queen, dated the seventh day of October one thousand eight hundred and fifty-four, and doubts have arisen respecting the power of her Majesty to give directions concerning the application of the fund further or other than those contained in the said commission, and respecting other matters connected with the constitution and powers of the body of commissioners and the conduct of the business relating to the fund; and it is expedient that all ground for such doubts be removed:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this

present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for her Majesty, her heirs and successors, from time to time, by commission under the royal sign manual, directed to such persons as to her Majesty, her heirs or successors, seem fit, to authorize and direct the commissioners thereby constituted to apply the patriotic fund and the income and accumulations thereof (in such manner as any such commission from time to time directs or as the commissioners think fit) to the purposes and in the order following:

First, in the relief of the widows, and the education, training, and advancement of children, of soldiers, seamen, and marines of her Majesty's army and navy who lost their lives in battle, or from wounds or by other casualties, in the late war with Russia;

Secondly, in the education, training, and advancement of children of soldiers, seamen, and marines of her Majesty's army and navy who have lost or hereafter lose their lives in battle, or from wounds or by other casualties, in any other war;

And for any of those purposes to extend or contribute to any royal or other charitable institution for the time being established for similar purposes in the United Kingdom; and to employ a secretary and clerks at such salaries, and with such retiring or other allowances (if any), as therein provided, the same, with other proper expenses, to be paid out of the patriotic fund.

2. This Act may be cited as The Patriotic Fund Act, 1866.

## CAP. CXXI.

An Act for the Amendment of the Law relating to Treaties of Extradition. [10th August, 1866.]

Sec. 1. Warrants of arrest and copies of depositions to be received in evidence if authenticated in manner specified by this Act.

2. This Act to be construed with 8 & 9 Vict. c. 113, and 14 & 15 Vict. c. 99.

3. Duration of Act.

‘WHEREAS difficulties have been experienced in carrying into execution treaties for the extradition of persons accused of crimes between her Majesty and the sovereign or governments of certain foreign states: and whereas the statutes now in force for this purpose have been found insufficient: and whereas it is expedient to amend the same, and to give greater facilities than at present exist under the aforesaid statutes for the admission of evidence of judicial or official documents or copies of documents:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That warrants of arrest and copies of depositions signed or taken by or before a judge or competent magistrate in any foreign state with which her Majesty may have entered into, or may hereafter enter into, any treaty for the extradition of fugitive offenders or persons

accused of crimes, shall henceforth be received in evidence if authenticated in the manner following, that is to say, if the warrant of arrest purports to be signed by a judge or other competent magistrate of the country in which the same shall have been issued, and if the copies of depositions purport to be certified under the hand of such judge or magistrate to be true copies of the original depositions, and if the signature of the judge or magistrate in each case shall be authenticated in the manner usual in the respective states or countries by the proper officer of the department of the minister of justice, and sealed with the official seal of such minister; and all courts of justice and magistrates in her Majesty's dominions shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

2. This Act shall be construed with an Act passed in the eighth and ninth years of the reign of her Majesty, chapter one hundred and thirteen, intituled *An Act to facilitate the Admission in Evidence of official and other Documents*; and also with an Act passed in the fourteenth and fifteenth years of the reign of her Majesty, chapter ninety-nine, intituled *An Act to amend the Law of Evidence*.

3. The duration of this Act shall be limited to the first day of *September* one thousand eight hundred and sixty-seven.

CAP. CXXII.

An Act to make Provision for the Improvement, Protection, and Management of Commons near the Metropolis. [10th August, 1866.]

# I N D E X

TO THE

## Public General Acts,

29 & 30 VICTORIA.

Showing whether they relate to the whole or to this part of the United Kingdom, viz.:

I. signifies that the Act relates to Ireland.  
 E. & I. ... .. England and Ireland.  
 G.B. & I. ... .. Great Britain and Ireland.  
 U.K. ... .. The whole of the United Kingdom.

	Cap. Relating to		Cap. Relating to
<b>ADVANCES TO RAILWAY COMPANIES;</b> to enable the public works loan commissioners to make temporary advances to railway companies in Ireland .....	95 I	to the carriage and deposit of dangerous goods.....	69 G B & I
<b>APPROPRIATION OF SUPPLIES;</b> to apply a sum out of the consolidated fund and the surplus of ways and means to the service of the year ending 31st March, 1867, and to appropriate the supplies granted in this session of parliament.....	91 U K	<b>CATTLE ASSURANCE;</b> to give further facilities for the establishment of societies for the assurance of cattle and other animals....	84 G B & I
<b>ARMY PRIZE MONEY;</b> to legalize the payment and distribution of Indian prize money by the treasurer or secretary of Chelsea hospital, and to amend the Act 2 & 3 W. 4, c. 53, for the consolidating and amending the law relating to the payment of army prize money .....	47 U K	<b>CATTLE DISEASES;</b> to amend the law relating to contagious diseases amongst cattle and other animals in Ireland....	4 I
<b>ART;</b> for facilitating the public exhibition of works of art in certain exhibitions.....	16 G B & I	<b>CATTLE DISEASES.</b> <i>See also</i> Public Works.	
<b>ASSURANCE OF CATTLE;</b> to give further facilities for the establishment of societies for the assurance of cattle and other animals....	84 G B & I	<b>COLONIAL BRANCH MINTS;</b> to enable Her Majesty to declare gold coins to be issued from Her Majesty's colonial branch mints a legal tender for payments; and for other purposes relating thereto... ..	65 U K
<b>ATTORNEYS AND SOLICITORS;</b> to amend the laws for the regulation of the profession of attorneys and solicitors of Ireland and to assimilate them to those in England.....	84 I	<b>CONSOLIDATED FUND;</b> to apply the sum 1,137,772l out of the consolidated fund to the service of the year ending 31st March, 1866 .....	6 U K
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